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Interzones of Law and Metaphysics: Hierarchies, Logics and Foundations of Social Order Seen Through the Prism of EU Social Rights

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SOLBJERG PLADS 3
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Christiane Mossin

INTERZONES OF LAW
AND METAPHYSICS

PART 1

HIERARCHIES, LOGICS AND FOUNDATIONS OF SOCIAL
ORDER SEEN THROUGH THE PRISM OF EU SOCIAL RIGHTS

PhD School in Organisation and Management Studies

PhD Series 02.2015

CBS

COPENHAGEN BUSINESS SCHOOL

HANDELSHØJSKOLEN

Interzones of Law and Metaphysics

**Hierarchies, Logics and Foundations of Social Order
seen through the Prism of EU Social Rights**

Christiane Mossin

PhD dissertation

Supervisors: Prof. Sverre Raffnsøe and Prof. Ove K. Pedersen

Doctoral School of Organization and Management Studies

Copenhagen Business School

Christiane Mossin
Interzones of Law and Metaphysics
Hierarchies, Logics and Foundations of Social Order seen
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"I don't believe in Father Christmas, I don't believe in God or Karl Marx. I don't believe in anything that rocks the world." Leamas said.

"But how do you sleep? You have to have a philosophy."

"I reserve the right to be ignorant. That's the western way of life."

THE SPY WHO CAME IN FROM THE COLD by John le Carré

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Introduction

Before I began this work I was haunted by a particular image. In fact, it stayed with me throughout the rather long period in which I was immersed in analyses of EU social rights , and I still cannot say that I have been able to cast it aside.

The image stems from Andrei Tarkovsky's film *Stalker*. The Stalker is a guide who leads people into a forbidden area, 'the Zone', in which the normal laws of physics do not apply. The Zone is deadly dangerous for those who do not know how to travel there. In the Zone, everything changes constantly; travelers cannot stay for long in the same place and must never attempt to go back the way they came. The Zone is full of traps and requires respect from those who enter it. Its unpredictability reflects the inner conditions of those who travel in it. Only people who have lost hope are accepted by the Zone, can survive in it.

We follow the Stalker leading a writer and a scientist through the Zone. By the end of the film, they reach their destination, 'the Room'. The Room will grant the deepest wishes of those who enter it. But not the deliberately expressed wishes, rather the true unconscious wishes which the visitor might not even be aware of having. The Stalker tells the story of a man who entered the Room in the hope of bringing his brother back to life. Instead he got immensely rich - for which reason he hanged himself. After hours of doubting and fighting, the writer and the scientist decide not to enter the Room. They fear the nature of their true inner wishes. The Stalker is devastated; human beings dare not hope for anything anymore.

It is the image of the three men fearfully waiting outside of 'the Room' which I cannot get rid of. Why? How does this image relate to EU social rights?

Before I began my analyses, I had a particular conception of EU social rights. Predominantly, these rights are formulated in broad and open terms, lacking specification, lacking conceptual clarification. In addition, they are formal rights based on the principle of non-discrimination which amounts to the most peculiar logic one could imagine within the context of law, giving rise to fundamental uncertainties and even paradoxicality. Initially, I thought: These rights open up enormous spaces of interpretation - for the member states responsible for their implementation and for the Court of Justice of the European Union which ultimately is the competent court with respect to their interpretation. What shall govern these interpretations? Political agendas or visions? Interests and relations of power? Or simply the immediate

concerns, that is, expediency and usefulness? In any case, will law not lose some of its most fundamental characteristics - its predictability as well as its status as something which stands above coincidental political agendas, relations of power and immediate concerns? Will law not become an instrument, rather than an overall standard? That would imply that human beings, when meeting the law, would meet nothing but themselves.

The suspicion which haunted my initial conception of EU social rights can be associated with contemporary law developments according to which law becomes increasingly processual, that is, less oriented towards a regulation which seeks to establish a certain state of affairs which is seen as desirable or just, and more oriented towards a regulation of processes by which the parties involved, including authorities and judges, may continuously negotiate, consider and reconsider which standards would be appropriate for the time being.

The image which haunted me can be interpreted as follows. Contemporary law is like life itself, a 'Zone' of unpredictability. Those who do not hope for any ultimate justice belong to the Zone. Law, being this Zone, reflects continuously the conditions of the people in it, their fears, desires, hostility, hopes, trust and mistrust. No true regularity exists; one never returns to the same place. The secret core of the law consists in the secret wishes of the people living the law. But would we dare to meet those wishes, would we dare meeting our selves? Would we confront the secret mirror which lies behind the immediate mirroring effects of law?

The fear I express might not be obvious to everyone. It would stand in contrast to a position according to which human processes of negotiation and adaption to various circumstances can basically be trusted - whether this trust would be a trust in the good will of human beings, in the morally binding forces inherent in human communication or merely in the human ability to pragmatic or strategic reasoning. On the basis of such trust, the possible status of law as an instrument rather than as an overall standard would not be problematic. There would also be those who would share the fear, but who would simultaneously hold that in a fundamentally unpredictable world, any too firm or rigid standards cannot be upheld. Law must, in order to be able to regulate at all, be as unpredictable and flexible as life itself. Overall standards are indispensable, but they must be open to continuous reinterpretation.

However true the latter position might be, the image of the three men sitting outside 'the Room', fearing it because they fear their own deepest wishes, will not leave me. If, in law, we only meet ourselves, then law will be more terrifying than life itself.

It turned out that I was wrong, in a certain sense. I have found that EU social rights do not merely constitute a field of irregularity. Or more precisely: As far as the Court of Justice of the European Union (the CJEU) is concerned, coincidental political agendas, power relations and immediate concerns do not ultimately determine the interpretation of those rights. As far as the member states are concerned, interpretations may very well be highly strategical and based on immediate political and administrative concerns. In fact, they are very likely to be so. But the CJEU does indeed establish a regular basis for EU social rights. This does not mean that politics, power and pragmatism are not involved. But - as I shall argue on the basis of the analyses of this work - they are involved in the sense that the regularity in question springs from some particular understandings of social order.

Accordingly, the regularity established by and through the CJEU is of a different kind than the regularity which may be the result of detailed, specific rights. There is no question about the fact that EU social rights are open and uncertain and that this gives rise to an extreme flexibility. Throughout part I, we shall be witnessing the logical inventiveness of the CJEU. We shall see that the interpretational strategies of the court are diverse and surprising, at times even so radical that if they were used in general (and not just rarely), they would undermine the possibility of law as we know it. I shall argue that this logical inventiveness of the court depends on the establishment of EU concepts and conceptual criteria, on strong EU principles (partly fixated, partly elastic with expansive capabilities) and ultimately on stabile interpretative horizons comprising visions and purposes of social order. The interpretational elements, in turn, depend on certain institutional orders which I shall call 'anchors of order'. These 'anchors of order' are presumed to exist prior to and independently from EU social rights in the sense that they are necessary for the implementation of those rights. But they are also conceptually qualified by those rights as interpreted by the CJEU.

In other words, the particular kind of regularity manifested through EU social rights is a regularity which ultimately depends on particular conceptual qualifications of certain institutional orders. The 'anchors of order' which are qualified by the CJEU are the following: the 'National Labour Market', the 'National Welfare Systems', the 'Employment Relationship', the 'Internal Market', the 'Family' and the 'State as One'.

Does this dismantle the relevance of the image of the three men waiting fearfully outside 'the Room'? I think not. Even if we are not confronted with irregularity in the shape of coincidental and immediate interests and concerns, but rather with established concepts and institutional orders, we are still confronted with ourselves, only in a complex and mediated sense. So, the image may still haunt us; only, the fear must be given a different articulation: Do the institutional orders in question entail any overall purposes by virtue of which we may truly say that an overall standard and not just an instrument has been established? Or do we - when being part of the both flexible and stabile workings of law - only meet ourselves? And what do we meet, then?

Fundamental impulses: conceptual connections between law, social structure and metaphysics and the significance of the anthropological question

It is the underlying conviction of this dissertation that contemporary law developments should be subjected to political philosophical analysis, and not only to legal, political and organizational analysis.

Originally, the inspiration came from Carl Schmitt whose writings I have dealt extensively with in the past. It should be emphasized that the dissertation has moved quite far away from the presumptions and methods of Schmitt. But a basic impulse has remained. According to Schmitt, law cannot be reduced to a self-enclosed system, but should be approached from an overall historical-conceptual perspective. At a given historical time and in a given political space, particular concepts and conceptual presumptions will be crucial, that is, they will have a constitutive meaning for the political order as a whole. More precisely, they will permeate the law, the social structure and the metaphysical presumptions (whether of a religious or secular nature) of that order. On the basis of such an overall historical-conceptual understanding, Schmitt analyzed political orders of his own time (the Weimar Republic, the Nazi-regime and later the global political space of the cold war) as well as past political orders (the European political order as guaranteed by the Catholic Church and the modern European state in its different historical phases).

This basic impulse - the idea that law, politics, social structure and metaphysical presumptions are deeply and inescapably conceptually connected - has remained with me and underpins the dissertation: its starting point, its methods, its purposes, perspectives and horizons.

Carl Schmitt has inspired me in yet another crucial way. He was deeply concerned about the human foundation of law, that is, those human *beings* or *forces* or the human *material* which the law seeks to regulate. He thematized this foundation in two different ways. On a general level, he emphasized that every political theory will need to be based on a particular anthropology. Every political theory must either presume that human beings are trustworthy or dangerous, predictable or unpredictable, driven by self-interest or by social concern, reason or irrationality, material or spiritual forces etc. We may add to this: Every political theory must presume that *that which is regulated* by law is either individuals or subjects or merely bodies or forces - or possibly just some kind of material which cannot be qualified at all (Schmitt did not dwell so much on the latter issue, but indirectly, it is present in his works). As far as Schmitt's own political theory is concerned, there is no doubt as to the nature of his anthropology. Human beings (and he did presume the existence of human beings) are fundamentally unpredictable and dangerous. This does not necessarily mean that they are evil or absorbed in self-interest. In fact, they are social in the radical sense that 'community' constitutes human destiny, for better or worse. But it does mean that hostility constitutes a fundamental driving force. Human beings are also spiritual beings, not in contrast to having a material nature, but in the sense that all material concerns will, to the extent they become issues of politics, eventually find a spiritual expression. Just as Kant found that human reason is characterized by a 'Drang zur Metaphysik', Schmitt held that human beings will always seek to legitimize the political battles they engage in as well as the power structures they establish.

Schmitt's particular anthropology finds its most radical expression in his reflexions on 'the state of exception', civil war and different forms of dictatorship. But it underpins all of his analytical endeavors. The 'state of exception' does constitute a core concept, though, in the sense that it underlines a crucial point of Schmitt's, namely that due to the fundamentally unpredictable and dangerous nature of human beings, every political order is fundamentally fragile, it may always be undermined and break into civil war. In this sense, the 'state of exception' constitutes the truth about any political order, however harmonic it may seem.

I share Schmitt's concern about the human foundation of law according to both perspectives. First and foremost, I believe that the question as to the nature of the human foundation of law is inescapable. Today, it has become deeply problematic to raise this question at all. The greatest political philosophers of the late 20th century

would all hold that we cannot presume the existence of human beings prior to or independently from socialization. 'Humans', 'individuals' and 'subjects' arise with and as a result of language and social order. Some philosophers would avoid the question (like Foucault) and focus on the ways in which 'humanization', 'individualization' and 'subjectivation' occur. Others would create an entirely different ontology, based on movements, connections, multiplicity, constellations, differences, asymmetry, heterogeneity and singularity (like Deleuze and in a certain sense also Derrida), or they would establish a complex collective subjectivity (like Negri and Hardt). But no matter whether the question is ignored or not, it is presumed that there is *something* which is being regulated. Naturally, this is not just being presumed by philosophers, but also by political orders. Hereby, I do not merely mean that politicians, judges, civil servants, employers, organizations and other obvious creators of regulation (in the shape of law, policies, administration, rules within various organizational settings) all presume that they are regulating a human *something* (even if they are also partly lost in particular systemic logics which function in abstraction from such a foundation). I mean that presumptions as to the nature of that *something* which is being regulated are necessarily implied in the various means by which regulation takes place. This does not exclude the possibility, however, that ultimately, the bio-ethical perspective tells the truth about regulation today - that all sorts of formal and informal regulation today presumes that human beings are constructable down to the slightest detail, to the smallest impulse.

I believe that the bio-ethical perspective might very well capture the presumptions of contemporary regulation. However, I also believe that it is important to maintain - like Schmitt - that human beings are fundamentally unpredictable. The unpredictable human foundation of law cannot be qualified any further, though. We should approach it merely negatively and as a border conception. We cannot say where regulation stops and unpredictability begins, we can only say that there is something which lives through regulation and which cannot be reduced to regulation. In this minimal sense, I embrace Schmitt's particular anthropology. Hostility may be an expression of this fundamental unpredictability, but it may also not. I do not even presuppose a fundamental spiritual human nature in the Schmittian sense; I leave it open whether human beings would ultimately be able to do without legitimizations. I do presume, though, that the need and search for legitimizations constitute a general feature of human history as we know it for which reason it will always be important to be aware of the presence (or possible absence) of this feature and its ways of manifestation.

In contrast to Schmitt, I would like to emphasize not only the destructive, but also the constructive potentials of human unpredictability. Whereas for Schmitt, the 'state of exception' would constitute the core concept as far as his anthropology is concerned, I would rather articulate the relationship between 'law' and 'human beings' as follows: Law depends, essentially, on those who are subjected to it. Law does not just regulate, construct or determine somebody or something. Law must be manifested through that somebody or something. Law is not only drafted, accepted, interpreted and applied by human beings. It is lived by human beings. It only exists *as lived* by those subjected to it. In order for law to be lived, a certain degree of irregularity is necessary. Were it not for flexible interpretations, for small deviations, misunderstandings, creative applications and even rebellion, law could not function at all. In this sense, human unpredictability serves law, - just as it may undermine it. Law depends on a delicate and always tensional relationship between regularity and irregularity.

So, these are the basic impulses which I have gained from Schmitt: the idea that law, politics, social structure and metaphysical presumptions are deeply and inescapably conceptually connected; the general significance of the anthropological question; and finally the presumption that however that question may be answered (and it may be answered differently in relation to different political orders), we must recognize that the human foundation of law is characterized by a fundamental unpredictability which can only be approached negatively, but which is likely to have a spiritual dimension (meaning that not only actions, but also convictions, passions and beliefs are unpredictable), and which both maintains and threatens the functioning of law.

A political-philosophical construction according to the categories

'social structure', 'social means', 'purposes' and 'human foundation'

On this basis, it has been the ambition to carry out a political-philosophical analysis of a particular area of empirical law, namely EU social rights. More precisely, it has been the goal of this work to construct a 'social order' with respect to the political philosophical features of such an order by means of an analysis of EU social rights. I do not assume that 'law' and 'social order' are identical, but I assume that they are mutually constitutive which means that from the binding provisions of law it will be possible to derive certain essential characteristics of the social order which is meant to be realized through those provisions of law. So, what kind of essential characteristics am I referring to?

Firstly, a particular *social structure* may be derived. EU social rights are granted to some people and not to others. Apart from that, differentiations are established. Some right-holders are granted better rights than others. That all depends on whether the right-holder in question can claim to be an 'EU-citizen' or not, a 'Worker' or not, a particular kind of 'Worker' or another particular kind of 'Worker', a particular kind of 'Family-member' of a particular kind of 'Worker' or another particular kind of 'Family-member' of another particular kind of 'Worker' etc. We shall in this connection talk about 'names'. A 'name' corresponds to the description of a particular situation. A potential right-holder may either be able to claim a name or not be able to claim it. We shall also talk about non-names and signifiers in-between names and non-names, - I will return to that in a short while.

However, in the first instance, it is important to emphasize that the number of names (and non-names and signifiers in-between names and non-names) turn out to be multifold. This means that a multiplicity of different rights are granted to a multiplicity of different right-holders. On the basis of a comparative analysis, a *hierarchy* may be established. More precisely, we shall establish three hierarchies, one for names, one for non-names and one for signifiers in-between names and non-names. Naturally, it may turn out that in some cases, clear hierarchical features cannot be established - either because the law is haunted by severe unclarities or because it is so flexible that it cannot be determined whether some 'names' are in fact more or less privileged than others. But this does not mean that we may not still establish a 'social structure'; only, that structure may have fluid aspects as well as clear hierarchical aspects. Also, the social structure may turn out to entail egalitarian aspects (meaning that some rights are granted equally to everyone). If so, those aspects will be captured by the comparative analyses as well.

Secondly, particular *social means* may be derived. By what means is the social structure sought realized? From the point of view of an analysis of EU social rights, the social means are the rights. Not so much rights from the perspective of who are granted which rights (the social structure is constructed on the basis of this perspective), but rights from the perspective of *logics of rights*. EU-social rights are predominantly based on the principle of non-discrimination. As we shall see, this principle gives rise to a number of different logics of rights. The internal relations between the various kinds of non-discrimination logics are not unambiguous. But most crucially, some fundamental problematics adhere to non-discrimination rights. These problematics are met by the

CJEU in a range of different ways. In other words, non-discrimination rights are being developed by the court by way of logical creativeness, conceptual developments, an expansive use of fundamental EU-principles and the establishment of stable interpretational horizons.

The interplaying of different kinds of rights is crucial in this respect. Non-discrimination rights are to some extent supported by rights which are not non-discrimination rights (I shall refer to these other rights as 'substantial rights' and 'access rights'). Furthermore, they interplay with fundamental rights, both fundamental EU-rights and human rights. Very often, the outcome of a judgment does not depend on a single right (including the various provisions serving to specify it), but on the interplaying of different rights, on 'seeing one right in the light of another right'. Different rights are not just balanced against one another, they also serve to strengthen each other mutually.

Logics of rights (including the developments of rights vis-a-vis fundamental problematics and the interplaying of different rights) do not only constitute means of law - although they certainly do that. They can also be approached from the point of view of *social means*. How do they affect the possibilities and limitations of the right-holders? What problematics do they involve, as such?

Thirdly, particular *purposes* may be derived. By purposes I both mean the explicitly stated purposes (such as the purposes of particular Directives, of a group of Directives, of a Treaty provision or of EU-law as such) and the implicit purposes underpinning legislation as well as case-law. The implicit purposes are comprised in interpretational horizons. By 'interpretational horizons' I mean the conceptual world visions within which the interpretations of the law are carried out. The question can be raised: Are we confronted with only one horizon or rather several? If there are several, may we then distinguish between more or less dominant horizons? Are they connected or overlapping or rather contradictory? Can they ultimately be said to constitute one overall horizon or not? To the extent that any overall purposes can be detected, it can be asked what their status might be. Are they immanent in the sense that they simply mirror some particular aspects of the social order, or in the sense that they can be seen as integrating principles? Are they transcendent in the sense that they constitute regulative principles, principles which can never be fully realized within that order? In any case, I shall argue that metaphysical presumptions are implied.

We shall see that we are indeed confronted with several different horizons which are partly overlapping, but also contradict each other to some extent. None the less, they all circulate around the same overall purpose, only from different perspectives. That overall purpose is the labour market. However, the status and meaning of the labour market as an overall purpose is not at all clear. This means that the metaphysical presumptions implied in the social order are highly ambiguous.

Finally, a *human foundation* may be derived. What is implied in the law with respect to the nature of those subjected to it? Does the law presuppose the existence of individuals, human beings, subjects, bodies or merely undeterminable material? Can a common human foundation be established at all, - or is it rather so that presumptions as to the nature of the human foundation of law are multiple and constantly changing? On the basis of the analysis of a constellation of concepts which - as I shall argue - implies a universal logic within the context of the law we are dealing with, a common human foundation can indeed be derived. Obviously, this foundation also concerns metaphysical implications of the law. It should be distinguished, though, from the purposes of the social order.

This is what I mean by a *political-philosophical analysis* of EU-social rights: the construction of a social order with respect to the above-mentioned four characteristics of social order - *social structure*, *social means*, *purposes* and *human foundation* - on the basis of an analysis of those rights. In other words, within the context of this work, 'political-philosophical analysis' does not mean an analysis which seeks to establish what would characterize social order as such. We shall seek to establish the characteristics of a *particular social order*, namely the one which can be said to be implied in an *existing particular regime of rights*, EU-social rights. However, since the characteristics in question correspond to fundamental political philosophical categories, it is meaningful to call the analysis a political-philosophical analysis.

The political philosophical categories in question spring from the basic impulses which I have gained from Carl Schmitt, as described above. It should be noted though, that my interpretations of those categories as well as my methods of analysis are quite different from the presumptions and methods of Schmitt. Moreover, it is clear that '*social structure*', '*social means*', '*purposes*' and '*human foundation*' do not merely constitute categories of interest to Schmitt; we encounter them as the fundamental building stones of political philosophy, classic and modern.

The regime of EU-social rights as a quintessential prism of problematics adhering to the concept of 'rights'

The area of law being analyzed is EU social rights. As indicated above, we may refer to this area as a particular regime of rights. 'Regime' does not imply the existence of a complete and perfect architecture, the lack of inconsistencies, the existence of a 'Grundnorm' or the like. But it means that these rights are clearly connected by way of common principles, logics and purposes, and that they are also meant to be mutually complementary.

Since the purpose of the investigation is the construction of a social order according to the characteristics described above, we may say that EU social rights function as a prism through which this order can be seen. This 'prism' is in no way coincidentally chosen: it comprises a range of problematics which adhere to the concept of rights today.

From a political-philosophical perspective, the concept of rights is essential. Traditionally, it is a mediator between the state and the citizen of the state; the right represents this relationship. Today, the concept of rights is in stormy waters. The number of rights (and not least the number of 'fundamental rights') is exploding, but established rights are also being undermined. In addition, 'fundamental rights' or 'human rights' are becoming increasingly ideologically important. They are being connected to issues of political 'identity' - and in this connection, they play the role of that which essentially is thought to characterize *certain particular* political orders (often referred to as 'the Western world'). But they are also granted a universal status and may function as legitimizations of various political interventions, including violent ones. They are both thought of as something which already characterizes those particular political orders and as something which could possibly constitute their foundation in the future. Fundamental rights have gained a fetish-character, as expressed by Joseph Weiler.¹

The relationship which the 'right' traditionally represents, the state-citizen-relationship, has been transformed without being abolished. It is no longer only the state which fills out the first side of the relationship, it may also be an international instrument of law *together with the state*. It should be recalled that international rights are still mediated

¹ Joseph H.H. Weiler (2009): "Human Rights, Constitutionalism, and Integration: Iconography and Fetishism," in Riva Kastoryano and Susan Emanuel: *An Identity for Europe, The Relevance of Multiculturalism in EU Construction*

through and implemented by states.² But also on the other side of the relationship, a doubling takes place. The right-holder is no longer only rights-holder by virtue of being a national citizen (or an individual subjected to national law), but also right-holder by virtue of being something else (it could be 'human being' within the context of the European Convention of Human Rights or it could be 'Worker' within the context of EU-law). In other words, within international law, the 'right' consists in a relationship between a right-granting body and a right-holder which has been 'doubled' on both sides. In fact, triplings or possibly even quadruplings of the relationship may occur as well, to the extent that two or more instruments of international law play together.³

EU social rights are interesting from the point of view of all these developments. They constitute an explosive area of rights, both quantitatively and qualitatively speaking. But due to their formal nature, it has often been questioned how significant they truly are. Are they ultimately not empty rights? Empty or not, 'fundamental EU-rights' play a dominant role within this regime of rights, just as 'human rights' can be found in remarkable roles. Apart from that, it is clear that the general fetish-character of 'human rights' is particularly obvious in connection with political-theoretical discussions of the political 'identity' of the EU. And regarding the relationship which the 'right' represents, doublings of it are clearly implied in EU social rights, and triplings may occur as well to the extent that 'human rights', as guaranteed by the European Convention of Human Rights, play a role in the case-law of the CJEU.

As already mentioned, EU social rights are predominantly based on the principle of non-discrimination. This principle gives rise to a range of different logics of rights along with some fundamental problematics. From the point of view of the relationship which the rights represents, the principle of non-discrimination has implications for both sides of the relation. Firstly, due to the principle of non-discrimination, EU social rights are formal rights which depend on the existence of national substantial rights.

² This is very clearly the case in connection with EU-law (the implementation of which happens through the political, judicial and administrative institutions of the member states). But also the European Convention on Human Rights regulates the relationship between states and individuals *through the states*. This will be clear from the analyses of chapter 33. Even if the European Court of Human Rights receives complaints from individuals independently of states, the judgments of the court presuppose that the states are responsible for the upholding of human rights - in which role they will be guided (and corrected) by the court, but also left a 'margin of appreciation'

³ These are complex matters, though. It may also be so that one instrument dominates over others which means that the latter are translated into the former. Implications of this kind are indicated below. We shall see this problematic unfolded in chapter 33

More precisely, EU social rights regulate *who* should have access to existing national social rights and under what conditions, just as they regard the coordination between different national systems of rights, including issues of transportation and translation of rights, but they do not determine the *content* of national social rights. This means that EU social rights are not only mediated through the member states in the sense that it is the member states who are responsible for their implementation, they are also mediated through the member states in the sense that they reproduce the content of national social rights. This makes the first doubling, the doubling of the side of the body that grants the right, particularly intricate. To the extent that a tripling takes place, matters become even more delicate. Not only is a third right-granting body involved, the European Council. 'Human rights' are seen as rights which, apart from being guaranteed by the European Convention, also belong to the constitutional traditions of the member states and to EU-law. This means that whenever a 'human right' plays a role in a CJEU-judgment, it might not even be clear who the third body might be, and whether there is a third body at all.

Secondly, if we consider the doubling on the other side of the relationship which the right represents, the principle of non-discrimination gives rise to particular complications as well. The basic formula of non-discrimination would read: *'There shall be no discrimination on the grounds of (...) within the areas of (...)'*. The discrimination grounds we shall deal with are the following: nationality, part-time work and fixed-term work, racial or ethnic origin, age, disability, sexual orientation, religion or belief and sex. It is the implication of the basic formula of non-discrimination that the potential right-holders are not designated in general. Admittedly, a designation of personal scope will always be given. The principle either applies to 'everyone', to 'the working population', to 'EU-citizens' or to 'third country nationals'. But the potential victims of discrimination are not pointed out. For instance, if we consider the principle of non-discrimination in relation to the discrimination ground 'religion or belief', then it would read: *'There shall be no discrimination on the grounds of religion or belief'*. It would not read: *'There shall be no discrimination against Muslims, Jews, Christians, Atheists'*. However, as it will be demonstrated in this work, the principle of non-discrimination gives rise to a range of different logics; the basic formula of non-discrimination is being modified in a number of ways. This means that sometimes, the potential victims of discrimination are indeed pointed out in advance, other times not. And then a variety

of variations exist in-between the two possibilities. For this reason, we shall be talking about 'names', 'non-names' and 'signifiers in-between names and non-names'.

The establishment of such distinctions with respect to the nature of the signifiers involved in the manifestations of the principle of non-discrimination has been crucial to the structure of this dissertation - just as it reflects one of its basic concerns, the nature of the right-holders from the point of view of the tension between that which is regulated and that which escapes regulation. Naturally, this structural idea will be explained more thoroughly in the following chapters. For now, we shall simply emphasize that due to the peculiar basic logic of the principle of non-discrimination, the second side of the relationship which the right represents, the side of the right-holder, is not only doubled or tripled. It is nullified and endlessly multiplied at the same time. On a general level, no right-holder is specified, but this opens up to an endless number of possible specifications of right-holders.

EU social rights are not only interesting because they are based on the principle of non-discrimination - for which reason they transform the state-citizen-relationship which the right represents in some rather peculiar ways. They also constitute a crucial subject of study because they are *social* rights. Social rights constitute, as I see it, the most precarious rights in Europe today. In fact, they have always had a special status. They were - and are - seen as 'positive rights' in contrast to the classical rights of freedom. They had to be freed from the idea of mercy. Today they are bound to strict rights-and-duties-logics (in contrast, for instance, to political rights which are also positive rights but which are not granted in exchange for something). They are under pressure in practically all European countries; they constitute *the* significant area of law in relation to the general reform agenda which is being shouted across Europe. As such they have become the fulcrum of other political issues, especially issues of immigration and the treatment of immigrants and refugees and issues of integration (not only of immigrants, but also of the poor, the sick, the unfortunate, the unemployed, the religious and those who live 'alternative lives'). Social rights have always been manifestations of social hierarchies, directly and indirectly, - today more so than ever.

EU social rights constitute a battlefield of law with respect to this general pressure on social rights and the political conflicts which follow in the wake thereof. EU social rights reflect the developments in the member states - and can be said to confirm and strengthen them in some respects. But they also challenge the member states by forcing them to grant national social rights to people who come from other member states and,

to some extent, from countries outside of Europe. Just as they challenge the member states by intervening in the national welfare systems from the perspective of other discrimination grounds - interventions which may be structurally influential, both directly (with respect to transforming the personal scopes of national social rights) and indirectly (with respect to transforming national categorizations of benefits). In this connection, a range of political issues have become part of the manifestations of EU social rights - issues which concern the treatment of 'strangers' (the ideological as well as the geographical strangers), the unfortunate people (for reasons of poverty, sickness, disability or unemployment) and those who do not conform to the dominant lifeforms. Accordingly, from a political philosophical perspective, the regime of EU social rights constitutes a quintessential prism. This rights regime can be seen as a manifestation of essential contemporary problematics relating to the concept of rights: transformations of the relationship which the 'right' represents with doubling or tripling consequences and ambiguities on both sides of the relationship, including the 'disappearance' of the right-holder; the tension between a 'fundamentalization' of the concept of rights (both within law and in political discussions) and an erosion of the same; the tension between formal and substantial rights; and finally the particular fragility of social rights which stems from the fact that they have never had an obvious status and due to which they tend to absorb a range of other political issues which concern social hierarchization.

The natural law ghost

If it was not for my deep respect for Marx, I would be tempted to say: '*A specter is haunting Europe - the specter of natural law*'⁴. And yet: now I have said it.

Why? Today, positivism dominates within the studies and practices of law. Also this dissertation has *in a certain sense* a positivistic foundation: it takes as its starting point an existing area of law. It seeks to analyze the presumptions inherent in this area of law, including metaphysical presumptions. But the investigation itself does not presuppose that law has a foundation in nature - just as it does not presuppose that law has a foundation in God or in a cosmic principle.

Contemporary natural law positions are hardly ever natural law positions in the classical or modern sense. They do not presuppose that any principles of law can be

⁴ The first sentence of Marx and Engels' 'Manifesto of the Communist Party' reads: '*A specter is haunting Europe - the specter of communism*'

derived from nature. Dworkin's theory - one of the most respected and influential natural law theories today - is based on considerations on presumptions which human beings *actually* make (according to Dworkin) when drafting and interpreting law.⁵

There are also approaches which would neither amount to positivistic or natural law approaches, such as historical, discursive or deconstructivistic approaches. The presumptions and methods of this dissertation would be related to such approaches. I shall return to that, of course. However, historical and discursive approaches can be said to be positivistic *in a certain sense* in that they do not assume a universal foundation of law. Mostly, they would - like this dissertation - examine *that which has been manifested historically* (whether that be law, politics, science or other institutions and practices). Deconstructive approaches may, however, imply a transcendent concept of 'justice'. But that would not be a 'justice' which could function as a foundation of any existing legal or political order.⁶

So, natural law in its classical and modern sense - that is, in its literal meaning, 'law based on nature' - has almost disappeared from legal and political philosophy - as it has generally lost influence over the practical work of lawyers and politicians. On the other hand, I will argue that natural law still vibrates within law and politics of today. Natural law is present as a ghost.

The symptoms of the presence of the ghost are obvious. Politicians as well as political scientists are highly concerned about 'values'. Above, I mentioned the ideological importance of 'fundamental rights'. 'Fundamental rights' are generally regarded as a 'value' - and mostly a 'universal value'. The Treaty on EU states, for instance, that the EU builds on '*the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law*'⁷. The general concern about 'values' and in particular 'universal values' bears witness to the existence of a general longing for - or at least a feeling of a need for - a universal foundation of law and politics.

But the concern about 'universal values' is not just a sign of a longing for a universal foundation of law and politics, it is also a sign of the lack of a belief in such a foundation. Values are immediately subjective. That is, they are not founded in a

⁵ I shall return to both Dworkin and positivism in chapter 2. I shall argue that from a certain point of view, Dworkin's theory may be described as a nuanced development of positivism (more precisely the positivism of Hart), rather than as a theory which is in opposition to positivism

⁶ The theoretical complexities which are hereby indicated - regarding definitions of and distinctions between positivism, natural law, historical, discursive and deconstructivistic approaches - will be dealt with more thoroughly in chapter 2

⁷ Recital 3 of the Preamble, TEU

principle of subjectivity (like 'reason' or 'reflexivity' or 'self-consciousness'). Far less are they founded in a principle of objectivity. They are, in fact, not founded in anything. They represent pure normativity. They are unconnected to any dimension of knowledge or insight into the nature of the world or the nature of human beings. They are the responsibility of humans alone. They are pure human creation.

'Unfounded' means, of course, 'metaphysically unfounded'. Seen from an un-metaphysical point of view, values may be founded in all sorts of things. Values may be founded in history and tradition, in social or psychological conditions, in collective experiences and in reflections arising from those experiences. But that is exactly the point. They may be founded *in all sorts of things*; we believe in them *for some reason or another*. The concept of value as such merely implies *'that which we believe in'*.

The concept of 'value' is, in its contemporary applications, threatened by a looming nihilism. The fact that the moral concept of value has a twin sibling, the economic concept of value, does not make it any easier. 'Value' within an economic context is but another word for exchangeability as such. The economic concept of value is no longer connected to any substantial ideas, such as 'work', 'usefulness' or 'the raw materials given to us'. 'Value' is simply that which is being regarded and treated as 'value'. The economic concept of 'value' goes a step further than the moral concept of value in that it relies on the idea of exchangeability. In contrast, the moral concept of 'value' depends on the idea that something might exist which is not simply exchangeable, something which may serve us as foundation. But because it is basically unfounded, it is basically fragile. A moral 'value' may any time be accused of being either coincidental or dogmatic.

Accordingly, contemporary 'values' cannot be universal. 'Universal' would imply a foundation beyond that which is immediately subjective. I do not necessarily mean a transcendent principle. It could also be an immanent principle such as 'History as such' or 'Collective self-reflexion'.⁸ The expression 'universal value' constitutes a contradiction in terms. I would say that this contradiction is a symptom of the presence of the ghost of natural law: We express with this contradiction our longing for a universal foundation while simultaneously stating our lack of belief in such a foundation. The different roles played by the expression today bears witness to the same: an oscillation between universality and mere subjectivity. Sometimes, universal

⁸ In this connection we need to distinguish carefully between an approach which would look for a historical foundation of our present values (and hereby justify them) and an approach which would claim that any values we might have are founded in 'History' as a metaphysical principle.

values are supposed to be 'our' values in contrast to those of others; other times they are supposed to apply to all. Sometimes, universal values represent that which we already are, other times they represent something which we mean to create in order to establish a foundation for ourselves in the future.

I believe there are deep reasons for these contemporary ambiguities. Law and politics - and any other kind of intended regulation - constitute acts of power. They rely on *authority*, on a *command* which says: this must and shall be done. The nature of the authority or the command may sometimes be clear (the father, the state, the employer etc), but more often, it is hidden. Not that we do not know (to some extent) who makes laws, politics and rules. But we do not know, exactly, why we obey and how we obey. As explained above, law depends, essentially, on those who are subjected to the law; it depends on their interpretations, misunderstandings, deviations, even rebellions etc - it depends on their *living* the law. In this sense, the law is ourselves, and the authority or the command is ourselves. We may analyze the source of this authority in ourselves. We may call it indoctrination, social force, pragmatism, self-interest, social consensus or social contract, masochism or whatever. And all of these analyses may be true, in their own way. I shall hold, though, that ultimately, this authority or this command in ourselves is beyond our analytical reach - just as the unpredictability of human nature is beyond our reach. Derrida has written a wonderful piece on the matter: 'The Mystical Foundation of Authority'. Schmitt's concept of 'decisionism' concerns the same problematic, although from a different angle. The mystical foundation of law (the law which is ourselves) constitutes the fundamental riddle around which Kafka's works circulate.⁹

In the following chapter, we shall dwell more on that mystical foundation of law which escapes us. The question which arises is of course: Can we live with this mystical foundation? Or do we need to establish a universal principle in which law and politics can be founded? The presence of the natural law ghost seems to indicate that we cannot live with the mystical foundation of law - while we are simultaneously painfully aware of the subjective and relative nature of universal principles.

Why do I say that a natural right ghost and not a 'ghost of religion' or a 'ghost of cosmic principles' is haunting Europe?

⁹ A similar argument could of course be made in relation to all the informal kinds of regulation which pervade our social lives and which are *not* deliberately intended.

In times of secularization, natural law can be said to represent the last bastion with respect to establishing a universal foundation of law. Modern natural law as unfolded by Locke, Hobbes and Rousseau presumes that a universal foundation of social order can be found in a universal human nature - and not in God or in a cosmic principle. Close relations between 'human nature' and 'social order' pervade the history of political philosophy, though. Plato based his 'ideal state' on human nature (although the analogy established by Socrates between the principles of the state and the principles of the soul is highly ambiguous). Yet, to the extent that the construction should be taken seriously at all, it ultimately depends on a cosmic order of which both states and human beings are but expressions. State constructions based on a Christian foundation also involves particular understandings of human nature, but ultimately God would be the source of any principles of social order.

One could certainly say that 'cosmic order' or 'the world created by God' constitutes a metaphysical 'nature'. In that sense, the classic Greek and the Christian political philosophy constitute natural law positions.¹⁰ But the meaning of 'nature' and therefore of 'natural law' may be contested. Leo Strauss - one of the last truly brilliant (as well as controversial) natural law philosophers - would deny that a religious position could be a natural law position. And he would see in the classic Greek natural law philosophy the culmination of natural law.¹¹ In contrast, I would emphasize the modern natural law philosophers, Locke, Hobbes and Rousseau. In a sense, the concept of 'nature' has been reduced. It does no longer represent the entire cosmic order which is good in itself. On the other hand, the concept of 'nature' has become a more distinct concept. 'Human nature' now constitutes the focal point of attention. Considered as a principle of law and politics, 'human nature' constitutes an immanent rather than a transcendent principle - yet, still a universal principle.

In times of secularization, 'human nature' can be said to constitute the last bastion with respect to establishing a universal foundation of law exactly because it is immanent. What could be more immanent than human nature itself - if universality shall not be lost? The universal has moved as close as possible to the human. It is, however, crucial to be aware that modern natural law does in no way presume that law and politics can

¹⁰ It could be argued that the classic Greek political philosophies are most adequately described as 'natural right' positions and not 'natural law' positions.

¹¹ Leo Strauss: *Natural Right and History*. Also the position of Leo Strauss is presumably rather a 'natural right' position than a 'natural law' position (see the previous note). However, it is extremely ambiguous what Leo Strauss actually means. We shall meet him again in chapter 2.

build directly on human nature. In order to protect human nature in society we will have to negate it or at least modify it (in the case of Rousseau, it is even highly ambiguous to what extent any reconciliation between human nature and social order can truly be found). In addition: human nature is reached by way of a speculative construction; none of the three philosophers would hold that we would have any immediate access to our own nature¹². Also in classical natural law, 'Nature' would not constitute something which we may build upon directly. Nature as such or human nature would constitute a hidden or secret truth, something which can either not be known at all, or only reached by way of contemplation. No political order will be able to realize 'nature' or 'human nature' in a full sense, but only strive towards such a realization.

This means that in both classic and modern natural law, a tension between 'foundation' and 'political order' will always exist. Either in the sense that the foundation ('nature' or 'human nature') is hidden from us or fundamentally inaccessible which means that political orders can only be expressions of an attempt to strive towards the realization of this hidden foundation. Or in the sense that the foundation must be partly negated in order to constitute the foundation of social order.

Today, this tension between 'foundation' and 'political order' is being undermined, although not abolished. The general concern about political 'identities' is a clear sign thereof. The concept of 'identity' goes hand in hand with the concept of 'values' in the sense that we are presumed to gain an identity through 'values'. The concept of 'identity' implies 'being identical to one-self', 'being one-self and not another', 'being in accordance with what one essentially is'. In other words, it entails no tension between what we immediately are and what we might secretly be (hidden to ourselves) and no tension between what we are and what we would want to be. Such tensions are not absent from the discussions and analyses of 'identities', though. But the concept of 'identity' still constitutes the underlying logic of these discussions. Even if complex 'identities' are being found or sought, what they imply is still this: 'this is what we essentially are and what we build upon'.

It is the dominance of the concept of 'identity' that shows us that we are facing a natural law ghost and not a 'ghost of religion' or a 'ghost of cosmic principles'. More precisely, we are facing a modern natural law ghost. Modern natural law implies an

¹² 'Speculative construction' does not imply, though, that 'human nature' (as manifested in the 'state of nature') is not real. We are not merely witnessing a methodological tool (like Rawls's 'veil of ignorance'). The 'state of nature' is *real* from an ontological point of view, only not directly accessible.

intimate relationship between 'foundation' and 'political order', between that which we fundamentally are and that which we may build upon when building social order. It implies that our foundation as such is within our reach. However, modern natural law still upholds certain crucial distinctions: we cannot build directly on who we fundamentally are and we can only approach who we fundamentally are by way of a speculative construction or imagination (the 'state of nature'). These distinctions are seriously threatened today.

I suggest that we acknowledge the ghost while simultaneously stepping out of its shadow. We should deeply acknowledge it because it reminds us of the mystical foundation of law and the possible unbearableness of it - meaning that we are fundamentally plunged into oscillating between nihilism and universalism. But we should seek to avoid the unreflected identification of the question of the human foundation of law and the normative foundation of law. We should, indeed, keep it open whether law and politics should be built on principles derived from a human foundation at all.

This does not mean that we should not raise the question of the human foundation of law. I have argued extensively for the significance of that question. We should never forget that the law depends, essentially, on the people subjected to it. Only, the human foundation of law may not serve us as a foundation of law in the sense of an ultimate justification of law and in the sense of overall purposes of law. Naturally, purposes and justifications of law must somehow accord with presumptions as to the nature of the human foundation of law, but this does not mean that they are identical. What we strive to be through law may be different from what we presume to be by nature.

This reopens, of course, the question of the establishment of principles on which we may build in the shadow of the mystical foundation of law. If we cannot build on human nature, on what then?

In this connection, another crucial distinction should be established, namely the distinction between the existing social order and the normative foundation of that order. To the extent that a social order could be said to possess an 'identity', that is, be 'identical with itself', it would have accomplished what it was meant to accomplish, no tension would exist between that order and the ideals implied in it. It would be without openings, without possibilities of self-reflexion or self-critique and self-development. It would mean that a particular foundation of that order would have been established and identified once and for all - or that no such foundation was regarded necessary.

In contrast hereto, it should be recalled that the foundation of a political order may also be thought of in the shape of ideals or purposes which are not and which cannot be realized completely by that order - although they still reflect it. Regulative ideals, as Kant would say. That would imply the opposite of an 'identity'-thinking, namely a non-identity-thinking in so far as our political orders are concerned.

The antechamber of the 'Room' as the scene - and what can be expected

Thus, we shall now embark upon our political-philosophical endeavor the purpose of which is the conceptual construction of a social order according to the four categories *social structure - means - purposes - human foundation*. For reasons which will be provided in the following chapters, I shall call this construction 'the ideal order'.

The prism through which the ideal order is seen is constituted by EU social rights - a particular rights regime. As argued above, EU social rights constitute a quintessential prism for a political-philosophical investigation today in that they are manifestations of essential contemporary problematics concerning the concept of 'rights'.

The problematic of the relationship between law and those who are subjected to law constitutes the horizon of the investigation. To the extent that we can assume that it is human beings who are subjected to law (and we shall tentatively do that), we may call it the *human problematic*. The image by which I opened this dissertation, gave it an 'opening scene' - the image of the three men fearfully waiting outside of the 'Room' stemming from Tarkovsky's film *Stalker* - will constitute *the scene* of the dissertation.

The law *is* those subjected to the law. Not only in the sense that law depends on human beings in order to unfold as law, but also in the sense that the foundation of its authority ultimately lies in them. However, human beings are not accessible to themselves; they are fundamentally unpredictable and the foundation of the authority of law is beyond their analytical reach. In this sense, the law is like the 'Zone' in Takovsky's film: it reflects the conditions of those who enter it, and yet it is incalculable, unpredictable. It unfolds as a continuous flow of obscure mirroring effects. But there is a mirror behind the multiple mirroring effects: the true nature of human wishes, the 'Room'. The 'Room' is the inaccessible core of the law. Unlike the three men in the film, we shall not be granted the possibility of entering the 'Room'.

Since we may not enter the 'Room' but can only wait outside it, fearing it or not fearing it, we are caught in a paradox. This waiting outside of the 'Room' appears to constitute an unbearable situation. Instead of waiting, we tend to create standards presumed to be independent from ourselves in order for the law to have a foundation. The natural law

ghost haunting Europe today bears witness to that. I have pointed to two important symptoms of the presence of the ghost. Firstly, the dominance of the contradictory concept of 'universal value' can be seen as an immediate expression of the paradox: the concept establishes a universal standard while simultaneously undermining the possibility of such a standard. The dominance of the concept of 'identity' makes out the other symptom. It tells us that 'law' and 'human beings' have moved as close towards each other as they possibly can. Already in the great modern natural law theories, the 'foundation of law' and the 'human foundation of law' stood in an intimate relationship. But the tension between the two was still upheld. The concept of 'identity', in contrast, implies the possibility of a restless identification of the two.

I believe that we should take the ghost seriously according to both of its symptoms. We cannot escape the paradox. But we need not reproduce it in an immediate manner by deploying a concept like 'universal value' in which 'universality' and 'mere subjectivity' violently clash. Maybe we would not even need 'universality' in order to establish a standard of law which would imply a tensional relationship to that which we presume to be? That should be kept open, - just as it should be kept open whether such a standard would reflect an immanent or a transcendent approach. Furthermore, we should not identify the 'human foundation of law' with the foundation of law as such, just as we should not identify the purposes of a particular regime of law with that regime. At least we should not do it in advance. We should keep it open that they need not be identical.

In other words, we shall seek the purposes of 'the ideal order' with an open mind as to their metaphysical status and character. We shall not presume that they be identical with the 'human foundation' of that order (to the extent that a 'human foundation' can be said to be implied); and we shall ask to what extent those purposes might simply reproduce the contents of that order - or whether they might stand in a tensional relationship to it.

The dissertation facing the reader amounts to a rather long and complicated construction. Firstly, it involves analyses of a rather large empirical material - 18 EU Directives/Regulations along with provisions of the Treaties, the European Charter of Fundamental Rights, the European Convention on Human Rights and 115 judgments. The analyses of the legal material will be carried out in Part I. Secondly, in Part II, we shall engage in the construction of 'the ideal order' on the basis of the analyses of Part I.

It will only be fair and suitable to indicate, already at this stage, the overall characteristics of the 'ideal order' which will be constructed. Indeed, some characteristics have already been mentioned above.

The 'ideal order' is a social order possessing both hierarchical, fluid and fundamental aspects. According to its social structure it is certainly a complex, flexible and to some extent also an ambiguous order. But in spite of that, it is a largely hierarchical, destiny-bound social structure celebrating a particular idea of 'the normal life'. As such, it is not without totalitarian aspects.

Furthermore, the ideal order is not without a human foundation. Presumptions as to the existence of a common human foundation are implied. But as far as overall purposes are concerned (which would provide the ideal order with a normative foundation), the ideal order is extremely ambiguous.

The ideal order is based on non-discrimination rights which are haunted by deep fundamental problematics. Predominantly, the particular rights of the ideal order are weak rights. There are huge differences, though, between different non-discrimination rights. But when that is said, it has been highly interesting to discover that these predominantly *weak rights* have given rise to a *strong concept of rights*. This may sound like a contradiction. The point is that in order to meet the fundamental problematics which adhere to non-discrimination rights, the CJEU has developed non-discrimination rights by way of logical alterations and various complementary measures. I shall argue that by virtue of these developments, the concept of 'rights' as such has become powerful.

Finally and crucially, particular institutional orders characterized by particular institutional logics make out the very essence of the ideal order. In this connection we shall analyze the logical qualifications of six 'anchors of order', namely the 'National Labour Market', the 'National Welfare Systems', the 'Employment Relationship', the 'Internal Market', the 'Family' and the 'State as One'. I shall argue that all other elements of the ideal order, its social structure, its particular rights and the interpretative methods and elements by which they are sought realized and the metaphysical idea of 'rights' shining through those realizations ultimately depend on these qualifications of institutional logics.

The six anchors of order turn out to be characterized by logics based on relationships of opposition, on asymmetrical mediations between individual and common aspects, taboos, discrimination, tensions between fundamental and particular aspects, lurking

violence, scenarios of danger and paradoxicality. In particular, it should be mentioned that the sixth anchor of order which I have called the 'State as One' (in contrast to the 'State as many') is left without integrating capacities.

However pessimistic this result may seem, it is crucial to emphasize that because of these deeply problematic institutional logics, the ideal order is not closed in on itself; it is not self-sufficient and self-confirming. It is not *identical with itself*; if we had wished to establish an 'identity' of the ideal order, it would not have been possible. This means that it is not without immanent openings.

By the very end of the dissertation, I shall embark on three reflexions which seek out the *potentials* of the ideal order on the basis of its immanent openings. These reflexions - which have a different status than the rest of the work - concern the possibility of establishing overall purposes of the ideal order which do not simply reproduce the contents of it.

All this is just indications of course.

In the following three chapters the theoretical foundation, 'grasps' and structure of Part I and II will be explained. Clearly, a political philosophical construction of this kind gives rise to a number of methodological problematics and possible objections - concerning the relationship between law and social order, between social order and human life, the status of EU-law 'as such' vis-à-vis its implementation in the different member states, the distinction between immanent and transcendent metaphysical principles, the meaning and status of concepts, logics, horizons and institutional orders. I shall address all these issues in due order. However, we shall begin with the most crucial: the mystical foundation of law and the paradox it gives rise to.

Chapter 1

Derrida and Schmitt on the Mystical Foundation of Law

What may we understand by 'law'? From the most fundamental perspective, 'law' could be considered as 'that which is enforced through us'. From this perspective, 'law' could not be reduced to written law, codified law, law relying on particular political and judicial institutions and on particular traditions, formal procedures and rituals concerning the drafting, adoption, application and interpretation of law. Nor could 'law' be reduced to conscious regulation, whether through policy measures of various kinds, ideological campaigns or local rules, standards and surveillance. Even if we include the silent rules of conduct the origin of which we do not know and which cannot be ascribed any clear intentionality, we might not have captured the full meaning of 'law' - although we would have approached it.

We shall now concern ourselves with two philosophers, Jacques Derrida and Carl Schmitt¹³, both adhering to a very broad and fundamental understanding of law. Accordingly, they both stand in opposition to a formal as well as a 'system'-understanding of law. In addition, they are both radical thinkers of law in the sense that they both emphasize the fundamental paradoxical features of law. On the one hand, they hold that there cannot be an ultimate normative foundation of law. On the other hand, their thinking continuously revolves around the normative aspects of law. It is implied that we cannot escape the question of the normative foundation of law, just as we cannot escape the question of the human foundation of law. These questions will continue to haunt the law because they belong to the unfolding of law itself. According to both Derrida and Schmitt, the foundation of law is fundamentally mystical. For this reason, I shall argue that their respective positions cannot be understood as hermeneutic positions either - although they are closely related to hermeneutics. It is positions which vibrate on the edge of hermeneutics.

But there are also important differences between Derrida and Schmitt - differences which concern the relationship between law, history and human beings, including the relationship between the 'machine'-aspect and the human-decision-aspect of law. But

¹³ According to his formal title, Carl Schmitt was a lawyer, not a philosopher. However, I see him as a philosopher of law in the most quientessential sense: he engaged in radical conceptual analysis with respect to the meanings, foundations, borders and distinctions of law.

also their normative approaches are highly different, that is, their respective views on *what we may hope for* and what we should work for as far as concerns the historical development of law. As I shall argue, these different normative approaches have implications for their different ways of working conceptually with the law.

The following reading is a complementary reading. First, we shall concern ourselves with Derrida, then with Schmitt. But after that, we shall embark on a complicated comparison of the two positions. This comparison will move back and forth between differences and similarities. I shall seek to demonstrate how subtle the differences in question are - while still being significant. More precisely, I shall demonstrate that the tensions which can be detected *between* the two positions also exist as tensions *within* each position.

It should be underlined, though, that I do not intend to deconstruct the differences between the two thinkers. Only, it is a reading that seeks the complexities and nuances on both sides which means that by the end of it, the differences will not stand as sharp and unambiguous as they did to begin with. We will be left with two highly tensional positions which - rather than working against each other - may be brought together and enrich each other.

This complementary reading makes out the first step with respect to developing the theoretical foundation of the dissertation. In chapter 2, this reading will constitute our starting point. The themes and problematics brought forward by it will be discussed in relation to the specific challenges of the dissertation. A number of other philosophers and legal scholars will be involved in these discussions, most notably Hegel, Adorno and Deleuze. But for now, we shall dwell on the rich and complex approaches of Derrida and Schmitt, respectively.

Derrida: negotiating the relationship between the calculable and the incalculable

For Derrida, 'law' is as fundamental and all-permeating as language itself. In the densified and beautiful text 'Force of law: The Mystical Foundation of Authority' (based on a speech given in 1989), Derrida begins by reflecting the law with which he is himself confronted when meeting the audience, *having to speak in a language which is not his own* (namely English). This is imposed on him, it is law, - just as responding to the invitation and 'understanding the contract', that is, the conditions

under which a speech is given in a colloquium constitute law.¹⁴ But certainly, the law he has in mind does not just concern the obligation to speak in a foreign language, it concerns everything which this 'other' language implies, the differences which this language establishes (through categories, concepts, oppositions, contradictions, connections, disconnections, conjunctions, disjunctions and so forth), the workings of that language as 'Differance'. However, not only the foreign, but also the native language is law, although we may not notice it. If we were to deconstruct Derrida's own text, we might begin with the expression '*a language which is not my own*'. Could there ever be a language '*which is my own*'? Surely not in the sense of ownership and control. Possibly, yes, in the sense of inseparability. We are not free subjects who control 'our own' language, but we might say that a language could be 'our own' in the sense that it is our breeding ground, our foundation and mode of existence. In this sense, a language might even be 'our own law'. And yet, can 'law' be 'our own'?¹⁵

This indication of a possible deconstruction of Derrida's own expression serves to demonstrate the complexities we are facing with respect to the relationship between law and those subjected to law. We need not go any further down this path of a possible deconstruction of 'my own language', 'my own law'. Crucial is, that language is law, just as the meeting of expectations in the most fine-grained sense is law. Any exchange, circulation, recognition, gratitude, calculation and any act of rationality is law.¹⁶ 'Law' even goes beyond the distinction between nature and convention.¹⁷ Law is not simply that which is conventionally established. In this sense, law does not presuppose nature, no more than it presupposes 'subjects' or 'human beings'. There is no 'someone' who is regulated by law; 'law' unfolds as 'Differance' - in the movement of which 'subjects' and 'human beings' arise and die and transform. Accordingly, the essence of law is affirmative, not prohibitive.¹⁸

Is Derrida's 'law' then not everything? Any articulation, any action? It is not, although we would never be able to say that an articulation or action was not law.¹⁹ There is

¹⁴ Jacques Derrida: "Force of law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds): *Deconstruction and the Possibility of Justice*, p. 4-5

¹⁵ Derrida would always criticize any presumptions indicating that we confront language as free subjects, see for instance p. 18-19, 25 (ibid)

¹⁶ Ibid, p. 25

¹⁷ Ibid, p. 8, 15

¹⁸ Ibid, p. 7-8

¹⁹ Ibid, p. 24-25

something which cannot be identified with law, and that is 'justice'. The relationship between law and justice is extremely ambiguous, though. Sometimes, Derrida speaks of 'justice' as law, but as a different kind of law than law as right (*droit*). If 'justice' is law, then it is '*a law that not only exceeds or contradicts "law" (droit), but also, perhaps, has no relation to law*'. Mostly, however, when speaking of 'law', Derrida means 'law as right (*droit*)' in contrast to justice. But he may also speak of '*justice as law (droit)*' or of '*justice as it becomes droit*'.²⁰ He explains that the distinction between justice and law (*droit*) is not a 'true distinction' since '*droit claims to exercise itself in the name of justice*' and '*justice is required to establish itself in the name of a law that must be enforced*'.²¹

In spite of this fundamental ambiguity, Derrida conceptualizes 'law (*droit*)' and 'justice' as extreme opponents. 'Justice' corresponds to a border concept - inaccessible and aporetic. One cannot speak directly of justice without betraying it; justice is unrepresentable.²² One cannot know, either, whether justice exists. But if it does exist, then it exists '*outside or beyond law*' and '*beyond moralism*'. Justice would, if it existed, '*be the experience that we are not able to experience*'²³. It would be an event of absolute singularity. Derrida does conceptualize justice, though; we are able to gain a glimpse of the meaning of justice. But of course, these conceptualizations are aporetic.

Firstly, justice is '*the experience of absolute alterity*' which requires '*addressing oneself to the other in the language of the other*', - but this is impossible²⁴. Here, we encounter again the dubious implication that a language may be someone's *own* language. Since we are now addressing the problem from the point of view of 'justice' and not of 'law (*droit*)', it is clear that 'the language of the other' constitutes a border expression. The 'other' need not be an other individual, it could be '*myself as other*'. Accordingly, the 'language of the other' would be a language of singularity, of alterity, of uniqueness, a language which might not even exist. - Thus, from the perspective of justice we acquire a new and deeply intensified understanding of the expression 'my own language'. 'My own language' might not even exist in full and deep meaning of that expression, it would be a possible impossibility as 'justice' itself. But to the extent that 'law (*droit*)' and 'justice' are related, this possible impossibility is at play within language as law (*droit*) the condition of which is the inseparability of language and the person speaking it. Exactly

²⁰ Ibid, p. 5

²¹ Ibid, p. 22

²² Ibid, p. 10, 27

²³ Ibid, p. 16

²⁴ Ibid, p. 27, 17

because it is in play, it becomes clear that the language which is 'my own' (inseparable from me) is also foreign to me, not 'my own'. But the language which truly is 'my own' is inaccessible to me. Only in the singular and unrepresentable event of justice would I have 'my own language'. In that event, 'my own language' would be 'the language of the other'. Only as 'myself as other' would I have 'my own language'.

This interpretation would be confirmed by the idea of the 'gift'. Justice demands '*a gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality*'.²⁵ Justice demands such a gift because it is '*owed to the other*'. In other words, the language of justice which is 'the language of the other' or 'the language of myself as other' is a language beyond ordinary language, a language which does not conform to any rules and logics of language. It is a language of madness, as Derrida says.

Justice is also conceptualized in another way. Justice is deconstruction. Justice itself cannot be deconstructed (in contrast to 'law (droit)'), no more than deconstruction itself.²⁶ Justice is '*the very moment of deconstruction at work in law and the history of laws, in political history and history itself*'.²⁷ Naturally, this conceptualization accords deeply with the conceptualization of justice as '*the experience of absolute alterity*' and '*addressing oneself to the other in the language of the other*'. Deconstruction works through the given language, but seeks that which is beyond it. Deconstruction takes place in '*the interval*' between the undeconstructibility of justice and the deconstructibility of law (droit). Although deconstruction seemingly does not address justice (because it does not speak of justice, it speaks of that which is representable and deconstructible, namely law (droit)), it is all about justice, of 'alterity', 'otherness', 'unrepresentability', 'impossibility'.²⁸ Due to the fact that deconstruction takes place in this '*interval*', we may distinguish between two different meanings of deconstruction. On the one hand, deconstruction is something which we may embark on, do, carry out etc. - on the basis of the given language, of law (droit). As such, deconstruction is not 'beyond law', no more than it is an '*experience that we are not able to experience*'. On the other hand, that which is sought by deconstruction is beyond law. When speaking of '*the very moment of deconstruction at work*' I believe that Derrida means the very moment when justice

²⁵ Ibid, p. 25. Derrida also says that justice is '*infinite, incalculable, rebellious to rule and foreign to symmetry, heterogenous and heterotropic*' (p. 22)

²⁶ Ibid, p. 14-15

²⁷ Ibid, p. 25

²⁸ Ibid, p. 10

happens through deconstruction. In this sense, deconstruction itself is 'the *experience that we are not able to experience*'; deconstruction as 'the very moment of deconstruction' or 'the event of deconstruction' is justice.

As it appears, justice is beyond law (*droit*), language as we know it, life and experience as we know it. In *Specters of Marx*, Derrida unfolds the special nature of the temporality of justice. 'The time is out of joint' - this quote from 'Hamlet' is reflected, extended, varied throughout the book. Times of injustice may be times 'out of joint'. But also the event of justice requires 'a disjointure or an anachrony', 'some "out of joint" dislocation in Being and in time itself'.²⁹ Justice is beyond times in terms of historical time (depending on the distinction between past, present and future). When speaking of justice, Derrida brings past and future together beyond the present. Justice implies that the other comes before us, the precedence of the other. Justice implies a responsibility towards an inheritance. But justice also implies 'the coming of the event'.³⁰ In this sense, the future must be the past, it must do justice to the past. The 'coming of the event' does not imply a messianic waiting, though. Nor are we to understand 'justice' as a regulative ideal. This is emphasized in 'The Mystical Foundation of Authority'. Justice has no horizon of expectation. 'Waiting' would be irreconcilable with justice, justice does not wait. The 'coming of the event' means, rather, the chance of the event.³¹

So, let us return to law. Law as *droit* pervades our lives; language is law, and any meeting of expectations is law. Any exchange, calculation, restitution, any act or expression of rationality is law. In 'Specters of Marx', we learn that law (*droit*) is that which we inherit, and we inherit it as 'a bottomless wound, an irreparable tragedy', an 'indefinite malediction'.³² Not only is law calculability, it is 'the economy of vengeance or punishment'.³³ Whereas justice blows apart the idea of the intentional subject - in that its concerns 'the other', including myself as other and the 'other language' - law (*droit*) depends on this idea. This does not mean that 'subjects' exist prior to law; it means that the idea of 'intentional subjects' arise together with law as *droit*. In this respect, the history of law (*droit*) is woven together with 'the carnivorous sacrifice'. Animals have never been seen as subjects of law - for which reason Derrida says that humans who

²⁹ Jacques Derrida: *Specters of Marx*, p. 32

³⁰ Ibid, p. 26-27, 33

³¹ Jacques Derrida: "Force of law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds): *Deconstruction and the Possibility of Justice*, p. 27

³² Jacques Derrida: *Specters of Marx*, p. 24

³³ Ibid, p. 6

have not been recognized as 'subjects of law' have been treated as if they were animals.³⁴

Is there no difference, then, between good law and bad law, legitimate and illegitimate law? Is law as *droit* always tragedy and malediction? We may certainly distinguish between different ways in which law manifests itself. Law as *droit* has multiple forms of manifestation. These forms imply, naturally, forms of legality as well as forms of legitimacy, just as they imply forms of performativity, persuasion, rethoric and paradoxicality.³⁵ But law (*droit*) cannot, fundamentally, be justified. Law is a force that '*justifies itself*', a force which is '*justified in applying itself*'. 'Force' should be taken seriously, it belongs essentially to the concept of law: law is always 'enforceable', - otherwise it would not be law.³⁶ It is based on authority - but obviously, not ultimately on the authority of particular people or particular regimes, but on the authority of law as law. Law is not merely an instrument in the hands of the people in power (although it is also that); ultimately, the relationship between 'law' and 'force' (or violence) is intrinsic to law. It should be noted, though, that due to its differential nature, its manifestation as *Differance*, law as *droit* is not only a performative force, but also and essentially an interpretational force.³⁷

Where does it come from, this force that justifies itself and implies its own authority? Derrida speaks of a founding and justifying moment that institutes law, a murderous and bruising origin of law. How may we understand this? It is not a moment inscribed in history. And it is not a moment which brings with it any justification beyond the performative and interpretational force itself - which is neither just nor unjust. It is a true constitutive moment, it is *decision*, that is, it is a moment which tears apart any continuity, it is undetermined. Is it a mythical moment? Derrida does not say so. But it is this moment that any constitutive political power throughout history depends on. Any new instituted order of law will depend on the conditions and conventions of earlier orders. Ultimately, the authority and justification of law depends on the founding moment, the mystical origin.³⁸

³⁴ Jacques Derrida: "Force of law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds): *Deconstruction and the Possibility of Justice*, p. 18-19

³⁵ Ibid, p. 7

³⁶ Ibid, p. 5-6

³⁷ Ibid, p. 13

³⁸ Ibid, p. 13-14, *Specters of Marx*, p. 25

What are we to do, then? Accept the tragedy and the mystical origin which ultimately means that law is unfounded in anything but itself as performative force, while hoping for the chance of the event of justice - which would be a moment of madness, beyond time and language as we know it? Or should we seek madness, non-calculability, non-rationality - in order to reach beyond law and provoke the coming of the event of justice? We should do neither. In fact, Derrida emphasizes that giving in to incalculability, to irrationality may very well lead to evil. *'Left to itself, the incalculable and giving (donatrice) idea of justice is always very close to the bad, even to the worst for it can always be reappropriated by the most perverse calculation'*³⁹, he says in *'The Mystical Foundation of Authority'*. And in *Specters of Marx*: *'To be out of joint [...] is no doubt the very possibility of evil'*⁴⁰. In other words, we see that although law as *droit* penetrates everything, it is not everything. And it is not only justice which is not law (*droit*). Also incalculability as evil is not law (*droit*); but evil may be used by and integrated in law (*droit*).

What we must do is to constantly negotiate the relationship between the calculable and the incalculable. And this requires calculation. In this deep sense, justice needs law (*droit*). Deconstruction is, of course, another word for this kind of calculation. It is a calculation which takes place in the interval between law (*droit*) and justice and which calculate on the basis of the given calculable (law (*droit*)) - but which seeks to take this calculation as far as possible so that it transcends the distinctions and logics with which we are immediately confronted. An important (if not the most important) point of departure would be law in the more narrow sense of that which is institutionalized as law, that is, the juridical field. Law in this sense is already associated with justice, and it claims the name of justice. But a deconstruction taking its point of departure in the juridical field could not be isolated to that field: *'Ethics, politics, economics, psycho-sociology, philosophy, literature etc'* are all fields *'from which we cannot separate [the juridical field], which intervene in it and are no longer simply fields'*.⁴¹

What could we hope to gain from this negotiation of the relationship between the calculable and the incalculable? Possibly, the transformation of law (*droit*) - through the remembrance of the brutal history of law (*droit*), the victims and the excluded or

³⁹ Jacques Derrida: "Force of law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds): *Deconstruction and the Possibility of Justice*, p. 28

⁴⁰ Jacques Derrida: *Specters of Marx*, p. 34

⁴¹ Jacques Derrida: "Force of law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds): *Deconstruction and the Possibility of Justice*, p. 28

ignored, and through the awareness that there are languages (of myself and of the other) which within the existing regimes of law are impossible languages.

Schmitt: in search of legitimacy

We find in Carl Schmitt's writings a fundamental understanding of law that shares important features with Derrida's understanding, but which also deviates from it in crucial ways.

Schmitt presupposes that law is much more than written, codified rules based on explicitly, established juridical institutions. Law corresponds to a regularity which may be silently recognized, to ordering principles and distinctions which are not necessarily explicitly stated or written or accepted and which spring from various sources, social-economic, religious, cultural or technological. The *Jus Publicum Europaeum*, the European order corresponding to the era of the modern European state - as it arose out of the ruins of the religious wars in the 16th-17th centuries and stabilized during the following centuries until the outbreak of the first world war - was according to Schmitt an order build on certain fundamental principles (such as the principle of sovereignty and such as the recognition of the enemy, in contrast to a totalizing concept of enmity) and fundamental conceptual distinctions (such as distinctions between public and private enemy, between civil and military, between public and private law, land and sea, European and colonial space, intern and extern sovereignty).⁴² Such principles and distinctions constitute, for Schmitt the very essence of law. They may be written down in constitutions and in international agreements, but they may also not be written down. As for the principles and distinctions of the *Jus Publicum Europaeum*, they did not appear in any overall international agreements. Schmitt pieces this order together on the basis of a variety of sources, some of them of a legal nature, some of them of a religious or philosophical nature (natural law philosophers like Grotius, Pufendorf and Hobbes play a huge role), some of them of a broader historical nature (like practices of war and colonialism and inner-state power struggles between monarch and bourgeoisie). Schmitt's actual construction of *Jus Publicum Europaeum* can certainly be criticized. However, for our purposes, what is relevant is not so much this construction as the understanding of law which it reveals: Law is broadly acknowledged principles (explicitly or implicitly acknowledged) relying on particular concepts and conceptual

⁴² Carl Schmitt: *Der Nomos der Erde im Völkerrecht des jus publicum Europaeum; Ex Captivate Salus; Land und Meer. Eine weltgeschichtliche Betrachtung*

distinctions. That they are broadly acknowledged does not necessarily mean that they are followed by everyone, but they constitute a kind of regularity which everyone relates to. Law concerns, essentially, the creation of political order, but is connected to the conceptual sources of religion, philosophy and literature, to technological developments and socio-economic problems and power struggles.

There is another side to law, though, and that is its potential machine-character. Schmitt would capture this aspect on the basis of his distinction between legality and legitimacy. The legality-aspect of law arises with codification and formalization. One should think that by making law explicit and explicitly binding, one serves law. However, Schmitt's point is that hereby, law becomes a technical tool. As such, it may be used for all sorts of purposes, also purposes contradictory to the original idea behind particular laws. It becomes a tool for the struggling parties of society and in the worst case a tool which may intensify the existing conflicts and lead to civil war.⁴³ More precisely, it is not necessarily legality in itself which is problematic, it is the loss of legitimacy. We shall return to the concept of legitimacy in a short while; for now, we may just say that law which relies on legitimacy rather than legality is law which is broadly acknowledged and which does not need codification and formalization or only a minimum thereof. For Schmitt, legitimate law is true law (whether supported by the aspect of legality or not); law which has been reduced to legality is but a mask of law, something which serves to hide, feed and justify political struggles.

We see that both Schmitt and Derrida understand law as something which reaches far beyond the juridical field, something which penetrates social life and which is intimately connected with language, that is, concepts, distinctions, categorizations. For both, the juridical field constitutes a central field of study, though, but when approached as such, it will soon 'flow over' and reveal connections to politics, economics, religion, philosophy and literature. However, Schmitt presupposes an understanding of history according to which a particular historical period will be dominated by particular concepts, ideas and problems. Derrida would never do so. Yet, the difference is subtle. Derrida would not reject the idea of historical-conceptual dominance. But he would consider a theory which approaches historical-conceptual dominance in a confirming, rather than in a deconstructing manner, as a theory which

⁴³ Carl Schmitt: *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 6-13, 28-29, 43-63, see also *Hüter der Verfassung* and *Legalität und Legitimität*, and "Staatsethik und pluralistischer Staat", "Die Wendung zum totalen Staat", "Weiterentwicklung des totalen Staats in Deutschland" (all in *Positionen und Begriffe*)

contributes to and intensifies the violence against the singularity of the 'other'. In fact, the subtleness of the difference between them can be taken even further. The case is that Schmitt does indeed deconstruct the principles and distinctions on which Jus Publicum Europaeum is build. But he does it unhappily, almost unwillingly. In *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, he points out that the modern European State was build on a fundamental distinction, namely the distinction between public and private, which would inevitably undermine it. That is, the most powerful distinction of the state (by which it was capable of neutralizing the political role of religion and taking the place of the Catholic Church as creator of political order in Europe) gave rise to its downfall.⁴⁴ The modern European state, celebrated by Schmitt, was build on a paradox. But Schmitt regrets the paradox rather than seeing in it an opening for meeting 'the other'.

We also see that Schmitt, just like Derrida, connects law with 'calculability'. In Schmitt's view, however, 'calculability' must not reign alone. If it does, then law will be a farce. The reason for this difference is, of course, that Schmitt has an ideal of law which is not beyond time and language as we know it, which is historical in the deepest sense of the word. This ideal of law does not correspond to 'justice', only to 'legitimate law'. Naturally, 'legitimate law' would also rely on calculability, only not in a strict technical or formal sense. For Derrida, such differences are certainly not irrelevant - they belong to the law as Differance -

but he would never build an ideal of law on the basis of them; his purposes are much more radical.

As far as concerns the foundation of law, Schmitt and Derrida both strongly hold that ultimately, no justification of law can be given external to law itself. Schmitt says that 'justice' does not exist prior to any particular regime of law, only within and on the premises of that regime⁴⁵ - meaning, of course, that 'justice' does not exist in a universal sense. Also, the relationship between law and violence is certainly not underestimated by Schmitt. And like Derrida, he distinguishes between constitutive and constituted law and violence - and problematizes in various ways the relationship between law,

⁴⁴ *Der Leviathan in der Staatslehre des Thomas Hobbes. Sinn und Fehlschlag eines politischen Symbols*, p. 62-68, 86, 94, 99-102, 103, 116-118, 127

⁴⁵ Carl Schmitt: *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*, p. 22-23, *Politische Theologie: vier Kapitel zur Lehre von der Souveränität* p. 39, 55

legitimacy and violence (some of these ways being rather controversial, for instance those springing from his examination of the concept of dictatorship).⁴⁶

However, when that is said, we encounter a crucial difference between the two thinkers. This difference concerns the relationship between law and human beings. Is law - which can be given no universal justification - a force which entails its own justification, or is it in the hands of human beings? Derrida would hold the former position (criticizing the idea of responsible subjects vis-a-vis law), whereas Schmitt would hold the latter. This difference will turn out to be related to the one mentioned above: the difference between embracing paradoxicality because of the openings it creates and mourning it because it destroys the possibility of a lasting political order build on historically recognized principles. Also, it will turn out to be deeply entangled with the differences of ideals - 'justice' or 'legitimacy'.

But firstly, we shall need to dig deeper into Schmitt's oeuvre and clarify his position with respect to the role of human beings within and in relation to law. We shall do that by way of an analysis of his 'decisionism' and 'political theology'.

Schmitt's decisionism

For Schmitt, Kelsen's *Reine Rechtslehre* represented the most important legal theoretical enemy of the 1920's. Kelsen distinguishes between *law itself as a formal system of norms* and *sociology of law*, which deals with the historical intentions and interests related to the rise and use of law. According to Kelsen, law can and should be interpreted in accordance with its *pure legal nature*: a formal, hierarchical system of norms. If confronted with 'impurities of the system', contradictions or ambiguities, the legal interpreter should be guided by the idea of an internally coherent hierarchical system, based on a transcendental logical presupposition: the 'Grundnorm'. So even if the actual laws of a historical legal system would hardly ever constitute a system completely without any inconsistencies or ambiguities, the establishment of a pure legal method would guarantee the pure legal nature of law, law as a closed, formal system.

Schmitt strongly opposes and even ridicules Kelsen's distinction between jurisprudence and sociology. There can be no such thing as a pure interpretation of law,

⁴⁶ Carl Schmitt: *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*

according to Schmitt. If law was constituted as a closed formal system it could never be applied to living human beings, relations and conflicts.

Schmitt brings the issue to the opposite extreme: It is a basic feature of legality that it can be used as technical means for all sorts of purposes; it can be bended and twisted and used in ways contradictory to the original intentions of the law. The major points of his criticism of parliamentarism in general and the Weimar Constitution in particular concerned the possible undermining and eventual elimination of parliamentarism *through the legality of parliamentarism itself*. The legality of one political system, the Weimar Republic, could be used *as a tool* for the establishment of another, the Nazi-regime. Schmitt even uses the expression of a 'legal bridge' making possible the transition between the two qualitatively different regimes.⁴⁷

Schmitt calls his anti-Kelsian position 'decisionism' in order to emphasize the unreducible element of human decision in every application of law. 'Decisionism' as a legal theoretical position implies, firstly, that *the act* of actualizing and implementing law cannot be deduced from law itself. Actualizing law is an act of power and intervention, no matter the nature of the law; a norm itself does not imply its own application. Secondly, every interpretation of law is related to social hierarchies, power balances and potential struggles; as such it cannot escape *prioritizing or even choosing* between competing interests. Due to the instrumental nature of legality, any law can be interpreted and used for the purposes of a manifold of interests.⁴⁸

But decisionism goes further than this. It brings into the heart of law a basic condition of unpredictability and non-determination. Decisionism does not amount to a simple reduction of law to politics or structures of power. Decisionism marks a *discontinuity*, the idea of a *break*, a sudden *event*. The decision qua decision cannot be derived from the events which preceded it; if it could, it would not be a decision. This fundamental point can be stated in both normative and descriptive terms. Normatively speaking, decisionism denies the possibility of an ultimate foundation and justification of law.

⁴⁷ Schmitt's critique of Kelsen can be found in several works, but is most elaborated in *Politische Theologie* and *Über die drei Arten des rechtswissenschaftlichen Denkens*; the critique of legality is stated in a variety of works: *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, *Hüter der Verfassung*, *Legalität und Legitimität*, *Der Leviathan in der Staatslehre des Thomas Hobbes*, also in articles and speeches, see: *Positionen und Begriffe*

⁴⁸ The main principles of decisionism are stated by Schmitt in *Politische Theologie* (f.inst. p. 39, 55, 69-70), *Über die drei Arten des rechtswissenschaftlichen Denkens*, *Der Leviathan* 82-82, *Die vollendete Reformation* 166-170, *Gespräche über die Zugang zum Macht* 12-14. The description of the assumptions of decisionism above expresses my own summing up of the position.

Descriptively speaking, decisionism insists that there can be no principles, no structures, no patterns what so ever which could determine or predict the decision.

As such, Schmitt's decisionism does not only relate to law interpretation, implementation and use. It must be seen as an ontological position stating the conditions of any human activity, whether law creation, political actions or the subtle practices of daily life. Even obedience implies an inescapable decisionistic aspect. Ontologically speaking, there is no hideaway behind structures or principles. The human actualization of *something* – an order, a law, a principle, an idea, an institution – does not follow as such from that something itself. Human actualization implies interpretation and choice, even when not explicitly or consciously.⁴⁹

In other words, human actions are fundamentally discontinuous, non-predictable and non-determinable. The following quote constitutes a powerful expression thereof: *'The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.'*⁵⁰ The existence of the rule *'derives only from the exception'*. The exception is the sign of human life without which there would be no normality. Underneath any seeming normality, any seeming predictability, decisionism claims the ontological condition to be a-normality and unpredictability. Through the exception, this ontological condition becomes manifest; the normality was never normal at all, what seemed structurally determined never was. What seemed like necessary, unbreakable relations of cause and effect were suddenly manifested as not necessary at all, but as breakable, interruptible.

Accordingly, decisionism does not only describe the state of exception, but also the normal situation, the seemingly stabile and non-surprising situation. Any human activity is ontologically a manifestation of discontinuity and thereby carries the marks of change, even if change hardly manifests itself; any human activity constitutes ontologically a break with particular believed determinations.

When Schmitt talks about *'the power of real life'* in opposition to *'a mechanism that has become torpid by repetition'* there is a utopian ring to it – as if the break with the present expectations did not itself bring new believed determinations and seeming necessities

⁴⁹Again: My own summing up of the position on the basis of a variety of works and statements by Schmitt, see the previous note

⁵⁰ Carl Schmitt: *Political Theology. Four Chapters on the Concept of Sovereignty*, p. 15 (*Politische Theologie*, p. 21)

into the turbulence of historical change. But Schmitt also talks about 'decisions' in different terms, connecting 'the changing decision' closely to the state of affair with which it stands confronted. He uses the word *choosing*, - which implies choosing or prioritizing between historical alternatives *already there*.

Schmitt is mostly known for emphasizing the importance of human decision in the *extreme historical situations*, such as states of revolution or civil war. But even in extreme situations of war, decisions are not unconditioned. In fact, in states of war, human decisions are confronted with very specific alternatives, with very clearly defined positions confronting each other. Human decisions are confronted with anormality and chaos in the sense of lack of consensus, but not necessarily in the sense of a diffuse social space.

In fact, it could be argued that the conditions of human decisions in what we understand as normal situations are much more complicated. From the point of view of decisionism, 'normality' is the expression of a neutralizing medium of negotiation which is created in a certain historical situation and which will at later stages be exploited, corrupted and eventually broken down.⁵¹ Without the existence of such a 'normal medium' laws and rules cannot possibly be applied: *'Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium. This effective normal situation is not a mere "superficial presupposition" that a jurist can ignore; that situation belongs exactly to its immanent validity. There exists no norm that is applicable to chaos.'*⁵² The normality, the 'homogeneous medium' will sooner or later break completely, - but until it does, how are the conditions of human decisions in the normal situation to be understood?

The normal situation is marked by breaks with believed determinations just as the state of exception. Accordingly, the difference between the conditions of the extreme and the normal situation is not absolute. In the normal situation, the decision is not confronted with clearly separable and distinct alternatives. Alternatives are blurred, weaved together. They are hardly manifested as alternatives, but rather as nuances or variations. Decisions confirm and continue believed determinations while continuously breaking with them, while continuously inscribing the discontinuity of breaking events within the continuity of 'normality'. The application of general norms necessarily

⁵¹ Schmitt: *Das Zeitalter der Neutralisierungen und Entpolitisierungen*

⁵² Schmitt: *Political Theology*, p. 13 (*Politische Theologie*, p. 19)

requires decision: interpretation, choosing and not least the act of power itself through which the norm is actualized. In this sense, the confirmation of norm application is never possible without a break with the norm *as necessary, as general and determining*. While confirming the norm, while upholding the continuity of normality, decisions continuously inscribe within the 'normal medium of negotiation' ever new subtle and hardly visible disruptions.

We see that we need to be careful when interpreting Schmitt's hard opposition between '*the power of real life*' (as manifested in the state of exception) and '*a mechanism that has become torpid by repetition*'. Certainly, the state of exception brings to the forefront the fundamental decisionistic conditions of human life. In this sense, '*the power of real life*' is manifested in the state of exception.⁵³ In the normal situation, in contrast, '*the power of real life*' is manifested only as hidden sources of discontinuity within norm continuation and norm confirmation. Yet, it is there - not in the shape of choosing between radical alternatives, but as densely weaved, subtle and non-transparent disruptions of normality within and on the basis of the medium of normality.

The political-theological dialectic between decisionism and historical thinking

So, 'decisionism' implies that the human decision is indispensable as far as law and *application* and *interpretation* is concerned. A law does not involve its own application. Just as any law opens for multiple possibilities of interpretation. Furthermore, the human decision is indispensable as far as concerns the *normative foundation* of law. There is no ultimate justification of law beyond the justification principles established by human beings themselves. Law has - as any phenomenon of power conducted by human beings - its source in human beings. Decisions penetrate everything, normality as well as states of exception.

This raises of course the question of the conditions of possibility for legitimate law - 'legitimate' according to Schmitt's understanding, that is, broadly historically acknowledged and deeply embedded in the dominating concepts and metaphysical understandings of a given era. Only legitimate law could be law which was not misused as a technical tool, a law based on a particular 'spirit' - providing a foundation

⁵³ As far as the state of exception is concerned, Schmitt's position is not consistent. At times there is a heroizing ring to his descriptions of the state of exception and the sovereign act of deciding over it. At other times he describes the state of exception as the expression of an extreme nihilism, the expression of a historical collapse. Such contradictory statements can even be found within the same book, most notably in *Political Theologie*.

of authority, justification and purposefulness for the human decisions through which the law is lived.

I shall argue that Schmitt's 'political theology' constitutes his attempt to answer this question - to establish the conditions of possibility for legitimate law. Just like the concept of 'decisionism', the concept of 'political theology' is complex and multifaceted. In addition, it is not free of inconsistencies. However, on the basis of a careful reading - an indirect reading which to some extent goes against certain statements of Schmitt for the sake of taking seriously what his own analyses point to - I believe it is possible to clarify the meaning and potentials of the concept.

'Political theology' is presented as a descriptive, not a normative concept. As such, it has two definitions. First and foremost, political theology refers to the general assumption that throughout history ("überall in der Geschichte"), structural analogies between political and metaphysical concepts can be detected. In other words, politics and metaphysics are deeply conceptually entangled in one another. Moreover, it is not so that one is derived from the other or merely 'reflects' the other; we should understand this as a general-historical bipolar phenomenon. It is important to emphasize that this bipolar phenomenon may have a range of different institutional manifestations - theocratic, feudalistic, monarchistic, democratic (based on a separation between state and church), even anarchistic.⁵⁴ Secondly, 'political theology' refers to a particular historical logic of secularization: the foundation of the modern European state on conceptual structures inherited from the Catholic Church.⁵⁵ This second definition can be seen as subordinated to the first definition: it regards the particular conditions of political-theological analogies in 16th-20th century Europe.

More precisely, 'structural analogies' between political and metaphysical concepts can be detected by way of a comparative, 'radical-conceptual' analysis of the *social structure*, the *legal constitutional structure* and the '*metaphysical image*' characterizing a given historical era.⁵⁶ 'Metaphysical image' means the image of a last or ultimate cause or foundation. I shall not go any deeper into Schmitt's methods of analysis. They are not only inconsistent and largely intuitive in praxis (that is, the comparative, 'radical-conceptual' analysis does not constitute any systematic and developed approach), they also depend on a problematic historical reductionism. However, what interests me is

⁵⁴ *Politische Theologie* p. 43-44, 50-51, *Begriff des Politischen* p. 64, "Staatsethik und pluralistischer Staat" p. 135 (in *Positionen und Begriffe*), *Politische Theologie II*, p. 41, 57

⁵⁵ *Politische Theologie* p. 43, *Politische Theologie II*, p. 86.

⁵⁶ *Politische Theologie*, p. 50-51

the relationship between the descriptive and normative aspects of the concept of 'political theology'. I shall argue that although Schmitt presents his concept as a descriptive concept, its fruitful potentials depend on our seeing it as a normative concept.

According to Schmitt, political-theological analogies can be found throughout history. Indeed, we are led to believe that all historical political orders are based on structural analogies between political and metaphysical concepts. However, when taking into account Schmitt's own analyses of the Weimar Republic, it becomes clear that this is not necessarily so. On the basis of those analyses, Schmitt found that the social structure of the Weimar Republic was most adequately characterized by the expression '*pluralistic total state*'. The legal constitutional structure was '*parliamentarism*', and metaphysically, the Weimar Republic was dominated by '*liberalism*'. According to Schmitt, '*parliamentarism*' is but an expression of '*liberalism*'. He defines '*liberalism*' as the general idea that allowing the free development of fundamental human forces will lead to the best end-result (whether understood as wealth, knowledge, civilization, the common good). '*Parliamentarism*', in its turn, is based on the idea that bringing together the diversified fragments of reason (reflecting different interests, situations, beliefs etc) so that they may confront each other in a battle of argument will lead to the best end-result.⁵⁷ In other words, the legal constitutional structure and the dominating metaphysical image are structurally alike. However, they do not correspond to the social structure, the '*pluralistic total state*'. It is a main point of Schmitt's that liberalism and parliamentarism are not capable of reconciling the conflicting parties of a political order once the conflicts have grown radical enough. The '*pluralistic total state*' (which implies the totalization of pluralism, that is, the totalization of internal differentiation and conflict) contradicts the ideals of liberalism, rather than being an expression of them.

In addition, '*liberalism*' does not constitute a '*true*' metaphysics, according to Schmitt. Ultimately, it is a negative position - and as such it is laudable.⁵⁸ But it does not imply an idea of an ultimate cause or foundation. As such, liberalism cannot provide a

⁵⁷ *Der Begriff des Politischen, Die geistesgeschichtliche Lage des heutigen Parlamentarismus, and "Staatsethik und pluralistischer Staat", "Die Wendung zum totalen Staat", "Weiterentwicklung des totalen Staats in Deutschland"* (all in *Positionen und Begriffe*)

⁵⁸ Although known as an anti-liberalistic thinker, there are many liberalistic features in Schmitt's theories, but exactly in this negative sense - the idea of non-intervention. This is one of the points of Leo Strauss' "*Anmerkungen zu Carl Schmitts "Der Begriff des Politischen"*", in Heinrich Meier: *Carl Schmitt, Leo Strauss und „Der Begriff des Politischen“. Zu einem Dialog unter Abwesenden*

political order with a foundation. In the 1920's, Schmitt believes that the concept of 'democracy' constitutes the only possibility of establishing a foundation of political order. Schmitt sees 'democracy' as a metaphysical concept - and therefore as a political-theological concept - although it represents an advanced step of secularization. More precisely, 'democracy' corresponds to a particular secular god, the 'people'. According to Schmitt's 'radical-conceptual analysis', 'democracy' implies that there be identity between the rulers and the ruled. But this is impossible; the 'people' constitutes a heterogenous mass which is never identical with itself. Accordingly, 'democracy' as a constitutional principle can only be realized to the extent that a metaphysical idea of 'who the people is' is established.⁵⁹ Obviously, this understanding of democracy stands in sharp contrast to parliamentarism. Schmitt regards 'parliamentarism' and 'democracy' as irreconcilable.

This brief (and highly concentrated) summary of Schmitt's diagnosis of the Weimar Republic serves, firstly, to illustrate what Schmitt means by political-theological structural analogies. But it also serves to illustrate that such analogies cannot always be detected. Rather than being in accordance with one another, the *social structure*, the *legal constitutional structure* and the dominating *metaphysical idea* of a given era may contradict each other. This is why I will argue that Schmitt's 'political theology' is must fruitfully approached as a normative, rather than as a descriptive position. As a normative position, it implies that good and stabile political orders (those which can be called 'legitimate') are characterized by political-theological structural analogies, whereas unstable and dysfunctional orders are characterized by political-theological discrepancies.

The normative ideal which 'political theology' represents would seem to stand in opposition to the fundamental decisionistic nature of law because it relies on historical conditions rather than human decisions. Yet, we have to recall that decisions do not happen in an empty space, they relate to historical conditions, even if they are not determined by them, but constitute a break with them. They depend on a medium, whether a medium of normality or a medium of extreme alternatives. But we must also acknowledge that historical conditions are created by human decisions. We must, in

⁵⁹ Carl Schmitt: *Begriff des Politischen* p. 68-69, *Die Diktatur* p. 116-129, 139-146, *Die geistesgeschichtliche Lage*, p. 30-41, "Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff" p. 21-25 (in *Positionen und Begriffe*)

other words, understand the ideal which 'political theology' represents on the basis of decisionism.

Accordingly, political-theological structural analogies are not simply either there or not there. Law makers may seek to establish legal constitutional structures which are in accordance with the social structure and the metaphysical image of their time. While doing that, they will of course both alter, develop and confirm the social structure and the metaphysical image. But how are they to determine, in the first place, the social structure and the metaphysical image? What conflicts are the essential conflicts, what parties are the essential parties, how may their power relations and their forms of organization be assessed, and what are they essentially struggling about? What metaphysical presumptions are essentially involved in these struggles? Clearly, this requires historical analysis and interpretation. It requires privileging certain struggles, certain problems, certain groups and certain metaphysical understandings while neglecting others. And therefore decision. But historical analysis and interpretation is not even enough. The purpose of law is the taming and reconciliation of conflicts. Establishing a legal constitutional structure which is *in accordance* with the social structure and the metaphysical image does not mean reproducing them. Rather, it means meeting them, reflecting them, altering them - so as to reconcile or neutralize the conflicts they give rise to. In this sense, the legal constitutional structure is not only human creation in the sense that it is based on an interpretation of a given historical situation, it is also human creation in that it establishes a *new principle* meant to reconcile the struggling parties. This new principle will involve a reinterpretation of the metaphysical image as well as the vision of an altered social structure. Schmitt's favorite example concerns the rise of the modern European state out of the ruins of the religious wars. The new state would build on concepts inherited by the Catholic Church, most notably the concept of sovereignty, but it would also reinterpret these concepts, give them a new meaning in a new institution, namely the absolute monarchy. Hereby, the dominating metaphysical image, the Christian God, would both be confirmed and neutralized within the order of the state - making possible a reconciliation of the struggling religious parties.

I will argue that Schmitt's position can be seen as a dialectic between decisionism and historical legal thinking. When considering his entire oeuvre, there is no doubt that the perspective of decisionism dominates in his earlier works, whereas the historical perspective dominates in his later works. Yet, both perspectives are in play throughout

his writings. Political order never is and never should be a result of human decision alone; on the other hand, political theological analogies do not arise out of the forces of history alone. In times of exception and civil war, the element of decisionism will appear most strongly: it will be clear that certain ideas and interests are protected and not others. Yet, decisions are only possible on the basis of certain conditions. In times of stability, the element of historical thinking will dominate, it will be more difficult to detect the continuous occurrence of decisions. Yet, stability is upheld by decisions.

The political theological dialectic - the dialectic between decisionism and historical thinking - can be seen as a particular expression of the fundamental paradox: that we need to establish an ultimate foundation of law although there can be no such ultimate foundation. For Schmitt, the establishment of an ultimate foundation of law is inescapable with respect to the possibility of 'legitimate law' at all. And only 'legitimate law' is truly law. Law which has been reduced to legality alone will be abused and undermined. But there is another reason as well. According to Schmitt, human beings are characterized by an urge for legitimization; they will always seek to legitimize the political battles they engage in as well as the power structures which they establish. That is not just the case for those in power; everyone subjected to law, everyone who belongs to a political unit will desire legitimization in the shape of final causes or foundation, in the shape of metaphysics. This fundamental urge for legitimacy (which truly is an urge for a metaphysical 'justice', for being able to say that one acts in the name of 'justice') is double-sided. It is dangerous because it gives rise to 'just wars' and 'holy wars', that is, to a fanatic and totalizing conception of the enemy. The most horrible acts are being done 'in the name of justice'. On the other hand, the urge for legitimacy is for Schmitt a sign of the spiritual nature of human beings. It would be much worse if it was not there. In the short and apparently easy, yet for a closer look highly condensed book, *Gespräch über die Macht und den Zugang zum Machthaber* [Dialog on power and the access to the ruler], Schmitt considers whether the 'machine'-element of law might take over to an extent which would mean that human decisions had become superfluous. In the era of the cold war, Schmitt finds that it is no longer human beings, but highly complex systems of labor differentiation which are the sources of power. The people in power are rather to be seen as 'prostheses of the machine' than as responsible individuals. Yet, the same book begins with the statement that ultimately, the source of power lies in human beings. And 15 years later, in *Politische Theologie II. Die Legende von der Erledigung jeder Politischen Theologie* [Political Theology II: The Myth of the Closure of

any Political Theology], Schmitt confirms more explicitly than ever his understanding of human beings as spiritual and political creatures.

I will argue that the dialectic between decisionism and historical thinking entails a critical and anti-authoritarian potential when seen in the light of the fundamental paradox. We have to establish a metaphysical foundation of law; yet, we cannot. Allowing decisionism to rule arbitrarily would mean giving up the idea of legitimacy completely - to identify the foundation of law with ideological power. On the other hand, relying so much on historical analysis that the continuous unfolding of human decisions is forgotten would mean another kind of totalitarianism: the identification of the foundation of law with a presumed 'historical reality' or 'historical necessity'. In both cases, the fundamental paradox would not be taken seriously. But in so far as decisionism and historical thinking were unfolded together, or more precisely, dialectically interplaying, they could correct one another, guard against totalitarian mistakes: due to decisionism, the historical analysis would continuously look skeptically on its own results, and due to historical thinking, decisionism would recall that it may not be futile to search for a principle of legitimacy which is not immediately reducible to the *factum brutum* of power.

I believe that it is on the basis of these potentials that we may understand the following puzzling and fascinating statement in *Gespräch über die Macht*: *'Ich wollte ihnen damit nur sagen, daß der schöne Formel: Der Mensch ist dem Menschen ein Mensch – homo homini homo – keine Lösung, sondern erst der Anfang unserer Problematik ist. Ich meine das durchaus bejahend, im Sinne des großartigen Verses: Doch Mensch zu sein, bleibt trotzdem ein Entschluß'* [*I simply wanted to tell you that the beautiful formula: Man is a Man to Man - homo homini homo - is not an answer, but the beginning of our problem. I mean that in a completely affirmative manner, in the sense of the great verse: To be human, after all, remains a decision'*].⁶⁰ Schmitt plays on his own 'decisionism', gives it a further dimension which is an ethical dimension. It is a decision in itself to accept and live with the conditions of decisionism. It is a decision to remember that one is merely human for which reason any legitimating principle established by humans is as fragile as human beings themselves; but also: it is a decision to remember that being human means carrying, ultimately, the responsibility of power.

One crucial story remains to be told regarding the essential normative implications of the concept of political theology. This story concerns the second and subordinate

⁶⁰ Carl Schmitt: *Gespräch über die Macht*, p. 31-32

definition of political theology. According to this definition, 'political theology' refers to a particular historical logic of secularization: the foundation of the modern European state on conceptual structures inherited from the Catholic Church.⁶¹ It is a crucial point of Schmitt's that 'secularization' does not mean the elimination of theology, but conceptual and institutional replacements of theological concepts with more immanent gods. The monarch of the absolute monarchy did still represent a transcendent god, either a theistic or a deistic god. But as secularization continued during the following centuries, new and world-immanent gods replaced the transcendent ones. The truly secular gods were the gods of the 17th- 18th centuries: 'The People' as the pantheistic god of the democratic movements and 'History' and 'Tradition' as gods of the counter-revolutionary movements. 'The people', as a founding concept of democracy is, as mentioned above, from Schmitt's point of view a metaphysical, rather than an empirical concept: there is no possible way in which to unite a heterogeneous mass of individuals into one people, one will; 'the common will' can never be anything but an impossible ideal. 'History' and 'tradition' as founding concepts of order are marked by eschatology: they are working against time, trying to withhold, if not stop, the depravity which comes with developments.⁶² Schmitt fears that ultimately, the human being will become god to him- or herself. In fact, this is what he sees in Russian Anarchism in the 1920. But also the 'false' metaphysics of liberalism finds compensation for its own lack of positive content by associating itself with a particular 'universal ethic' which largely relies on the idea of 'the human'.

Schmitt fears the ultimate result of secularization, that the human being will become god to him- or herself. Why would a human god be worse than a transcendent god? *'[Der] Mensch, den die Philosophen und Demagogen zum absoluten Maß aller Dinge erheben, [ist] keineswegs, wie sie behaupten, ein Inbegriff des Friedens, vielmehr [bekämpft] er mit Terror und Vernichtung die anderen Menschen, die sich ihn nicht unterwerfen.'* *[The human being, by philosophers and demagogues made into an absolute standard of all things, is by far, as they would claim, an expression of peace; he fights other human beings who do not submit to him, with terror and annihilation].*⁶³ According to Schmitt, on the basis of the 'human god', concepts of enmity are established which are far more horrifying than any concepts of

⁶¹ Carl Schmitt: *Politische Theologie* p. 43, *Politische Theologie II* p. 86.

⁶² Carl Schmitt: *Politische Romantik* p. 86-95, *Politische Theologie* p. 43-44, 51-54, 59-68, "Staatsethik und pluralistischer Staat" in *Positionen und Begriffe* p. 130, 135, 142

⁶³ Carl Schmitt: *Donoso Cortes in gesamteuropäischer Interpretation. Vier Aufsätze*, p. 110

enmity springing from a transcendent god: concepts such as 'unhuman' and 'dehumanized'.

There is only one way in which to we can understand this on the basis of the fundamental paradox: By establishing a world-transcendent foundation of law in the form of a transcendent god, human beings acknowledge that they are only human; they live humbly with the paradox - having established a standard which they cannot establish, but a standard which serves to relativize themselves and their judgments and which therefore - paradoxically - serves to remind them that it (the standard) must be continuously reinterpreted. In other words, transcendent gods constitute a better foundation for the possibility of recognizing and living wisely with the decisionistic conditions of human law than immanent gods. The closer the foundation of law comes to the human being itself, the greater the risk that human beings might forget their own power responsibility *and* their own limitations with respect to carrying that responsibility. So, also in this sense can it be said that it '*remains a decision*' to be human: never to allow that the human being becomes god to him- or her-self.

Comparing the positions of Derrida and Schmitt: delicate differences

We have seen that Schmitt and Derrida have some fundamental features in common, but that they also diverge from one another as far as concerns the *normative respons to these features*.

Firstly, they both understand law as something which reaches far beyond the juridical field, something which penetrates social life and which is intimately connected with language. However, Schmitt presumes that a particular historical period will be dominated by particular concepts, ideas and problems. Derrida would never do so. The difference is subtle, though. Just like Derrida, also Schmitt ends up deconstructing presumed historical features of coherence (of his own time, the Weimar-period, the cold war period, as well as of his own historical ideal, the era of the modern European state); also Schmitt stands faced with paradoxical political orders, crumbling from their very first breath. On the other hand, Derrida acknowledges of course, more deeply than anyone, the historical dominance of certain concepts and understandings. I will argue that the difference is largely of an ethical nature. Schmitt regrets deeply the paradoxes which he finds in particular historical orders (paradoxes which some way or another reflect the fundamental paradox); Derrida, on the other hand, welcomes paradoxes because of the openings which they create.

Secondly, both Derrida and Schmitt sees a danger in calculability, in the machine-character of law. In fact, they both connect calculability with excessive, unstoppable and tragical violence. Schmitt emphasizes that calculability may function as a weapon for human hostility and may lead to civil war; Derrida connects calculability with revenge and a painful historical inheritance of bruising exchanges and exclusions. However, the difference is that Schmitt's ideal of *something else* is an immanent ideal - a 'legitimate law' rather than a 'just law', a law which is broadly recognized and deeply embedded in the understandings of a given historical period - whereas Derrida wishes to maintain the possibility of 'justice' - something which transcends law as we know it. They are also both aware of the dangers of incalculability. Derrida says that evil will spring from incalculability if 'left to itself'. And Schmitt warns that any metaphysical legitimization of law may lead to totalizing concepts of enmity, to 'just wars' and 'holy wars'. Derrida concludes that we must continuously negotiate between calculability and incalculability. Schmitt, in turn, appeals to human recollection of human limitation. This brings us the last and most difficult point, the question of the relationship between law and human beings. We have seen that Schmitt's concept of 'decisionism' means, in all its different aspects and nuances (we have seen that it is indeed a very rich and multifaceted concept), persistently insisting on 'homo homini homo', 'the human being is a human being to him- or herself', that is, there is no other foundation of law than human beings. Law application, interpretation and justification is in the hands of human beings; and decisions occur continuously, in times of normality and in times of exception, as visible or invisible breaks with what was given, ruled, seemingly determined. In this sense 'anormality' constitutes the anthropological truth. 'Decisionism' means realizing the 'homo homini homo' foundation and living with its ethical consequences by 'deciding' to remain 'human' - that is, accepting the power responsibility while recognizing the limited capabilities of human beings with respect to carrying it and never seek human gods, but only transcendent gods. In other words, 'decisionism' means living with the fundamental paradox in the most paradoxical way: establishing transcendent standards which cannot be established by humans, in order for human beings to continuously recall their own limitations as humans. Because of 'decisionism', Schmitt's position becomes a highly complex immanent-transcendent position: His ideal of 'legitimate law' is an immanent ideal because it relies on historically established principles; however, he requires that these historically established principles carry transcendent names.

As for Derrida, his view on 'decisions' is very different. 'Decision' implies, for Derrida (as for Schmitt) a break with determination, with what is ruled. But whereas Schmitt would say that decisions occur all the time and inevitably so, Derrida would say that we cannot know whether they occur at all: *'Who will ever be able to assure us that a decision has taken place? That it has not, through such and such a detour, followed a cause, a calculation, a rule, without even that imperceptible suspense that marks any free decision [..]'*.⁶⁴ For Derrida, a 'decision' is an act of freedom - something which would break free of law (droit) as such. What he implies is that we cannot presume the existence of such freedom, we cannot presume that human beings will ever do anything but following law (droit). However, we need to understand the complexities of his position. He acknowledges the presence of 'the undecidable' (*'the ghost of the undecidable'*) in any law applying situation. 'The undecidable' certainly concerns the fact that any law may be interpreted in multiple ways as it concerns the choice of applying the law or not applying it. In this sense, Derrida does not disagree with Schmitt. Only, for Derrida such choices are still choices made from the point of view of law (droit). Choosing one interpretation and not another could still be done on the basis of some calculation, some rule or method or automatism of interpretation. Even if the particular law in question does not govern its own interpretation and application, some other element of law (formal or informal) would determine its interpretation, and the force of law as such would guarantee its application. Choosing does take place, but not free decisions. The 'undecidable' concerns, of course, first and foremost the impossible possibility of justice, *'the experience of that which, though heterogenous, foreign to the order of the calculable and the rule, is still obliged'*.⁶⁵ Any law applying situation entails the possibility of a 'moment of suspense of the undecidable'; any free decision will have to pass through that 'ordeal of the undecidable'. However, once the decision has been made, it will never be possible to say whether it was truly a free decision or whether it did in fact follow some sort of rule or calculation.

In 'Politics of Friendship', we find this understanding of 'decisions' - as impossible acts of freedom which could become possible, as the breaking free of determination - beautifully expressed: *'The possibilization of the impossible must remain at one and the same time as undecidable – and therefore as decisive – as the future itself. What would a future be if*

⁶⁴ Jacques Derrida: "Force of law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds): *Deconstruction and the Possibility of Justice* p 25

⁶⁵ Ibid, p. 24

*the decisions were able to be programmed [...]. What would remain to come should the inassurance [...] not hold its breath in an 'epoch' [...] in order to open up, precisely a concatenation of causes and effects, by necessarily disjoining a certain necessity of order, by interrupting it and inscribing therein simply its possible interruption?"*⁶⁶

Obviously, as far as the status of 'decisions' are concerned, we have encountered a huge difference between Derrida and Schmitt. We may ask: Do they not mean the same when speaking of 'decisions'? That does not appear to be the case. For both, the 'decision' is a break with the seemingly determined, with what appears to be necessary, with the programmed and expected. Schmitt would say that such breaks are inescapable whether we notice them or not. Even when we act like '*a mechanism that has become torpid by repetition*', it is still our decision to apply and interpret rules in accordance with this mechanism. Because no rule applies itself. Derrida would say the opposite: we can never know whether we are not programmed. The decision is the impossible possibility.

Does this mean that Derrida does not hold human beings responsible for law? Does he understand law as something which entails its own application, a machine? Does he find that only calculability should be feared, not human beings? And what is 'justice'? Is it in any way an expression of 'something human'?

These are difficult questions, and I shall not be able to answer them in any definite way. However, it is clear that if Derrida had not held human beings responsible, there would have been no reason for him to speak and write as he did, he did indeed *address* his readers. And deconstruction would have been a purely theoretical gesture, not a praxis, a praxis which expresses, exactly, responsibility. Furthermore, Derrida fears the incalculable as well as the calculable, in particular when 'reappropriated' by the calculable. 'Reappropriated'? Taken back? Does this mean that 'the incalculable' disappears in law (*droit*), - or does it rather mean that the incalculable and the calculable are in fact inescapably bound together in law (*droit*)? I believe that they must be: if not, how could deconstruction and justice even be possible (as impossible impossibilities); how could negotiations between calculability and incalculability be possible?

Again, I would suggest that it is for ethical reasons that Derrida insists on the impossibility of the 'decision' and the pervading nature of calculability. Only hereby can the possibility of freedom and of justice towards the 'other' be glimpsed in its

⁶⁶ Jacques Derrida: *Politics of Friendship*, p.29

radicality. Both Schmitt and Derrida want human responsibility. But they seek it in different ways - on the borders of law or within law. This also means that for Schmitt, 'law' becomes deeply human, for Derrida machine-like and autopoietic.

Ultimately, this difference - seeking the source of human responsibility either *beyond* or *within* law - constitutes the most crucial and fundamental difference between Schmitt and Derrida as I see it. This crucial difference leads to other differences: different approaches to the relationship between law, language and history (seeking overall historical-conceptual characteristics or seeking to deconstruct such characteristics; mourning or embracing paradoxes of law); different kinds of counter-concepts to 'calculability', to the brutality of a law machine ('legitimate law' or 'justice'); and finally different views on the relationship between human beings and law (seeing law as being in the hands of human beings or seeing law as a force which applies and justifies itself and herein produces what we naively call 'human beings' or 'intentional subjects').

And yet, even this most crucial difference is a delicate difference just like the other differences. Not only is Schmitt's position not simply a historical position, but entails overall presumptions as to the nature of human beings and to the relationship between law, history and language. He also formulates some overall normative principles of law which - although they reflect his ideal historical order, the modern European state - are not reducible to historical conditions. These principles would be the following: 'inhibition', 'protection' and 'recognition of the enemy'. They spring from the inescapable political condition which is the destiny of human beings according to Schmitt (and which is deeply connected to the anthropological foundation he establishes): human beings will always tend to build friend-enemy-relations, to intensify conflicts, to totalize enmity. The role of law is to counteract the most tragic consequences of the political condition while simultaneously building on this condition, in other words to 'inhibit' the expressions of hostility', to 'protect' against the most dangerous implications of the political, namely civil war, and to create a foundation for 'recognition of the enemy' so as to prevent the development of totalizing concepts of enmity. Especially the latter principle is noticeable. In his later writings, Schmitt develops the principle of 'recognition of the enemy' into a dialectical principle. The enemy is 'my brother', the enemy is the one who can question me (*'mich in Frage stellen kann'*), he says in his prison-work *Ex Captivate Salus*, and concludes: *'Der Feind ist meine eigene Frage als Gestalt'* [*'The enemy is my own question as an image'*]. It would not be difficult to see a parallel to Derrida's 'ghosts' or to his

concept of the 'other': The enemy is 'the other' or myself as 'other', that in me for which I have no language, my limitation. This 'otherness' which is at play in Schmitt's works (explicitly in his later and implicitly in his earlier works) is of course deeply connected to his political-theological concerns regarding secularization. If the human being becomes god to him- or herself, then 'the other' will be forgotten; transcendent gods, in contrast, will remind us that we are only human and therefore, we can never claim to be ultimately 'just'.

On the other hand, even if Derrida seeks the 'otherness', the 'justice' beyond law and historical time, he is a deeply historical thinker. In fact, it could be argued that his thinking is more deeply historically embedded than the thinking of Schmitt's (considering Schmitt's often rather reductionistic approach to history and his tendencies to view history in the light of his own metalanguage). Deconstruction works only through the historically given, never from the point of view of a metalanguage. It is exactly for this reason that 'justice' must be conceptualized as something beyond law, language and time as we know it. And yet - as argued above - the incalculable, and therefore also 'justice', must somehow be embedded in law and history. Otherwise, deconstruction could not even be imagined possible.

Chapter 2

Developing a Tensional Theoretical Foundation

The theoretical foundation of the dissertation can be unfolded on the basis of the complementary reading of Schmitt and Derrida provided above. The dissertation builds on the understandings which can be said to be shared by Derrida and Schmitt, as it build on the tensions between the two thinkers. As I have demonstrated above, there are crucial differences between them. Yet, these differences are delicate and full of nuances. In the course of the analysis above we saw Schmitt and Derrida changing 'positions' towards each other several times; sometimes, they would almost seem to mirror each other, other times they would appear to be extreme opposites, - and there would even be times when they could be said to 'change roles'. Even if I did not actually deconstruct the differences between them (that was never my intention), but concluded that a crucial difference remains, the difference of seeking the source of human responsibility *beyond* or *within* law (a difference which I believe to be primarily an ethical difference), I still hope to have been able to show that the tensions which

exist *between* Derrida and Schmitt are also tensions which exist *within* Derrida's works and *within* Schmitt's works. Presumably, I could have encountered the same tensions had I only dealt with either Derrida or Schmitt. However, these tensions can be more powerfully and distinctly unfolded on the basis of a comparative reading which stands confronted with passionate conceptual investments both in relation to the *beyond-law-* and the *within-law-perspective*. When read together, a rich and complex conceptual understanding of the nature of 'law' appears - an understanding which is never 'at ease' though, but which continuously vibrates within the tensions of 'justice', legitimacy, legality and calculability; of immanence and transcendence; of historical order and deconstruction; of evil and hope; and of freedom, responsibility and powerlessness.

In the following, I shall explain how this restless tensional understanding of law which has arisen from the complementary reading of Schmitt and Derrida can be said to constitute the theoretical foundation of the dissertation. I shall simply go through the crucial points of the complementary reading, one by one, in order to clarify their implications for the analyses of the dissertation. We shall begin with the features which are shared by Schmitt and Derrida: the wide-reaching concept of 'law', the emphasis on the dangers of 'calculability' and the unfounded nature of law. Then, we shall move on to the delicate differences: overarching historical-conceptual thinking versus deconstruction, legitimacy versus justice, and decisionistic law (law being in human hands) versus self-enforcing law. Other philosophers and theoretical positions will be involved on the way. Obviously, the issues and tensions in question do not just concern Derrida and Schmitt, but are embedded in the history of metaphysics and dialectics.

The wide-reaching concept of 'law'

According to Derrida and Schmitt, law is far more than the 'juridical field', that is, what we generally consider to be institutionalized law. However, for both thinkers, codified and clearly institutionalized law constitutes a core field of study because it is the expression of a deliberate will to regulate human lives from the perspective of creation and maintenance of social order, manifested as an obligation backed up by violence (whether physical, economical, psychological, symbolic) and carried out in the name of justice. Codified and institutionalized law is, in other words, a strong expression of society building and society maintenance carrying with it four core characteristics: intentionality, a binding nature, means of violence so as to insure that this binding

nature is respected and the claim of justice. But both Schmitt and Derrida would hold that these characteristics depend on something which lies beyond particular law regimes. They depend on *authority as such* - meaning that we allow law to be enforced through us - as they rely on *justification of violence* - meaning that we fundamentally accept that violence may be a manifestation of justice. Where do these fundamental features of law come from? Philosophers like Nietzsche and Foucault have provided brilliant analyses of the historically changing manifestations of authority and justification, of how authority and justification work through us, of where we situate the command (inside or outside us) and on what conditions we consider this command to be true and just. Schmitt and Derrida do not only see authority and justification as something which appear in varying historical forms and on different historical conditions. They also emphasize that authority and justification pervade human history. They are features of civilization as we know it. Derrida who does not wish to formulate a historical origin of law, but who would also not be content with simply noting that any particular historical regime of law must be seen as a manifestation of authority and justification in its own particular way, talks about an original founding event, a mystical origin which does not belong to historical time. In other words: authority and justification belong to human life and history, just like language as such or difference, and their sources will remain mysterious, no matter how scarily excellently we may be able to rationalize them. Schmitt, on his part, would connect authority and justification to what he calls the political destiny of human beings - the forming of friend-enemy distinctions, the human tendency to build up hostility and conflict and to justify hostility by spiritual means. Law builds on the political condition while simultaneously seeking to inhibit its most radical expressions. Authority is that which is fundamentally needed in order to avoid the very worst and most archaic expression of 'the political': civil war, brother fighting against brother.

So, for both Schmitt and Derrida, institutionalized and codified law relies on something which cannot be reduced to the conditions and means of particular law regimes. In addition, they both claim that deep conceptual connections exist between 'the juridical field' and other 'fields' such as economics, religion, art, technology etc - for which reason it would not be right to use the term 'field'. As far as politics is concerned, Derrida mentions it as a 'field' next to other 'fields' which are not really fields, whereas Schmitt would deny that 'the political' could ever be a field. As just mentioned, 'law' and 'politics' are fundamentally connected according to Schmitt, not in the sense that

they are identical, but in the sense that 'law' builds on the political condition while simultaneously seeking to modify it.

The dissertation builds on this wide-reaching understanding of law. EU social rights - the object of analysis - constitute of course what we would generally consider to be 'law' - it is binding law which is formally written down and which has been drafted and adopted according to explicit procedures (themselves binding, formally written down and adopted), and it is supported by a range of institutions, not least the CJEU. It is meant to build and/or maintain social order in some way or another, if ever so moderately (otherwise it would be superficial). As such, it is *meant* to be society constitutive.

However, the dissertation does not build on the mere *intentions* which can be said to lie behind EU social rights. It builds on the manifested rights - that is, rights which come in the form of binding legislation and which are interpreted (bindingly) by the CJEU. As such, they are real - whatever may happen later. Along with Schmitt and Derrida, I shall say that any particular law regime depends on certain features - namely authority and justification - which transcend that particular regime just as they transcend all other particular regimes. For my part, I shall neither talk about an original founding act, nor shall I presume a political destiny. But I shall maintain that any particular historical law regime depends on a mystical foundation of law, that is, something which can never be fully rationalized and explained within that regime. Due to this mystical foundation, any particular law regime is deeply connected to law in the most wide-reaching sense of the term. Not only is it connected to other particular law regimes of the time and of earlier times, it is also connected to all other sorts of informal manifestations of law, and ultimately to the laws of language. Furthermore, it is bound together with the general conceptual resources of the time (which, of course, are based on historical resources). Even if there might be concepts within any law-regime which are particular to that regime (or particular to 'law' in a narrow sense of the word), the language of law is the general language. What makes the language of law special is its logical features: conceptual definitions and distinctions, certain argumentative structures (premisses and conclusions), certain ways of delimiting the scope of the law ('personal scope' and 'material scope' and specifications of exceptions), certain principles which can be translated into argumentative structures (like 'the principle of proportionality'), certain ways of justifying the law or derogations from it etc. But these logical features depend on something beyond themselves, namely on the infinite and

dynamical resources of language in general, - just as they depend on the mystical foundation of law, 'authority' and 'justification'. That goes for any special legal concept as well (which is also ultimately based on the general language, even if through a chain of definitions).⁶⁷

In other words, because of the dependency of any particular law regime on the phenomenon and conditions of 'law' in the most wide-reaching sense of the word and on general conceptual resources characterizing a given historical situation (rooted in historical conceptual resources), I will argue that we ought not look upon law (in the narrow sense of the word) as a closed system the concepts and logics of which are only relevant to that system alone. The concepts, the distinctions, hierarchies, justifications and logics which are established within the rights regime constituted by EU social rights are also immediately concepts, distinctions, hierarchies, justifications and logics of social order as such. A mutual constitutionalism must be presumed: law (in the narrow sense of the word) is part of social order as such (that would be 'law' in the wide-reaching sense of the word); 'law' both relies on and serves to constitute the social as such.

The objection would be: Even if law in the narrow sense of the word relies on law in the wide-reaching sense of the word, including the conceptual resources of social order as such, it is still so that law in the narrow sense of the word corresponds to a highly specialized system of its own - characterized by particular institutions and particular methods of reading, interpretation, documentation, justification etc. The conceptual characteristics and logics of that specialized system only have relevance within it; to the extent that 'law' in the narrow sense of the word also lives outside of that system, it will be due to *translations* of those conceptual characteristics and logics into other conceptual characteristics and logics.

My answer to that objection would be the following. Certainly, law in the narrow sense of the word corresponds to specialized knowledge, traditions, methods, rituals and

⁶⁷ It should be mentioned that a number of interesting theories concerning the relationship between law and language exist - focusing, exactly, on the elements of language which cannot be captured by strict or literal approaches. The relationship between law and rhetoric, law and narratives, law and imagination, law and literature, law and the complexities of the faculties of understanding, has been studied in excellent works like James Boyd White: *The Legal Imagination*, David Gurnheim: *Memory, Imagination, Justice. Intersections of Law and Literature*, Karen-Margrethe Simonsen and Ditlev Tamm (eds): *Law and Literature. Interdisciplinary Methods of Reading*, Hans Petter Graver: *Juridisk overtalelseskunst*, Steven L. Winter: *A Clearing in the Forest. Law, Life, and Mind*, Paul Books and Paul Gewirtz: *Law's Stories. Narrative and Rhetoric in the Law*. My position can certainly be related to these works; however, it is also distinct from them, due to the fact that it depends on the mystical foundation of law, as explained above.

forms of justification. And any particular law regime (such as EU social rights or EU-law as a whole) is based on even more specialized understandings. And certainly, translations do take place. None the less, I will claim that such translations ultimately depend on shared conceptual resources - resources which cannot be 'held in place' within different systems or fields. As argued above, the particular language of law in the narrow sense of the word, its imperative form ('this shall be...') and its logical characteristics depend on the mystical foundation of law which it shares with law in the wide-reaching sense of the word and on general conceptual resources. Certainly, different forms of rationality will collide whenever law is interpreted, implemented, used, lived. But these collisions depend on a shared medium. Different forms of rationality are not merely translated into one another, they meet, collide, flow over into one another, are negotiated - or they fight 'to death' in the sense that one wins over the other, dominates the other, neglects the other, or even erases the other.

Hereby, I have hopefully also made clear that I do not in any way presume the existence of causal relations between EU-social rights and the social order as such (law in the wide-reaching sense of the word). When I say that I consider EU social rights to be constitutive of social order as such, I do not mean that they are capable of determining social order. For two reasons. Firstly, as explained above, the forms of rationality inherent in this particular rights regime will collide with other forms of rationality when these rights are implemented and lived, nationally and locally. The result of these collisions cannot be determined in advance. Secondly, due to the fundamentally fluid, ambiguous, dynamical, problematic, unsafe, seductive and manipulative nature of language (including legal language), the possible interpretations of a given law can never be identified in advance. Even the most precisely formulated law may be used for purposes which could not have been foreseen when it was drafted. This problem - often referred to as the problem of indeterminacy - is of course deeply embedded in the old problem of 'particular case meeting general law'. Subsuming a particular case - a particular life situation - under a general law requires not only the reflection of the characteristics of the particular case in the light of the definitions and distinctions laid down in the general law, it also requires the rethinking of the meaning of the general law and the definitions and distinctions it relies on. In truth, every new application of a general law means restating, re-interpreting and even re-inventing it. But the problem of indeterminacy does not only manifest itself in relation to the 'particular case meeting general law' situation.

EU social rights are to be implemented in national law or in national agreements between the parties of the labour market. Here, general law meets general law (or agreement) with the purpose of reformulating the latter in the light of the former.

The two issues - the collisions of different forms of rationality and the problem of indeterminacy - are of course closely connected. When different forms of rationality meet each other, the fightings or negotiations between them will involve fightings or negotiations about the meaning of the law (or laws) under dispute. In fact, we cannot even say that 'different rationalities' are meeting each other independently from the issue of interpretation. The different rationalities will correspond to different positions with respect to the interpretation of particular laws. And their collisions - whether peaceful or with devastating consequences for one or more of the positions involved - will take the form of interpretational collisions.

Accordingly, I do not claim that by means of an analysis of EU social rights, we shall be able to determine the nature of social reality as such. EU social rights are not constitutive in that sense. But they are constitutive in the sense that the hierarchies, logics, conceptual foundations, dilemmas, ambiguities, uncertainties and paradoxes inherent in that particular regime of rights will meet other hierarchies, logics, conceptual foundations and complexities, - and in these meeting the conceptual implications of EU social rights cannot simply be neglected but must necessarily be taken into account, be part of a battle, a compromise, a reconciliation or 'a fight until death'. In this sense, I will argue that the conceptual implications of EU social rights constitute elements of social reality which are not only relevant within the institutional borders of EU-law, but also in relation to national law, national administration, national agreements, local organization - and the lives of the potential right-holders.

In this connection, it is crucial to underline that the potential collisions and battles of interpretation should not be seen as something external to the rights themselves, but as something which belongs to them in all their phases. Their formulations in the relevant legislation and the interpretations carried out by the CJEU are not clear and unambiguous. Legislation and case-law opens a space of interpretation; in this sense they imply a variety of possible interpretations and interpretational conflicts. Simultaneously, they bear witness to a foreseeing of and preparation for possible collisions with other forms of rationality (by way of the logical elements mentioned above, delimitations of scope, clarifications of concepts, designation of acceptable modes of argumentation as well as concepts such as 'national discretion' and 'margin

of appreciation'). In other words, particular laws constitute ambiguous spaces of interpretation, already marked by dilemmas and conflicts, just as they entail elements the meaning of which is to delimit ambiguities, dilemmas and conflicts. This is of course something which should be integrated in the analysis, not neglected. Therefore: When analyzing particular laws, we shall analyze, exactly, the conceptual ambiguities, uncertainties, taboos, dilemmas, paradoxes, abstractions, priorities and disregards; we shall not treat those laws as if they constituted a clear and univocal imperative 'there shall be...'

Thus, the features of social order which I derive from EU social rights (and on the basis of which 'the ideal order' is being constructed) can be seen as forms of rationality implied in the formulations and CJEU-interpretations of those rights and which are 'real' not only within the institutional borders of EU rights, but 'real' also with respect to social reality as such in the sense that they will be present in all applications and interpretations of EU social rights. However, it cannot be determined in advance whether the forms of rationality in question will be severely transformed or repressed as a result of applications and interpretations. The forms of rationality which can be derived from the formulations and CJEU-interpretations are not themselves simple and univocal, though, but deeply complex and ambiguous. In this sense, they anticipate, already, the interpretational conflicts they will give rise to. To some extent, this is due to deliberate intentions (those who have drafted the law and the judges who interpret it deliberately leave open a space of interpretation), but more fundamentally, this is due to the infinite and always unpredictable resources of language. In principle, therefore, the forms of rationality which can be derived from the formulations and CJEU-interpretations are themselves infinite and not distinguishable from the 'other forms' of rationality which they will meet in connection with applications.

Clearly, this gives rise to a dilemma: Should the analysis seek to follow the infinite possibilities of interpretation - and accordingly result in multiple and non-distinguishable forms of rationality? Or should it seek to characterize, in a more distinct manner, certain forms of rationality implied in EU social rights, but hereby reducing them? The first approach would be in accordance with the true nature of the conceptual foundation of these rights (infinite, uncertain, shaking, always moving). But it would not be able to say anything *characteristic* about that foundation. Apart from that, it would never be able to do justice to the infinite foundation. The second approach would reduce the true infinite nature of the conceptual foundation. But it

would be able to tell us something characteristic about EU social rights and the features of social order which they imply.

I shall carry out my analyses in accordance with the second, rather than the first approach. I do wish to be able to characterize the rationalities implied in EU social rights in a rather distinct manner - so that I may build a social order with distinct political philosophical features on the basis thereof. However, I shall integrate a deep awareness of the truths of the first approach. First of all, following the second approach does not mean that I neglect conceptual ambiguities, dilemmas, paradoxes, inconsistencies, taboos etc. I do believe (and will demonstrate in the course of this work) that such conceptual complexities may be presented in a distinct manner, that they may have a characteristic nature. In this sense the infinite conceptual resources are in no way 'cut away', they belong to the analysis (and to the results of the analysis) in the most significant way. Secondly, I shall of course not seek to establish the existence of characteristics where none can be found. If a particular law or judgment or a constellation of laws or judgments turn out to be so ambiguous, so unclear, so inconsistent that it points in multiple directions (or in no direction at all), then this will of course be the focus of the analysis and will be reflected in its results. In fact, some of the rights which will be analyzed are what we may call conceptually undeveloped rights for which reason they give rise to great uncertainties. - However, what I shall generally do is to look for general and dominating patterns, but also for conceptual features which might occur more rarely, but which can be said to be significant to the conceptual foundation in question.

In this sense, the forms of rationalities which I shall derive from the formulations of EU social rights in legislation and their CJEU-interpretations will correspond to forms of rationality which are conflictuous in themselves and which therefore already anticipate possible conflicts of interpretation. But they will also be sought characterized as distinct rationalities (which include distinct dilemmas and inconsistencies). They will not anticipate all possible conflicts of interpretations, all possible uses and misuses. They will be characterized as certain forms of rationality in contrast to other forms.

As already mentioned in the introduction, the social order which will be constructed on the basis of the analyses of EU social rights will be called 'the ideal order'. There are several reasons for that. The first reason springs from the considerations presented above: The 'ideal order' is ideal because it is based on analyses which require a reduction of the infinite nature of the conceptual foundation of EU social rights. Had it

been possible to take into account these infinite resources, then, in principle, all possible interpretations, all possible ways of *living these social rights* would have been taken into account, including ways of complete transformation and ways of neglect. But that would not have been possible; the reduction is necessary. But it is also analytically fruitful: it makes it possible for us to capture - on the basis of certain dominating conceptual patterns and significant features - certain distinct and characteristic forms of rationality implied in EU social rights which will meet and collide with other forms of rationality. The 'ideal order' corresponds to a construction which brings these distinct and characteristic forms of rationality together. I will argue that although the ideal order is a construction, it is not 'unreal'. The forms of rationality which it comprises are indeed in play in all applications and interpretations of the rights in question. But the ideal order is 'pure' in the sense that it does not include all forms of rationality which could possibly be in play in connection with applications and interpretations, but only some forms of rationality - namely those which are dominant and significant within EU-legislation and -case-law. - This point will be developed more thoroughly in the following.

The emphasis on the dangers of 'calculability'

Both Derrida and Schmitt warn against what we may call the machine aspect of law, the aspect of calculability. However, for Derrida 'calculability' pervades law, history and language, that is, it pervades law in the wide-reaching sense of the word (law in the sense of 'droit'). Only 'justice' which transcends law will give us a glimpse of something which cannot be reduced to calculations. Schmitt, in contrast, establishes a distinction between legality and legitimacy within law. It is important to underline that 'legitimacy' does not imply 'incalculability'. But 'legitimacy' requires, firstly, human decisions, the establishment or creation of principles of legitimacy, of a foundation of law (which means a break from determinations and hereby from 'calculability' in a totalizing sense), and secondly, it requires the idea of a 'spirit of law', a spirit which accords deeply with the overarching concerns and conceptual characteristics of the historical situation in question (which means another approach to law than a purely technical one).

As far as the issue of 'calculability' is concerned, I shall build on Schmitt's distinction rather than on Derrida's. But Derrida's understanding will be kept in mind; we shall remember that what Schmitt calls 'legitimacy' implies a kind of calculability of its own.

The indeterminacy-issue raised above can be qualified by way of the distinction between 'legality' and 'legitimacy'. Indeterminacy will always be a characteristic of law, but as such it can be manifested in different ways. In a 'legitimate regime of law' (according to Schmitt's understandings of 'legitimacy'), the indeterminate nature of law will not mean that particular laws can be used for all sorts of purposes. It will only mean that the exact ways of applying and interpreting those laws cannot be determined in advance, - and not only because of the limited capabilities of those who interpret the laws, but because no 'correct' or 'ideal' understanding of a given case in the light of a given law can be presumed to exist. But particular laws will still be interpreted in the light of their 'spirit' - and not used against their original purposes (which does not exclude the possibility that original purposes may be reinterpreted). Interpreting laws in the light of their 'spirits' means of course that a certain spectrum of variations, nuances and grey zones must be taken into account. The wise judge, politician or civil servant - or anyone living the law - will understand the historical 'spirits' of particular laws and will make their decisions in accordance herewith. - In contrast, in a regime of law in which 'legitimacy' has been reduced to 'legality', particular laws are used as technical tools - which means that they may be twisted and bended in all sorts of directions and used against any overall purposes of those laws (whether that be original purposes or purposes which have later been deployed as legitimizations).

From the point of view of the distinction between 'legitimacy' and 'legality', the degree of indeterminacy does not necessarily depend on the level of precision of a given law. A precisely formulated law in a regime of pure 'legality' may still be used against its purposes, and an imprecise, open, vague or even badly formulated law may still function quite well and never give rise to disputes in a 'legitimate regime'. Recalling Derrida's understanding of 'calculability', we may add that in the latter case, what makes the vague or badly formulated law functional after all is a different and probably less visible kind of 'calculability'.

The issue we are discussing may also be formulated as the issue of the relationship between law (in the narrow sense of the word) and culture. This relationship has been discussed by political philosophers in 2500 years, and often quite polemically. In Plato's 'The Republic', Socrates explains that no serious legislator would waste any time on formulating precise and detailed laws: In a badly functioning state, such laws would be meaningless and useless since they would not be followed any way; and in a good

state, they would be superfluous, either because they already belong, in an informal way, to well-established arrangements or customs, or because they are so obvious that they need not be written down.⁶⁸

Rousseau, on his part, emphasizes again and again the importance of considering the relationship between law and culture. A good constitution helps very little if people do not possess the spirits and customs necessary for using it. Rousseau uses the expressions of 'suited' and 'ill-suited': a people should be *suited* for its laws. If not, the laws will be disrespected, neglected and misused – and eventually overthrown.⁶⁹ This does not mean that laws and institutions should simply be adapted to existing cultural conditions. Rather, Rousseau envisions the possibility of a *simultaneous* constitutionalization of laws and customs - in which connection the latter are crucial to the functioning of the former: '*the most important [law] of all [...] is graven not in marble or in bronze, but in the hearts of the Citizens [...]. I speak of morals, customs and above all of opinion; a part [of the laws] unknown to our politicians but on which the success of all the other depends [...] particular regulations [...] are but the ribs of the arch of which morals, slower to arise, in the end form the immovable Keystone*'⁷⁰ The problem for legislators is that morals, customs and opinions are neither easily created nor destroyed. Establishing a new and good republic involves creations as well as destructions of customs.⁷¹

Both Plato and Rousseau emphasize, in different ways, that laws are useless or will be misused and undermined if they are not in accordance with broadly established cultural norms and practices, with 'customs' and 'morals', with the informal, fine-grained regulations penetrating social life. That does not mean that laws cannot affect cultural life (although Socrates seems to indicate the opposite), but it takes time, and special kinds of laws are required, namely laws which concern the ideological education of citizens.

The issue of the relationship between law and culture - deeply related to Schmitt's distinction between 'legality' and 'legitimacy' - is highly relevant to an analysis of EU social rights. It is well-known that in many member states, EU social rights (or some of

⁶⁸ Plato: *The Republic*, Book 4, 427a

⁶⁹ Rousseau: *Discourse on the Origin and Foundations of Inequality*, p. 115, *Of the Social Contract*, p. 72, 135-136, Rousseau: *Emile or on education*, p. 468

⁷⁰ Rousseau: *Of the Social Contract*, p. 81

⁷¹ I have dealt with the relationship between creation and destruction of order within Rousseau's writing in my article "Creation, Destruction and Continuity of Order", in Holger Ross Lauritsen and Mikkel Thorup: *Rousseau and Revolution*

them) are considered to represent a threat against the national welfare system. In particular, this is the case in relation to those EU social rights which are based on the discrimination ground 'nationality'. In my own country, Denmark, the fact that citizens from other member states are entitled to 'equal treatment' with respect to welfare benefits if they reside and work in Denmark (and also, under certain circumstances, if they only reside and do not work in Denmark), is frequently being subjected to intense political debate and public indignation. Residence rights for EU-citizens and for third country nationals which are closely linked to EU social rights (for which reason they form part of the empirical material analyzed in the dissertation) are controversial from the perspectives of the member states as well since they interfere in national immigration laws. But also some of the other discrimination grounds may give rise to problems for the member states. The social rights related to the discrimination grounds 'age' and 'sex' may very well imply comprehensive institutional transformations in the member states, just as the social rights related to the discrimination ground 'sexual orientation' will be provocative in countries in which discrimination against homosexuality prevails.

EU social rights depend entirely on the member states; they are formal rights which relate to national social rights, and it is the member states who are responsible for implementing them. Very often, member states will have a national interest (whether of an economical, political, institutional or ideological nature) in implementing these rights as vaguely as possible, or at least implementing them strategically - so as to protect their own citizens, companies and welfare systems against transformations or economical burdens. And in any case, the general culture prevailing in the respective member states (with respect to a range of relevant issues such as views and practices concerning welfare benefits, foreigners, family structures, employer-employee-relationships, religion and political, administrative and legal organization) will vary greatly. It is crucial to mention as well, of course, that 24 different languages are recognized as official languages of the EU; legislation and case-law are produced in all of those languages.

In other words, as far as implementation in the member states are concerned, we are indeed faced with what Schmitt would call a 'legality regime'. Strategic interpretations, including deliberate omissions and evasions, are likely to occur. Or at least, implementation will happen from the point of view of national interests, conditions and traditions - in which case it could be said that EU-law is being integrated in a

national regime of legitimacy, but would be not embedded in an overarching regime of legitimacy. On the other hand, one does not need to study many CJEU-judgments within the area of EU social rights in order to realize that the CJEU seeks to counteract national implementations which are either deliberately strategic or happen on the basis of purely national concerns. The CJEU is known for its teleological and contextual style of interpretation. The dissertation will certainly confirm this (while also pointing to the fact that the methods of interpretation deployed by the CJEU are multifold and cannot be reduced to 'teleological' and 'contextual' methods). We shall see that the CJEU often refers to the 'spirit' of EU-law (or the 'spirit' of the Treaty or of a particular legislative act or group of acts). 'Fundamental purposes', 'fundamental principles' and 'fundamental rights' of EU-law play a huge role in the judgments of the CJEU as well. The court emphasizes, again and again, that although the member states enjoy huge discretion with respect to the implementation of EU rights, implementations should happen 'in the light of' the spirit or purposes of EU-law and that implementations may not 'undermine the efficiency of fundamental EU-rights'. Apart from these statements, the CJEU makes use of a number of more detailed methods (logical and conceptual methods) in order to secure that the 'spirit', and not only the wordings, of EU-law is respected.

I shall of course not anticipate the results of the analyses already now; - but it is useful to be aware, already from the outset, that a battle between a 'legitimacy regime' and a 'legality regime' (according to Schmitt's understandings) is indeed at stake. From the point of view of the CJEU, EU social rights should be interpreted in accordance with an overall 'spirit' of EU-law - and this 'spirit' is developed by means of a rich landscape of declared 'EU-concepts' and conceptual criteria which also imply assumptions as to the structural and ideological meaning of national institutions, overall political purposes and fundamental understandings of the nature of human beings. In other words, as far as the rulings of the CJEU are concerned, EU social rights are embedded in broad society visions (because of which they can be analyzed politically-philosophically, from the point of view of 'social structure', social means', 'human foundation' and 'purposes'). We may say, accordingly, that EU social rights are embedded in a *striving* legitimacy regime. But as far as the implementations in the member states are concerned, EU social rights are likely to be embedded, at least to some extent, in a 'legality regime'.

It is not the purpose of the dissertation to determine who is the stronger part in this battle. But it is important to be aware of the fact that it takes place. We shall be analyzing the battle solely from the side of the CJEU. It should be noted that this side is not without powerful weapons; after all, the CJEU does constitute the highest authority with respect to the meaning of EU-law, and its judgments are binding. This means that not only are the statements concerning the 'spirit' and purposes of EU-law binding, also the more detailed conclusions which follow from these statements (concerning, for instance, the personal scopes of national social rights and categorizations and definitions of benefits) are binding. On the other hand, it is clear that the CJEU cannot control whether or not the implementations in the member states will satisfy the criteria of interpretation laid down by the court - even if the member states are, in principle, obliged to follow those criteria.

It is the conviction of the dissertation that the forms of rationality which are implied in the formulations of EU social rights in EU-legislation and their interpretations by the CJEU, constitute an interesting subject of study, even if they are not necessarily manifested as such in the member states. As argued above: these forms of rationality will, in any case, be at stake in connection with all implementations, interpretations and applications of those rights - and in a binding way. The member states must necessarily relate to them. Moreover, these forms of rationality do not only constitute fragmented forms of rationality, they are embedded in broad society visions, in a striving 'legitimacy regime', according to Schmitt's understanding. Consequently, it can be said that, on the one hand, the ideal order which will be constructed represents a kind of *shadow-realm* - an order never fully manifested anywhere, only manifested more or less reduced or transformed in the different member states; on the other hand, this shadow-realm is an important shadow-realm because it is comprised of, in principle, obliging forms of rationality. Apart from that, this shadow-realm is important because it unfolds, in a quintessential manner, a range of contemporary problematics adhering to the concept of rights.

I would like to emphasize that the analyses of EU social rights and the subsequent construction of a social order are not based on any presumptions regarding the particular nature of this ideal order. That is, I have not presumed that a 'legitimacy regime' would be at stake, an order which entails broad society visions. In truth, I had expected the opposite. I had expected that I would only be able to construct a rather formal or even abstract order - an order which to some extent would entail hierarchical

features and fragments of fundamental assumptions and political purposes, but certainly not broad institutional characterizations. I would have expected to be able to construct an order of a rather technical nature, a coordinating or mediating order, rather than a substantial order. And to the extent that more overarching visions could be detected, I would have expected them to be visions of a trans-national order, not visions of national order. - But what I found was over-national visions of national order, an over-national shadow realm vibrating with rationality forms which concern the member states as states - national hierarchies and national institutional orders.

In other words: The tension between 'legitimacy' and 'legality' (related to the question of the relationship between law and culture) was presupposed as a theoretically crucial tension - a tension which should be part of the analytical approaches of this work. But it was not presupposed that the 'ideal order' should correspond to a 'striving legitimacy regime'.

The unfounded nature of law

Both Schmitt and Derrida emphasize that no ultimate justification of law can be given beyond law itself. But simultaneously, they hold that there is a mystical foundation of law by virtue of which it exists *as law*, as authority, as a 'there shall be' - whether that foundation is conceptualized abstractly as a founding event outside of historical time or rather in anthropological terms, as something which springs from 'human destiny', friend-enemy-distinctions and the desire to legitimize those distinctions. Furthermore, they are both driven by normative concerns and hopes regarding the possibility of reflecting, criticizing and transforming law as we know it - either in the light of 'justice' or in the light of 'legitimacy'.

If we consider the two positions in the light of the still influential distinction between natural law and positivism, I shall argue that they cannot be grasped from the perspective of that distinction - in spite of the fact that both natural law and positivism have been developed into very nuanced positions and that together, they cover a vast spectrum of theoretical presumptions.

Since neither Derrida nor Schmitt believe in the possibility of an absolute standard of law except for the ones which are historically instituted as such, they are not natural law thinkers. Schmitt's position can be said to possess certain natural law features, though, in the sense that he does formulate some overall normative principles of law ('inhibition of the expressions of hostility', 'protection' and 'recognition of the enemy')

which are not reducible to historical conditions and which are intimately connected to what he claims to be the political 'destiny' of human beings. These are features which remind us of Hobbes who described, more brutally than anyone, the horrors of the state of nature, and whose natural law theory bears witness to this brutal understanding in that it implies the hardest possible negation of the state of nature. Yet, there is a difference: For Hobbes, there is still something in human nature which deserves protection and for the sake of which the state of nature as such must be negated, namely human freedom; this is not the case for Schmitt.

Even if Schmitt's normative ideals of law does build on 'human destiny' as he sees it, it builds on it because, according to Schmitt, it would be impossible to abolish this destiny, and to the extent that we attempt to do so, it will manifest itself in much worse and more totalizing ways. In this sense, for Schmitt, there is nothing in human nature as such which may serve us as a normative standard of law; but law must necessarily be unfolded in accordance with human nature. - Derrida, on his part, deconstructs the distinction between nature and convention and dismantles, hereby, the possibility of any natural law theory. His position constitutes a more consequent rejection of natural law than the position of Schmitt's. In contrast to Schmitt, Derrida holds that we should never seek to establish any meta-languages as far as concerns the 'beginning' or 'foundation' of law, neither of a descriptive nor of a normative kind.

But neither are Schmitt and Derrida positivists, although they are both historical thinkers who examine the historically given law. They are not positivists because they examine the historically given law in the light of what they see as the fundamental paradox of law. For Schmitt, the paradox would read: we have to establish a normative foundation of law, although we cannot. Derrida, denying that we should attempt to establish meta-languages, would rather formulate the paradox as follows: law (*droit*) cannot be 'just' although it strives to be so; it is impossible for law (*droit*) to do justice to the unique nature of the singular, to the 'other'. For both, the non-existing normative foundation of law is nevertheless always in play, but exactly as non-existing, manifesting itself as a fundamental aporetic nature of law.

The same can be said about this dissertation. I examine historically given law, an empirical regime of rights. I ask to what extent and in what ways this regime of rights entails presumptions as to a human foundation of law and to a normative foundation of law; I do not myself presuppose a particular human nature or particular purposes of law as such. But these examinations are still carried by the conviction that we cannot

ignore the question of a normative foundation of law. Ultimately, we must be able to reflect, critically, the results of the examination. The possibility of such critical reflections do not merely spring from the examination itself - *even if the means by which it unfolds are immanent means*. Let me explain this. When examining the given law we shall be aware of paradoxes, inescapable dilemmas, taboos, totalitarian features and inconsistencies. And more than anything, we shall be aware of the presence or absence of overall purposes by virtue of which it can be said at all that law represents a striving for justice, that law concerns standards by which we may reflect and criticize our ways of living with ourselves and others. These approaches, these awarenesses, all represent immanent maneuvers. However, the idea that paradoxes, dilemmas, taboos, totalitarian features and inconsistencies would represent a problem at all is not an idea which merely springs from EU social rights themselves (although some kind of variant of this idea will certainly be implied in this regime of rights). Likewise, the idea that in order for law to be meaningful, it must be more than the tautological 'there shall be' working through us, it must entail standards by which we may judge and criticize ourselves, is not just an idea which can be derived from the analysis either (although also this idea will not be foreign to the regime of EU social rights). Where do these ideas come from, then? The first answer would be that they come from law in the wide-reaching sense of the word. In this sense, they will also, to some extent, be part of the regime of EU social rights which relies on the general meaning of law, as argued above. But if they come from law in the wide-reaching sense of the word, then they are also entwined in the mystical foundation of law. They are normative ideas which are significant to law as we know it historically; we cannot do without them. Yet, they are not instituted by anyone, they belong to the event of law as such (however that event may be conceptualized). In this sense, the idea that law ought to be the manifestation of meaningful order (if not meaningful to humans, then to God) and the idea that law ought to have a normative foundation are fundamentally unfounded, just as law itself. These normative ideas are therefore what we must call immanent-transcendent ideas: we know them through history, but we also realize that we cannot do without them; they belong to history by virtue of the *non-historical event of law in history*. They are always in play, but in a deeply aporetic way.

Thus, when asking, critically, about the internal meaningfulness of the law and its purposes, I do this for immanent-hermeneutic reasons and on the basis of immanent approaches. However, the driving force behind such questions is not solely immanent-

hermeneutic - although it is also that. It is associated with a fundamental understanding of the paradoxical nature of law. Because of this presumed paradoxical nature of law, the critical questions and the reflexions they give rise to will themselves be equivocal. If the regime of rights under examination turns out to be lacking internal meaning because it is characterized by deep inconsistencies or conceptual problem and if it does not contain any overall purposes, then I will consider it to be problematic: it will be a regime of rights disassociated from any idea of 'justice'. However, if this regime of rights turn out to be internally meaningful and coherent and characterized by overall purposes, then I will consider it to be problematic as well, - because then, this regime of rights will be in risk of closing in on itself, of forgetting the paradox, forgetting that it can never be justice, only claim to be justice.

In the following, it will be unfolded what this means for the analytical approaches of the dissertation.

Overarching historical-conceptual thinking versus deconstruction

Above, I have unfolded important aspects of the theoretical foundation of the dissertation in the light of what I would argue to be crucial similarities between the positions of Derrida and Schmitt. We shall now move on to the delicate differences - differences by virtue of which the theoretical foundation of the dissertation can be developed as a restless and tensional foundation.

So, a conceptual analysis of EU social rights will be carried out. It is an analysis which can be said to have a hermeneutic foundation in the sense that the conceptual landscape of this particular regime of rights (just as the conceptual landscape of any particular law regime) is presupposed to be deeply and inescapably connected with contemporary and historical conceptual resources in general - for the reasons given above. It is also an analysis which is carried out in the light (or should I say 'shadow') of the fundamental paradox of law: that law must claim to be justice without being able to claim it (whether this 'claiming' is in the hands of human beings or whether it characterizes law as a self-justifying force). This fundamental paradox of law can be said to constitute the foundation of the analysis for hermeneutic reasons since it characterizes law as we know it historically. But it also marks the border of hermeneutics; it is presupposed as an immanent-transcendent fundamental paradox of law.

On this basis, the question arises: Should the analyses seek to establish conceptual coherence, consistency and overall meaningfulness (and follow Schmitt who sought to characterize the overall historical-conceptual features of a given historical period), or should any apparently meaningful concept or conceptual implication be sought deconstructed (so as to follow Derrida in his radical approach to any language with which he stands confronted?) This is an intricate question because the analytical approaches in question both relies on the nature of the given empirical material, but also on ethical decisions. As stated above, I do wish to be able to say something characteristic about EU social rights from a political-philosophical point of view - for which reason I have pursued dominating patterns and significant features. But as also emphasized: inconsistencies and paradoxical features may be characteristic, just as features of coherence. It is implied in what I have said about the always ambiguous, uncertain, fragile, seductive and dynamical nature of language that deconstruction will always be possible. I dare say there would not be a concept, a criterium, an argument, a legislative act or a judgment which could not be deconstructed completely, that is, revealed as inconsistent or ambiguous and based on conceptual presuppositions which are unfounded and problematic. On the other hand, it will also always be possible to find connections and overall horizons of meaning. One may 'fill in' the holes which can be detected in definitions and arguments, create conceptual bridges between seemingly disparate fragments of meanings, seek underlying logics by virtue of which inconsistent lines of arguments can be seen as meaningful after all, establish the existence of non-explicated conceptual presuppositions as well as overall purposes and visions, etc.

It appears that choosing between the two different approaches would be almost impossible. But maybe we do not need to choose. Let me introduce another philosopher who is undoubtedly crucial to both Schmitt and Derrida and who has also influenced myself very deeply before I became acquainted with Schmitt and Derrida (and who, I must admit, has also influenced my readings of them). This philosopher is of course Hegel. Hegel creates overall conceptual connections and meaningfulness by way of deconstruction - that is, by the dialectical force of negativity.⁷² He brings conceptual logics to their outer limits, to the point where they collapse in the sense that they can be shown to be self-undermining. But afterwards, he reinstitutes the

⁷² In particular I have in mind Hegel's *Grundlinien der Philosophie des Rechts* and *Phänomenologie des Geistes*. Regarding similarities as well as differences between 'the dialectical force of negativity' and 'deconstruction', see below.

meaningfulness of those collapsed logics by seeing them in the light of other, more comprehensive conceptual logics. Ultimately, what he creates are comprehensive conceptual wholes bursting with inner complexity and fragmentation. In Hegel's works, it is obvious that deconstruction and overarching unity or meaningfulness serve each other. Overarching connections are only credible to the extent that they rely on complexity (that is, deconstruction or negativity), not abstraction. Hegel's work also demonstrate that ultimately, it is for the reader to decide what should constitute the focal point of attention, overarching unity or fragmentation. We may read his *Philosophy of Rights* as a conceptual-institutional analysis which provides for the unifying capabilities of the institution of the state. But we may also follow Marx's readings and conclude that this book demonstrates more powerfully than any other book (except perhaps, for certain works of Marx himself) the contradictions and inescapably torn nature of bourgeois society.

Also in Derrida's and Schmitt's work, deconstruction and overall meaning creation are entangled in one another. Derrida explains that deconstruction is not meant to be destructive. In fact, he has great reservations about the term 'deconstruction'. In particular, he emphasizes that 'deconstruction' should not be seen as any particular method or analytical strategy. As we learned above, 'deconstruction' is all about owing justice to 'the other'. There might be certain approaches, certain ways of analyzing which could serve that end, but fundamentally, there can be no 'formula' of deconstruction. Derrida even says that deconstruction is impossible. It will never be possible to owe justice to the other. What Derrida does is to work radically with the texts, theories, problems or situations confronting him. 'Radically' means thoroughly, carefully, with great sensitivity, paying attention both to visibly dominating distinctions and to single words and expressions which presumably play a more modest role. He brings forward the most fine-grained elements of meaning. Hereby, he works both with and against that which confronts him, enrichening and sharpening it, but also breaking down the presuppositions on which it depends. Such readings do not just leave us with a ruined conceptual landscape, but with new connections and distinctions, new interpretational spaces. Even if 'the other' will continuously escape us, 'something else' will arise, a deepened and transformed conceptual landscape. In this sense, it may be said that Derrida's deconstructions are not completely different from Hegel's dialectical work. It should be noted, though, that Derrida would never move towards grand and comprehensive conceptual units, guaranteed by overarching principles. Apart from

that, it may be discussed to what extent deconstruction can be said to be the work of 'negativity'; I shall return to this latter point in a short while.

Schmitt, on his part, uses the expression 'radical-conceptual structure'. It can be questioned, though, to what extent the analyses carried out by Schmitt are indeed expressions of 'radical-conceptual' work. He is looking for 'analogies' between political and metaphysical concepts of a given historical period. This is an abstract historical-conceptual approach which reduces, in advance, conceptual complexity and presupposes that history can be divided into conceptually distinct 'periods'. On the other hand, the paradoxical structures he mournfully derives from his historical-conceptual analyses can be said to be expressions of conceptual radicality. Due to these paradoxical structures, his political-theological constructions eventually become a mixture of historical-conceptual abstractions and deconstructions thereof. - In truth, neither Derrida nor Schmitt are 'builders' of social order - Derrida because he does not want to be a builder of order, Schmitt because the orders he builds are broken down by his own hands.

What I shall be doing is the following. I shall seek to create connections, coherence, overall meaningfulness as far as it is possible. But not on the basis of abstractions. I shall pursue the ambiguities, inconsistencies and unclarities inherent in definitions, distinctions, criteria, argumentations and relations between different elements of law. I shall only establish connections, coherence and meaningfulness on the basis of the complexities which arise from careful readings. And naturally, I shall not presume that any overarching units of meaning can be established. We may end up with only fragments. Or we may end up with overall dilemmas or inconsistencies. In fact, this means alternating between the pursuit of overall conceptual meaningfulness and deconstruction. I do not, like Hegel, work through particular figures of thought (which are taken to their logical limits and afterwards instituted in new conceptual constellations). Rather, the alternation is of a more flexible and less systematic nature. This is due to the fact that I wish to be sensitive towards the empirical material with which I am confronted - the specific nature of the legal language in question and the forms of rationality which it entails. In other words, I wish to be able to pursue the conceptual constructions as they appear in this material, and this requires a flexible approach. This also means that the deconstruction is not always of a radical nature, and the pursuit of conceptual meaningfulness is not always of an overall and comprehensive nature.

More precisely, the radicality of both approaches - and therefore the radicality of the alternation as such - will increase in the course of the dissertation. This has to do with the different levels of analysis implied. In *part I* in which I analyze the legal empirical material, I shall be sensitive and, I would even say, respectful towards the legal language with which I am confronted. As far as possible, I seek to analyze it on its own premisses, to take into account the specific nature of legal argumentation and interpretation. This is reasonable because the forms of rationality which the empirical material implies are closely tied to this kind of language (which does not exclude, though, that the legal language and the forms of rationality bound to it are inescapably connected to and dependent on the general resources of language, as argued above). Accordingly, this part of the dissertation pursues a less conceptually radical approach. This does not mean that it is not conceptually careful, but it is so in a manner which does not deliberately work against the premisses of legal language, it does not deconstruct legal language as such. What is unfolded is a critical approach on the basis of the premisses of the meaningfulness of legal language. Such a critical approach is not necessarily that different from what would generally be implied in critical legal analysis. Just like any serious legal scholar, I shall analyze the definitions, distinctions, justifications, lines of demarcation etc laid down in legislation and case-law and critically question the implications thereof. Conceptual carefulness and seriousness is something which lawyers and philosophers have in common. - However, even in part I, I think it will become obvious that I am a philosopher and not a lawyer. Apart from the fact that the structure of the analysis has a philosophical foundation (which concerns the relationship between the signifiers of law and the human material which is subjected to law, as will be explained below), there will be times when the analysis will indeed go beyond the premisses of legal language and pursue a radical conceptual approach. But this will only happen whenever it is clear that we are facing inconsistencies, dilemmas or paradoxes which cannot be dealt with on the premisses of legal language. Or at least, what would *normally* be seen as the premisses of legal language. Naturally, no clear line of delimitation can be drawn between 'within' and 'beyond' the premisses of legal language. Legal language is dynamical like any other kind of language, and it is connected to the infinite contemporary and historical resources of language in general. In this sense, it could in fact be said that I do not go beyond the premisses of legal language, I only *extend them* by pursuing its conceptual implications.

In *part II*, we have reached the second level of the analysis. In part II, the alternation between deconstruction and the attempt to establish overall unities of meaning will become more radical. This is due to the fact that part II is dedicated to the construction of a social order, the 'ideal order' on the basis of the analyses carried out in part I. The challenge of part II concerns, in other words, the establishment of overall features of social order - to the extent that such features can be established. As explained above, when taking the step towards the building of grander and more comprehensive unities of meaning, it is very important that this does not happen on the basis of an abstraction, but rather on the basis of increased complexity. Therefore, the attempt to establish overall features of social order must be accompanied by increased radicality in so far as deconstruction is concerned.

To some extent, a systematization of the alternation between deconstruction and the pursuit of overall unities of meaning will occur in part II, namely in connection with the analyses of six 'anchors of order', presumed to exist *and* qualified with respect to their basic logics by the CJEU. The systematization will take the form of a dialogue with ghosts springing from those basic logics. First, the presumed basic logics of the six anchors of order will be established and critically analyzed. From these analyses a number of ghosts will arise. The ghosts haunt the six anchors of order in that they represent certain questions which seemingly cannot be answered on the basis of the basic logics of those orders, they are impossible questions. Then, the qualifications of the basic logics provided by the CJEU will be pursued. They will be pursued from the perspective of the questions raised by the ghosts. Will the qualifications provided by the CJEU be able to satisfy the ghosts, bring them to rest? But even if the qualifications can indeed be seen as answers to the ghosts, this does not mean that these answers are themselves unproblematic - for which reason new ghosts may arise.

In the very last section of the dissertation, called 'Ending and Beginning', the alternation between deconstruction and the pursuit of overall unities of meaning will be manifested in its most radical way. By the very end, after having summed up the main results of part I and II, I shall engage in three last reflexions which seek out the *potentials* of the 'ideal order', reflexions diving into its unhappy and paradoxical features in order to locate its immanent openings. These last reflexions revolve around the possibility of establishing overall purposes of the ideal order - and they brings the double approach of *building* and *deconstructing* order to the extreme.

Let me explain a little more carefully what I mean by concepts and conceptual analysis.

First and foremost: Concepts are real and should not be understood as something which stands in opposition to practices, social reality or the like. In this sense, I embrace a Hegelian understanding. Hegel examined the forms of rationality dominating his own historical situation as well as the forms of rationality which preceded them - stemming from law, science, philosophy, moral life, religion, art, politics, economical life, family life etc. Concepts imply other concepts with which they are connected; in this sense a concept is not only a single concept, but a constellation of concepts, that is, a variety of concepts related to each other in particular ways, forming a conceptual architecture, so to speak. Hereby, they are already potentially forms of rationality.

Concepts are not only present whenever they are mentioned, orally or written. Concepts may also be present as non-explicated, presupposed forms of rationality. More generally, they may be present as spatial-temporal structures of whatever art. When watching films by directors such as Takovsky, Bergman, Fassbinder or Kubrick, I have often caught myself thinking that a film scene constitutes a concept in a quintessential manner: a particular spatial organization of dead and living bodies which is simultaneously a psychological, social and maybe even metaphysical organization, moving in time, hereby unfolding a logic of its own - with the camera being the origin of this temporal-spatial constellation, the organizer, the prism through which it unfolds.

However, two important remarks should be made concerning the limitations of concepts and of conceptual analysis.

The first remark concerns only the limitations of conceptual analysis. In the Introduction to his *'Philosophy of Right'*⁷³, Hegel uses the expression of the 'quiet rooms of thought', detached from the 'colorful carpet of interests and purposes continuously crossing and fighting each other'. I understand this expression as follows. What Hegel studies is the rationality forms of the noisy world, but he takes them away from the noise in order to study them quietly. This does not mean that these rationality forms are no longer tied together with certain interests of the world; interests are obviously themselves manifestations of forms of rationality. Neither does it mean that the one who studies them (Hegel) is himself neutral or disengaged, as I shall explain below. It simply means that in the quiet room of philosophy we do no longer hear the noise of the interests; we may study the rationality forms as pure conceptual forms. This is not

⁷³ Hegel: *Philosophie des Rechts. Die Vorlesung von 1819/20 in einer Nachschrift*, "Einleitung" §3 and 4.

an abstraction, as Hegel understands 'abstraction'. Quite the contrary. It is the noisy world in which we are not able to see the rationality forms by which Reason unfolds itself which is 'abstract'. - When choosing a particular prism through which I study the political-philosophical features of social order, namely EU social rights, and when seeking to capture certain *characteristic* forms of rationality through this prism instead of following all possible paths opened by this prism, all possible kinds of interpretation, use, misuse and interweavings with multiple concerns and interests, I would say that I bring certain rationality forms implied in EU social rights into the 'quiet room of thought', freeing them from the noise through which they are otherwise experienced. I do not hereby free them from interests, but I make it possible for us to study them at all by making them appear to us in more purified forms (I will not attempt to reach a degree of conceptual purity which can be compared to Hegel's figures of thought; however, by the end of the dissertation, rationality forms will appear to us at a higher level of purity than in the beginning of the dissertation). This is not abstraction; these rationality forms are as real as ever. Rather, it is a way of sharpening our possibility of seeing what is already there. But it is reduction in the sense that not every trace is followed. This is the first reason why the social order which I have constructed will be referred to as the 'ideal order'.

The second remark concerns both the limitations of concepts and of conceptual analysis. When saying that concepts are real and that various non-verbal forms of temporal-spatial organization are conceptual as well as verbal forms, I do not mean to imply that concepts exhaust reality. Adorno's critique of Hegel is important to remember. Adorno draws attention to that which is not and cannot be captured by concepts. The more totalitarian the nature of society, the more excluding the nature of its concepts. The more a society seeks to dominate nature, including human nature, the more uniform its 'identity'-thinking', that is, the way in which reality is sought conceptually 'identified'.⁷⁴ Adorno would of course, just like Derrida, deconstruct the distinction between 'nature' and 'culture'. None the less, the concept of 'nature' appears in Adorno's works as a negative concept, as a designation of that which is the object of social domination, that which is sought rationalized and which accordingly is historically transformed (from mythical nature, from 'mana', to scientifically calculable nature), but which also continuously escapes domination and conceptualization⁷⁵.

⁷⁴ See in particular Adorno: *Negative Dialektik* and *Drei Studien zu Hegel*

⁷⁵ Adorno: *Dialektik der Aufklärung*

Concepts may be rich, ambiguous, comprehensive (hereby pointing to their own limitations of control and identification), or they may be narrow and totalitarian. In any case, there will be something which they do not capture. This something which will always escape identification is what Adorno calls the 'non-identical'. The 'non-identical' has, according to Adorno, become almost completely inaccessible after 'Auschwitz' - the most extreme historical manifestation of identity-thinking, the most extreme example of classification and elimination of difference. But certain forms of art (like Beckett's plays and Schönberg's music) which restrain from any positive identification of human ideals, while reflecting, in stead, the contradictions of the present forms of domination are capable of giving us a glimpse of the 'non-identical'. Likewise, Adorno's own 'negative dialectic' seeks to display the immanent contradictions of the social order within which he lives and thinks - hereby opening for the possibility of the negative presence of the 'non-identical', within the fractures of the text.

The problem of 'that which escapes our concepts' is also reflected by Koselleck whose conceptual-historical methods are of course completely dependent on concepts. In *Futures Past: On the Semantics of Historical Time*, he notes that there is an 'extra-lingvistic element to history'. History as such cannot be reduced to historical concepts. However, we only have access to the extra-lingvistic element through concepts. As I read the book, it entails at least three different answers to the problem: a *naturalistic answer* which is deeply problematic in my view (based on the idea that there are certain concepts which must be given a special status because they are expressions of the natural conditions of human beings, concepts such as 'birth', 'death', 'man', 'woman', 'young' and 'old'); a *transcendental answer* which is also problematic (relying on certain formal categories which are presumed to constitute conditions of possibility of history - like 'asymmetrical concepts' which could be said to constitute 'conditions of possible politics'); and finally a third answer which I would call '*the dynamics of the speechless*'. The third answer is by far the most interesting and it is also the answer which reflects most accurately, as I see it, the way in which Koselleck actually works.

The third answer implies that concepts are not only repressive and excluding, they are also powerful weapons of historical change because they motivate action. By motivating action, concepts give rise to dynamics which will eventually be the cause of their own undermining. Historical concepts are undermined or lose importance while others arise in their place. In the course of such conceptual displacements, what used to

be speechless may have gained a kind of language while new forms of speechlessness arise. The perceptive historian must avoid absolutizing historical concepts and work within the tensions of language creation, language loss and utter speechlessness. - A particularly interesting example of an analysis carried out within these tensions is provided in the chapter 'Terror and Dream'⁷⁶. In this chapter, Koselleck analyzes descriptions of dreams that are dreamt by people living in the Third Reich and by people who were kz prisoners. Koselleck emphasizes that the feeling of terror itself is inaccessible to the historian. But interestingly, the dreams he analyzes are not directly about terror. He concludes that the feeling of terror experienced by kz prisoners was so extreme that it could not even be represented in their dreams. The dreams are about terror without representing terror, they are about terror exactly by not representing terror. Koselleck's analysis is a subtle and nuanced expression of how a historian may work in the tension between representation and non-representation, speechlessness and language creation.

What does the recognition of the 'non-representable', the 'extra-lingvistic', the 'non-identical' mean for the dissertation? We shall continuously be aware that the concepts which we analyze as well as the concepts which we derive (concepts which are silently present as hidden presumptions or as parts of interpretational horizons) constitute repressions of other perspectives which may be expressed by other concepts but which may also be non-conceptual, speechless. But simultaneously, we shall be aware that the 'speechless' is in itself dynamical, it is not determined once and for all what is speechless and what is conceptually articulated. Dynamics of the speechless will be detectable within the empirical material subjected to analysis, - but it must be recalled that the analysis itself will take part in the creation of such dynamics as well. It shall be no secret that I have learned a lot from Adorno's 'negative dialectic': Our possibilities of getting a glimpse of that which escapes our concepts depend, I believe, on our ability to dismantle the apparent incontestability of those concepts; the 'non-identical' will appear in the fractions left by paradoxes and inconsistencies. On the other hand, Adorno's view on the totalitarian nature of the society within which he lived is so consequent that he leaves no space for conceptual transformations, for any gradual displacements of the 'non-identical'. In this respect I find that Koselleck's more dynamical view is indispensable; although 'negative dialectic' would not be foreign to him (as his analyses of dreams and terror display), the 'speechless' would not

⁷⁶ Koselleck: *Futures Past: On the Semantics of Historical Time*, chapter 12

necessarily and always be fixated in a given historical period. We should be open to both possibilities: the 'non-identical' may, in a given historical situation be held captive within totalitarian concepts so that it will appear to be immovable, non-displaceable; but fundamentally, it is always dynamical, it may always give rise to conceptual transformations.

One difficult issue remains before we can move on to the next issue, the next theoretical tension. Above, I have sometimes used the expressions 'deconstruction' and 'the dialectical force of negativity' (or 'negative dialectic') within the same sentence, as if they were the same. I do believe they are closely related. But it is important to consider the potential differences between them.

'Negativity' means self-undermining through otherness, or otherness through self-undermining. Hegel and Adorno demonstrate how concepts or positions imply their own undermining; they turn out to imply inescapable immanent contradictions, they are not only 'self', but also 'not-self', they depend on that which they are not. For Hegel, this opens for the possibility of new, more comprehensive concepts or positions which encompass the earlier ones (which, within the context of the new concept or position do not collapse as they did when seen in isolation). The force of 'negativity' is, in other words, both destructive and creative. Adorno, in contrast, insists on staying with, not negating, the immanent contradictions he is facing. This means that the creative powers of 'negativity' remain negative, are not allowed to become positive; but still, creation takes place in the form of the silent and imageless presence of the 'non-identical'.

Derrida has often expressed that he has great reservations towards the word 'deconstruction'. It was never his intention that it should become as influential as it did. And he distances himself from the dominant 'models' of deconstruction. In his understanding, 'deconstruction' does not correspond to a 'model' at all, to any fixable method. When forming this word in the first place (meant as a translation of two words from Heidegger, 'Destruktion' and 'Abbau'), he meant to describe a practice which was not solely negative or destructive, but rather *destructuring*: taking something apart in order to see how it is constituted. In a roundtable discussion he explains that he loves everything that he deconstructs; deconstruction is a way of keeping a text (or a phenomenon, issue or question) open and living and ever changing.⁷⁷

⁷⁷ Christie McDonald (ed): *The Ear of the Other. Texts and Discussions with Jacques Derrida. Otobiography, Transference, Translation*, p. 86-87

On the other hand, Derrida pursues a deeply aporetic thinking; he does not simply look upon the elements of which something is constructed. He shows that particular concepts, distinctions, positions cannot be upheld, that they are impossible. Undeniably, deconstruction has much in common with the dialectical force of 'negativity'. Conceptual logics are pursued to their limit, to the point where they break - and hereby, the impossible possibility of owing justice to the 'other' is opened but never fixated, never maintained. Simultaneously, conceptual transformations have taken place - if not in the form of new positions which encompass the dismantled positions, then still in the form of conceptualizations which are richer and more fundamental than the deconstructed ones.

But even if Derrida's deconstructions certainly rely on 'negativity', and even if both Hegel's and Adorno's ways of dialectical creation are undeniably present in them (the impossible idea of the 'other' resembles immensely the impossible idea of the 'non-identical', and simultaneously, Derrida's deconstructions are always driven by a desire for conceptual refiguration), there is also a difference between his works and the dialectical works of Hegel and Adorno. The difference stems from what could be called the 'overflow of meaning' or 'overflow of signification' which Derrida always takes into account. It would be a simplification to say that Hegel and Adorno only works through conceptual oppositions and not on the basis of rich and multifaceted conceptual constellations, - but eventually, they bring their material to the point where it breaks from within because of stark oppositions. Conceptual oppositions also play a crucial role in the thinking of Derrida, but they are rarely clear or distinct oppositions. Oppositions are not really oppositions but rather expressions of a common phenomenon which is fundamentally ambiguous. This does not only imply that opposites depend on each other (which would be a dialectical point as well), it implies that there is something more at stake, an overflow of meaning which transcends these opposites. Derrida does not just presume the existence of such an overflow of meaning, he works with it, pursues it, flows with it, is distracted by it, allows himself to be distracted, regards such distractions as essential distractions, brings 'back' from the apparent side paths new insights to the apparent main road of questioning which may imply a deconstruction of the 'main question' itself, etc. Not just conceptual definitions and distinctions, but any association springing from a single expression may turn out to be essential to the investigation.

Accordingly, I suggest that the difference between Derrida's deconstructions and Adorno's and Hegel's dialectical thinking can be described as follows. Firstly, Derrida surrenders to the overflow of meaning, devotes himself to it. Adorno and Hegel recognize the overflow of meaning just as deeply as does Derrida, but it remains a negative force for both of them. For Adorno, this overflow remains captured in the secrets of the 'non-identical', and for Hegel, this overflow is the same as the dialectical force of negativity itself due to which figures of thoughts are undermined and new figures arise. This means, secondly, that the deconstructed material *remains with us* in a different manner than the dialectically self-undermined material. Even though deconstruction has shown that certain concepts, distinctions or positions are impossible, we cannot negate them by moving on to a higher level of insight or by insisting on their immanent contradictions. For Adorno and Hegel, the dialectically self-undermined material remains with us as negated; for Derrida, the deconstructed material remains with us as *specters*. This does not mean that it remains with us in a positive manner instead of a negative manner; rather I would say that the 'specter' defies the distinction between 'positive' and 'negative'. Ultimately, we cannot distinguish between that which is undermined and that which is restored; language as such is a ghost world.⁷⁸

The dissertation unfolds within these tensions of negative dialectic and deconstruction. Certainly, I shall work through and on the basis of dialectical oppositions. But I shall also allow myself to embark on more free and associative readings. Sometimes, the conceptual figures with which we are confronted will be negated and replaced by others. Other times, they will stare at us as harsh contradictions. But there are also times when they will remain with us as features of language itself. The differences in question are extremely delicate. Within the context of the dissertation they represent tensions, rather than clearly distinguishable approaches.

Legitimacy or justice?

As explained above, we shall embark on an investigation and construction unfolding in the light (and shadow) of the fundamental paradox of law: that law implies fundamental justification (whether as a self-justifying force or due to human decisions) although such justification can never be given. For the work of the investigation this means that we cannot ignore the normative question of the foundation of law although

⁷⁸ We shall return to 'specters' or 'ghosts' in the next chapter

we cannot presuppose such a foundation. The normative question will be in play in the course of our work - both when we are deconstructing and when we are seeking to establish unities of meaning.

But the question is: how should this inevitably normative nature of the dissertation itself be understood? As a desire for 'justice' beyond law, history and language as we know them - expressed in the impossible possibility of speaking the language of the 'other' or the 'non-identical'? Or as a desire for 'legitimacy' as Schmitt would understand it, echoing Hegel's absolute spirit - as a hope for overall historical meaning, for the possibility of the reconciliation of a given historical situation with itself?

This is not a choice which I will make in advance. Both ideals - 'legitimacy' and 'justice' - will be part of my normative horizon. More precisely, I shall take my starting point in the immanent perspective, the ideal of 'legitimacy'. I shall seek the possibility of overall meaningfulness (in the form of overarching conceptual features, of coherence, dominating patterns, logics and purposes) *in so far as the analyzed material allows me to do so*, - that is, it shall be sought on the basis of conceptually radical approaches. Obviously, the fact that I shall seek, at all, to construct a social order according to fundamental political-philosophical categories, bears witness to an underlying quest for overall meaningfulness. But I shall remain critical towards the possibility of such overall meaningfulness, - this is implied in the conceptually radical approach. And ultimately, I shall question very seriously what holds together the 'ideal order' - to the extent that it can be said to constitute a unified order at all. Not all self-undermining forms of rationality can be transformed into something meaningful when seen in a larger context; some will remain with us as frozen contradictions or as fundamental ambiguity.

Hereby is also said that although my starting point shall be the perspective of 'legitimacy', the perspective of 'justice' will continuously be in play. All along, it will be a possibility that no overall meaningfulness can be established, that coherence, unity or overarching principles will collapse into fragmentation, unreparable inconsistencies or the arbitrariness of a pure legality machine. To the extent that that would happen, we must give up hope with respect to the regime of law confronting us and maintain, instead, the possibility that beyond this order something else could arise which we might call 'justice', and even if this 'something else' cannot in itself be identified without being lost, then it may open our eyes towards the possibility of legal and political change. - As already indicated, both in the Introduction and in this

chapter, I shall indeed conclude that although the 'ideal order' turns out to constitute a substantial order held together by a range of common features, it is deeply problematic in so far as its overall purposes are concerned. Accordingly, the very last reflection of the dissertation - in which the interplay between deconstruction and the pursuit of overall meaningfulness will find its most extreme expression - will happen from the radical perspective of 'justice', rather than from the perspective of 'legitimacy'.

So, the tension between the ideal of 'justice' and the ideal of 'legitimacy' throughout the dissertation will depend on a *sensitivity towards the nature of the empirical material itself*. But this statement opens, naturally, a problematic issue of its own. What does this mean, 'being sensitive towards the material itself'? Above, I have argued that in principle, there would hardly be a concept, an argument, a judgment or a legislative act which could not be deconstructed to a point where it would collapse. And likewise, it will almost always be possible to establish connections and meaningfulness where there would seemingly be none, if only the interpretative horizon in question is broad and nuanced enough. So what shall determine to what extent and in what ways the respective approaches are pursued, and the relationship between them? In what sense may this be governed by 'the material itself'? Underneath this problematic lies another, namely the question of the purpose of the analysis and construction. To the extent that I am working in the light of the ideal of 'legitimacy', would I then be seeking a reconciliation with my own historical situation? Or am I seeking to establish principles of legitimacy so as to contribute to the legal and political developments of my own time? To the extent that I am working in the light of the ideal of 'justice', would I then be seeking a radical critical stand towards my own historical situation, - or would I be advocating for radical change? - Or would it be possible to just have a diagnostic agenda?

Let us, as a starting point, assume that I merely have a diagnostic agenda. The relationship between deconstruction and the pursuit of overall meaning - and hereby the relationship between 'justice' and 'legitimacy' - will then depend on the nature of the empirical material itself. There is only one way in which the empirical material could be said to govern this relationship (which in principle is uncontrollable): the empirical material must be seen as part of a contemporary horizon, a 'normal medium' which entails, as such, multiple and fine-grained standards by which 'meaningfulness' as well as the lack of meaning, consistency or coherence can be evaluated.

‘Der Anfang’, as Hegel would say. The problem is that ‘the beginning’, namely the contemporary horizon (the ‘objective spirit’), is both the object of analysis and the foundation of the analysis. But in the course of analysis, ‘the beginning’ changes. Hegel’s philosophy is a philosophy of becoming. The object of analysis – the empirical world as such – becomes through the philosophical analysis of it. But the foundation of this analysis also only becomes through the analysis itself. The foundation would consist in the presupposition of an immanence which encompasses everything and which gives itself as material for analysis, but which changes as such through the analysis - that is, *substance in-itself* which through the philosophical reflection becomes *for itself*, becomes spirit. Also the means and standards of the analysis only becomes through the analysis itself since these means and standards can only spring from the foundation which is also the object, that is, the becoming spirit. And finally, the philosopher or the researcher who carries out the analysis becomes as self-conscious subjectivity through this analysis.

In other words, we facing an inescapable circle. In order to analyze at all an empirical material of one’s own time and to be sensitive towards its nature, one must rely on standards which spring from contemporary horizons of thought. But these horizons are necessarily just as much the objects of investigation as they are foundation and tool. And the researcher him- or herself cannot be separated from them. - What happens in the course of the investigation is that ‘The Beginning’ (which has all of these meanings: the world as an object of analysis, the world as a foundation of the analysis, the tools of the analysis and the researcher him- or herself) changes. Or more precisely, it becomes what it already was; only, it becomes what is as subjectivity, as self-consciousness. The researcher him-or herself is part of this becoming; he or she becomes as individual subjectivity mediated through collective self-consciousness

So, from this Hegelian perspective, my political-philosophical ‘diagnosis’ of my own time through the prism of EU social rights would rely on a circle in which I would be captured myself. And eventually, what I would have gained would not merely be a political-philosophical understanding of my own time through this prism, I would have gained myself as belonging to my own time, and I would have gained my own time as belonging to me. In this dynamical belonging lies the possibility of freedom; the possibility of continuously reconciling oneself, radically and critically, with one’s own time - and hereby being part of its dynamical transformations.

But does that mean that the empirical material will practically ‘analyze itself’? I only need to be sensitive towards it, follow its own nature, its own logics, its own movements? Certainly, there are many Hegel-interpretations which tend to presuppose a ‘dialectical machine’ which ‘runs by itself’. I believe we should be skeptical towards such a presupposition. Admittedly, Hegel’s own formulations may encourage it. When he speaks of the logics and the movement of the Spirit, it would seem obvious to conclude that Hegel himself has nothing to do with these logics and movements. Yet, if we take seriously that the Spirit is exactly spirit, that is, subjectivity, it becomes clear that we cannot simply assume that what we are witnessing is a ‘dialectical machine’ manifesting itself through the empirical material.

At this point, it is time to introduce two other philosophers, namely Deleuze and Guattari. In contrast to Hegel, they would emphasize the aspect of *creation*. Instead of assuming that the horizons which form our starting point (in Hegel’s terminology ‘the substance in-itself, in Deleuze and Guattari’s terminology ‘planes of immanence’) would imply their own logics and movements, they emphasize that concepts are always created. The concept as created should be seen as pure event, intensity, singularity, - an act of thought operating at infinite speed⁷⁹. However, the concept also has an independent, self-positing nature. On the last pages of the Introduction in *What is Philosophy?*, Deleuze and Guattari emphasize the importance of the tension between the *created* and the *self-positing* nature of the concept: ‘*But the concept is not given, it is created; it is to be created. It is not formed but posits itself in itself – it is a self-positing. Creation and self-positing mutually imply each other [...]. What depends on a free creative activity is also that which, independently and necessarily, posits itself in itself: the most subjective will be the most objective.*’⁸⁰

Interestingly, they ascribe this understanding of the concept to Hegel. According to Deleuze and Guattari, Hegel’s *Figures* (different forms of rationality, each constituting a new stage of the development of the spirit) are the result of creation, whereas the *Moments* of the Figures (constituting the logic by which the Figures move and eventually undermine themselves) are expressions of the self-positing nature of the

⁷⁹ Deleuze, Guattari: *What is Philosophy*, p. 20-21

⁸⁰ Deleuze, Guattari: *What is Philosophy?*, p. 11

concept.⁸¹ In other words, *each new Figure* within the development of the spirit is *created*; it does not follow 'automatically' from the previous Figure. A new Figure is a *positive creation*, a *new draft*, a *new attempt*, which could not possibly be automatically deduced from the past. Only the logical development of each figure can be said to spring from the logics of the material itself. In the view of Deleuze and Guattari, Hegel's philosophy of becoming should not be seen as a logical-dialectical machine that runs by itself.

This does not mean, however, that each new Figure does not rely on the conditions of the previous one. Only, it is not determined by them. A new figure must be seen as an attempt to develop a new and more comprehensive position that does not suffer from the limitations and inner paradoxicality characterizing the previous figure. Also the concept creations of Deleuze and Guattari are not disconnected from pre-given conditions. Concepts are created as answers to problems which are thought to be badly put or badly understood⁸²; and they are relative to their own components, to other concepts and to the 'plane of immanence' on which they are defined.⁸³ The creation of concepts is simultaneously the layout or the instituting of a new plane of immanence, an act which implies not only the instituting of a problem to which the concept responds, but also a horizon of truth.⁸⁴

There are many similarities between Deleuze and Guattari's creations of concepts and Hegel's creation of Figures. In both cases, the created concept is not only a single concept, but a conceptual constellation which can be seen as a reaction to previous constellations which have proved to be insufficient. This new conceptual constellation implies not only a new answer, a new draft to a problem of the past, but simultaneously a new formulation of the problem - for which reason it cannot be said to be the same problem anymore. But it implies even more than that. It implies the instituting of a new horizon of truth, that is, a new understanding of the contemporary horizon on the conditions of which the new conceptual constellation was created in the first place. - Also for Deleuze and Guattari, all the elements implied only arise through

⁸¹ 'Hegel powerfully defined the concept by the Figures of its creation and the Moments of its self-positing. The figures become parts of the concept because they constitute the aspect through which the concept is created by and in consciousness, through successive minds; whereas the Moments form the other aspect according to which the concept posits itself and unites minds in the absolute of the Self', *ibid*, p. 11-12

⁸² *Ibid*, p. 16

⁸³ *Ibid*, p. 21

⁸⁴ *Ibid*, p. 38-42

the philosophical practice itself: the object of analysis, the foundation, means and standards of the analysis and the subjective force implied in the investigation. (called the 'conceptual person' - we shall return to this in a minute).

But there is also a crucial difference between the two kinds of creations in question. For Hegel, the contemporary horizons which make out 'the Beginning', that is 'the substance in itself', must be gained as subjectivity in order to be living horizons, living spirit. The hope of reflecting the contemporary horizons as a totality, as a wholeness, remains a driving force underpinning his analyses - even if this hope may never be fulfilled. The possibility of freedom depends on this hope. For Deleuze and Guattari, in contrast, the contemporary horizons which make out 'the Beginning', that is, the 'planes of immanence', do not need to be conceptualized and reflected in order to be alive. Any plane of immanence is shapeless infinity, described as a wave or a desert, but as such it is immediately life. Conceptual creations spring from planes of immanence and they give rise to new planes of immanence, but they should not be seen as reflections of those planes. Conceptual creations are singular events which breathe through the infinity of the planes of immanence⁸⁵, they do not encompass them. Different conceptual creations can be related in multiple ways, within the same plane and across different planes (in fact, different planes are only distinguishable from particular points of view), - but they can never be brought together in one picture or architecture: *'There is no reason why concepts should cohere. As fragmentary totalities, concepts are not even the pieces of a puzzle, for their irregular contours do not correspond to each other.'*⁸⁶ Ultimately, the infinity of immanence as such will remain un-conceptualized; concepts occupy and populate the plane of immanence bit by bit, but they never divide it as such, not to mention reflecting it as a whole.

We should be aware that when talking about 'creation', Deleuze and Guattari do not mean to imply that the philosopher is a free subject who decides what to create. 'Creation' simply means that an event takes place which is not determined, does not follow automatically from certain conditions. It is a reaction or an answer to certain conditions, but as such it constitutes a break with them.

The subjective force implied in the conceptual creation has acquired a specific name in the thinking of Deleuze and Guattari, namely 'the conceptual person'. The 'conceptual

⁸⁵ 'Concepts are the archipelago or skeletal frame, a spinal column rather than a skull, whereas the plane is the breath that suffuses the separate parts', Ibid, p. 36

⁸⁶ Ibid, p.23

person' who arises together with the concept is not identical with or a representative of the philosopher. Deleuze and Guattari would say that the conceptual person is the thought itself, or the thought looking upon itself. Or the becoming of a philosophy as subjectivity. Examples of 'conceptual persons' would be 'Zarathustra', 'Antichrist', (in Nietzsche's works), the 'Wondering Idiot' (in Descartes's works) or 'Socrates' (in Plato's works).⁸⁷ It would not be difficult to extend the list. When glancing over the history of philosophy, we might think of the 'teacher', the 'priest', the 'revolutionary', the 'rationalist', the 'sinner', the 'cynic', the 'intellectual immigrant', the 'detective', the 'utopian' and many others.

The 'thought looking upon itself', 'the becoming of a philosophy as subjectivity'. It is clear that again, Deleuze and Guattari pay their respect to Hegel. They might just as well have said 'the becoming spirit'. And yet, they might not, for the reasons just given above: Just as the conceptual creations should never be seen as attempts of winning the contemporary horizon as a whole, the conceptual person who arises constitutes particular subjectivity, never 'objective spirit', never a particular stage of the 'becoming spirit'.

So, where does this leave us? From Deleuze and Guattari's interpretation of Hegel and from their considerations as to the nature of concepts, we have learned that we must take into account the aspect of creation as well as the aspect of the 'self-positing' capacities of concepts. In other words, conducting our analyses in ways which are 'sensitive towards the empirical material itself' means acknowledging and pursuing the conceptual logics implied in this material itself when reflected on the basis of the contemporary horizons which form our inevitable starting point. But it also means creating conceptual constellations or forms of rationality and hereby breaking with this starting point.

The particular expressions and directions of deconstruction and the pursuit of overall meaning, respectively, as well as the relations between them, arise within the tensions of creation and the self-positing capacities of the material, in the light of the starting point, the infinite contemporary horizons. In this connection, I shall not presuppose that creation has to do with the establishment of overall meaning, and that the self-positing capabilities of the material are what we follow when we deconstruct. This is what Deleuze and Guattari implied in their Hegel-interpretation: that the establishment

⁸⁷ Ibid, chapter 3

of conceptual constellations correspond to creation, whereas their logical collapse is due to their self-positing aspects. Admittedly, the aspect of creation will be most *obvious* whenever I seek to establish overall connections and unities of meaning, whereas the aspect of the self-positing capabilities of the material will be most obvious whenever I point to the existence of logical inconsistencies, ambiguities or paradoxes. However, I shall argue that deconstruction requires creation as well; logical inconsistencies or ambiguities are not simply there. A certain gaze, a certain approach and a certain break with conceptual expectations implied in contemporary horizons will be required. Likewise, the pursuit of overall meaning would not be possible without the recognition of certain logical capabilities adhering to the empirical material itself - even when I am *constructing* order.

It is clear that the aspect of creation constitutes a complication with respect to the presumptions underpinning the analysis, as unfolded above. As explained, I bring certain rationality forms implied in the regime of EU social rights into the 'quiet room of thought' with the purpose of analyzing them in their conceptual purity. And I claim that these rationality forms are real: they are at stake in connection with all applications and implementations of EU social rights, only not in their purity, but in a noisy mixture of different forms of thought. However, we have now seen that something happens with these rationality forms when taken into the quiet room of thought. They are not simply displayed in their purity. We may either (with Hegel) say that they *become alive through the reflection*, they become subjectivity, - or we may say (with Deleuze and Guattari) that they are *created as rationality forms* in the quiet room of thought. In any case, they are transformed. So, can these transformations be said to be *already implied* in the contemporary situation - as potentiality, as possibilities essentially belonging to it? Or would these transformations rather constitute particular and singular events? Hegel would adhere to the former, Deleuze and Guattari to the latter. For my part, I believe they are both right. The transformations which take place in the quiet room of thought are indeed implied in the contemporary horizons which make out my starting point; if they were not, then the analyses carried out in the quiet room of thought would not be relevant to the reality of the rationality forms in question. On the other hand, these analyses are also singular events which constitute a break with contemporary horizons in the sense that they do not spring from them automatically. This does not mean that they do not relate to these horizons in the most intense manner, but it means that they constitute only particular interpretations of them; they regard the contemporary

situation as such, but only from a particular point of view. The point of view is particular because it is based on a reduction of the multiplicity of rationality forms implied in the contemporary situation. We now see that this reduction is not only a matter of a pragmatic choice (as unfolded above, had I pursued the multiplicity, I would have lost the possibility of grasping the rationality forms in question as characteristic forms), it is a matter of the conditions of the analysis as well. Since my analysis is creation, it will continuously break with the starting point, the contemporary horizons - although, simultaneously, these horizons will continuously constitute the foundation of the analysis. - Accordingly, we may say that the aspect of creation which we have gained from Deleuze and Guattari's *What is Philosophy?*, deepens the point already made above: that even if the regime of EU social rights are analyzed on the basis of contemporary horizons as such, from the point of view of the fundamental entanglement of this regime of law with language as such, then the analysis will never capture this foundation as such, but only particular aspects of it.

From Deleuze and Guattari's *What is Philosophy?*, we have also learned that the aspect of creation cannot simply be ascribed to me as a philosopher carrying out the analysis and the construction. And yet, creation takes place through me. We may say that through me a conceptual person arises - or, more precisely, more than one. There is the 'Diagnostician' - seeking to merely follow the logics inherent in the material itself. However, since creation is inevitably and continuously at play, the 'Diagnostician' is overthrown by the 'Reconciler' driven by a desire to be able to see a particular regime of law - EU social rights - as a meaningful and coherent regime of law relying on a meaningful and coherent conception of social order - and hereby be able to contribute to the formulation of possible principles of 'legitimacy' which may serve contemporary political and legal developments. But the 'Diagnostician' is also overthrown by the 'Critic' who sees no such meaningfulness and coherence and who advocates a radical idea of 'justice' - if not with the hope of realizing it, then at least with the hope of maintaining the possibility of more radical legal and political transformations.

I cannot say that I choose when to be a 'Reconciler' and when to be a 'Critic'. I can only say that the interplay between them will be carried out 'with sensitivity towards the material' - a sensitivity which, in its turn, implies the doubleness of creation and acknowledgement of the capabilities of the material itself. There is no way out of these circles. What I can do, however, is to take upon me the responsibility for creating

concepts within a horizon characterized by a tensional relationship between 'legitimacy' and 'justice'.

With this 'responsibility' we have returned to Schmitt and Derrida. Their respective understandings of 'decisions' can certainly be compared to Deleuze and Guattari's understanding of 'creation'. Both 'decisions' and 'creation' concern the possibility of not being determined, of breaking with what would seem to be automatized. For Schmitt, decisions are inescapable (which does not necessarily imply that human beings make their decisions in freedom). For Derrida, true decisions correspond to an impossible possibility; none the less, deconstruction cannot happen without the event of a decision. For both Schmitt and Derrida, decisions are intimately connected to human responsibility.

This brings us to the last theoretical tension.

Decisionistic law (law being in human hands) versus self-enforcing law

The last theoretical tension concerns the human foundation of law. Law is enforced through human beings. But may we say that law is, therefore, in human hands?

As argued in the Introduction, the question of the human foundation of law is inescapable. It is inescapable in general, just as any particular regime of law must imply presumptions as to the nature of the human foundation on which it relies. Certainly, it may be presumed that human beings are nothing but a material which cannot be qualified in itself and which may be formed into anything through regulation. It may be presumed as well that the concept of 'human beings' could in fact be deconstructed and that the foundation in question should rather be described in other terms, such as 'difference', 'machines', 'connections', 'differences', 'movements', 'constellations' or 'spirit'. However, I will argue that no matter how human beings are qualified or not qualified, and no matter whether other terms are deployed, any presumptions as to the foundation of law must take into account that we are not simply dealing with a passive material. If that which is being regulated could not somehow be understood as *activity*, as forces of some kind, then it would be inconceivable how law could be enforced through human beings at all. Law depends on those subjected to it; it is enforced *through* them, not just *over* them.

Schmitt would talk about human beings. But what he means is rather driving forces - forces of power, of hostility, of community, of interests of various kinds, including spiritual concerns. He does not presuppose human being as autonomous, responsible

or free subjects. Quite the contrary, what he describes as the Machiavellian perspective - that human beings may be regarded as manipulable material in the hands of the legislators of the state - dominates his own works as well. Derrida would criticize and deconstruct any talk of 'subjects' or 'human beings'. These concepts are established through language and law. However, in this respect they are fundamental; the structure of subjectivity has arisen together with law. Does this mean that he regards the 'subjects of law' as completely and utterly constructed? I believe not. We must assume that Derrida presupposes the existence of something other than pure constructability. Otherwise, the tension between the calculable and the incalculable, between law and the possibility of breaking free of the determinations of law - which may be an expression of evil as well as justice - could not be formulated at all. And negotiations between the calculable and the incalculable - due to which law develops and transforms - could not be possible at all.

In other words, in spite of huge differences between Derrida and Schmitt, not least regarding their views on decisions (do decisions occur all the time and inevitably so, or are they they ungraspable events, impossible possibilities?), I will argue that ultimately, their understandings of the human foundation of law revolve around the same tension, the tension between being created or constructed on the one hand, and being incalculable, unpredictable, erratic on the other. The latter may give rise to evil, to uncontrollable forms of hostility and violence, - but without it, we could not presume the meaningfulness of a human responsibility at all. This tension, common to Schmitt and Derrida, is presumed by the dissertation as a fundamental and inescapable tension. As unfolded in the Introduction, I do believe we should understand the aspect of incalculable and unpredictable forces as an aspect which does not only work against law, but also serves law. This point does not appear to be dominating in the works of Schmitt and Derrida; yet, I will claim that it is necessarily implied. Schmitt would seem to be occupied with the state of exception underlying and threatening any particular regime of law. And he is. But we have seen, when analyzing the implications of his 'decisionism', that decisions are not just relevant in connection with 'founding acts', when new political and legal regimes come into being, they are crucial to the everyday maintenance of law. And decisions rely on the aspect of incalculable and unpredictable forces. Derrida, in his turn, identifies law with calculability. And yet, the incalculable is continuously in play - as claims of justice, as possibilities of justice, as evil exploited by calculability, and as negotiations between the calculable and the incalculable. - In this

connection, it is noticeable that both Derrida and Schmitt are occupied with the distinction between the *instituting of law* and the *maintenance of law* (a distinction unfolded by Benjamin in 'Critique of Violence' ('Zur Kritik der Gewalt') and later taken up by Agamben⁸⁸), but that they also both dismantle this distinction. Schmitt dismantles it by pointing to the fact that decisions are as important to the maintenance of law as they are to the instituting of law - and hereby that incalculability belongs to law. This point is sharply expressed in his examinations of the concept of dictatorship on the bases of which he concludes that the state of exception and the issue of dictatorship may just as well constitute integral parts of law, as they may mark the borders of law.⁸⁹ Accordingly, we may say that for Schmitt, the maintenance of a particular law regime requires the continuous repetition of the instituting moment of law. This is practically what Derrida says, only reflected from the point of view of the founding moment of law. In his deconstruction of Benjamin's 'Critique of Violence'⁹⁰, he points out that it belongs to the nature of the instituting moment of law that it will have to repeat itself. That is, the maintenance of law is implied in the instituting of law (where Schmitt indicates the opposite: that the instituting of law is implied in the maintenance of law). Derrida makes this point even more general in that he emphasizes that every new founding act (the instituting of a particular regime of law) depends on earlier founding acts and ultimately on a mystical foundation which does not belong to historical time. The instituting of law is in a certain sense already inscribed in the historical continuity of law.

So, for both Schmitt and Derrida, the tension between the calculable (that which is already instituted, regulated, constructed) and the incalculable (that which defies regulation and therefore cannot be constructed) belongs to law. Only on the basis of this tension may we understand what it means that law is enforced through human beings.

It is my conviction that by keeping this fundamental tension in mind, we shall be able to critically consider the predominant 'identity'-thinking of our time due to which that which we are (or believe to be) and that which we aspire to be tend to melt together,

⁸⁸ Benjamin: *Zur Kritik der Gewalt und Andere Aufsätze*; Agamben: *State of Exception*

⁸⁹ Carl Schmitt: *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*

⁹⁰ Jacques Derrida: "Force of law: The Mystical Foundation of Authority" in *Deconstruction and the Possibility of Justice*, p. 29-63

without distinctions. If we are fundamentally incalculable, then no such identities can be presumed. Then there will always be a difference between what we are (or believe to be) and what we aspire to be; first of all, we will never know exactly what we are, and secondly, we will never be able to become the incarnations of the ideals we establish for ourselves through law. - If, on the other hand, we were completely 'made', completely constructed, then the identity in question would already be installed, at least in principle; we would already be what we aspire to be, and to the extent that that would not be the case, it would only be a matter of adjusting the means of construction.

Interestingly, in spite of the fact that the identity-thinking in question relies on natural law presumptions (in that it presupposes that we have 'an identity', that we essentially 'are something'), the identity-thinking actually culminates when the idea of a 'human nature' has been completely eliminated and replaced by a complete constructivism. As mentioned in the Introduction, the great classical and modern natural law theories have never presupposed any immediate identity-thinking. It was either envisioned that law should build on nature in the sense of a cosmic order (possibly a divine order), or it was envisioned that law should build on human nature. In the first case, human nature was seen as part of nature as such, as an expression of its fundamental principles. But those principles would not be immediately detectable in the appearances and behavior of human beings. Only through contemplation (or, possibly, revelation) would it be possible to gain an insight into the principles of nature, including human nature. In the latter case, human nature was also not directly accessible for the human being itself: the 'state of nature' corresponded to a speculative construction. Furthermore, human nature would need to be partly negated in order to function as a foundation of law.⁹¹

In this latter implication of modern natural law lies in fact the seeds for the transformation of natural law to constructivism. If human nature must be partly negated - both inhibited and transformed - in order to function as a foundation of law, then this implies that human nature is *changeable*. Leo Strauss - one of the most interesting, but certainly also controversial and obscure natural law thinkers of the 20th Century - emphasizes this point in the Introduction to his *City and Man*. More precisely, he indicates that modern natural law marks the beginning of the end of natural law. By opening the possibility that human nature is changeable, modern natural law paves the way for a scientific understanding of human beings, according to Strauss. This both implies a natural science understanding of nature in general and a social science

⁹¹ As is the case in the social contract theories of Locke, Hobbes and Rousseau

understanding of human nature. The latter is based on historicism and relativism: human nature changes historically and through social regulation. A distinction between 'facts' and 'values' is implied herein: Human nature can be scientifically understood (which provides for the 'facts'), and on the basis of these understandings, we may decide how to regulate human nature (according to 'values'). On the basis hereof, Strauss sees the historical situation of his own time (the 1950's-60's) as characterized by a political-philosophical crisis: Political philosophy is still based on natural law ideas, most notably on the idea of a universal foundation of politics and law, but the predominant scientific concept of nature which relies on a distinction between 'facts' and 'values' is irreconcilable with natural law ideas. The classical foundation of political philosophy has been undermined, - and as a consequence, political philosophy has become ideology, captured on the 'value'-side of the distinction. The most important source of ideology lies, however, in the natural and social sciences. But they deny their ideological role and claim to be 'value-free'.⁹²

Now, 50 years after this diagnosis was formulated by Strauss, I would say that the problem is not so much the fact-value-distinction as it is the ultimate collapse of any distinction which would imply a tension between who we are and what we aspire to be, including the facts-value-distinction (which can be said to constitute a crude and unreflected manifestation of such a tension). I am not saying that we do not still, to some extent, distinguish between 'facts' and 'values' - in the arenas of politics and law as well as in daily life and science. But these distinctions rely on a different foundation. I will argue that there is no longer any positive concept of human nature left - that is, a positive understanding which would entail the possibility of change. All that is left is the created or constructed human nature. The 'changeable human nature' has culminated in the 'constructed human nature'.

The predominant identity-thinking is a significant symptom hereof. What we are - our identity - is our values. In other words, what we are is what we aspire to be. The only way in which we can immediately be what we aspire to be - or at least claim what we aspire to be as our immediate 'identity' - is by being fundamentally constructed and constructable. That is, there is one alternative: a naive naturalism (in the form, f.instance, of a primitive kind of social darwinism or liberalism according to which unregulated human nature will be a guarantee of a good and just society). This kind of

⁹² Apart from the Introduction to *City and Man* (from 1964), see also *Natural Right and History*, especially the Introduction and chapter I and II (from 1953)

naive naturalism can certainly be found, but it does not characterize the predominant identity-thinking. The identity-seeking considerations today are, on the contrary, often rather complex. Even the most simple would presuppose that what we are depends on social, historical and discursive mediations. And the most reflected and sophisticated would take as their starting point a historically and socially differentiated inter-subjectivity or multifold subjectivity.

Another significant symptom of the collapse of tensions between who we are and what we aspire to be, on the conditions of the constructed human nature, can be seen in the amalgamation of politics and necessity. In Europe, there is a general feeling of a lack of political purposes or visions, even a feeling of a lack of politics. This feeling of a lack of political visions is to some extent (and in some countries) accompanied by a feeling of a lack of political differences; increasingly, the old right wing and left wing parties are becoming indistinguishable, or at least they operate on the basis of muddled or intransparent ideological foundations. Most notably, it is generally held that Europe (the European states as well as the EU) is governed by economical rather than political concerns. This may seem paradoxical when seen in the light of the dominance of the concept of values and the constructed human nature. If 'values' rule, and if we are not bound by any human nature because we are fundamentally constructed, how is it then possible that we would be in lack of politics? - My answer would be that of course we are as 'political' as ever. But it is true that political choices are often disguised as 'economical necessity' - which means that it becomes obscure what overall political purposes or visions are in play, if any. In other words, what we are confronting is an amalgamation of politics and necessity, that is, of values and necessity. What we aspire to be (because we choose it and pursue it) is largely seen as necessity, not as freedom. Consequently, the collapse I am talking about has a two-fold expression, it may be seen from two sides: What we *are* is identified with our values, with what we aspire to be; and what we aspire to be is identified with necessity, that is, it becomes nature, in a certain sense, something which we cannot escape.

So, the fact that only the created or constructed human nature remains does not give rise to a free and multifold establishment of values. There is no radical 'transvaluation of all values' in play, as Nietzsche would say. On the contrary, we are witnessing a collapse of distinctions which means that 'the created' either becomes necessity or arbitrariness. Simultaneously, the natural law ghost has not been cast out. It is still there

in the sense that we assume a foundation (something which we 'are'), and in the sense that we are longing for universal political purposes and visions.

We could point to other symptoms, apart from the two mentioned, the identity-thinking and the amalgamation of politics and necessity. The widespread assumption that certain values may be an expression of neutrality (namely the values connected with democracy and pluralism) is obviously also an expression of values being neglected as values, values being neutralized as values - while still being upheld as universal. Liberalism in general is caught in a paradox: not the original paradox that human nature must be negated so that we may build upon it, but rather the opposite, that human nature must be created as nature in order for us to have a foundation of law and politics at all (otherwise, what would 'non-intervention' and 'negative rights' mean?). But also deliberate politicization is lacking a human foundation when formulating its purposes - for which reason it tends to oscillate between claimed 'necessity' and arbitrariness, as explained above. Finally, a noticeable paradox of 'creation' arises due to the general obsession regarding creation, transformation, innovation, growth: the paradox of how to create creation.

In other words: the fact that we are left with an entirely constructed human nature does not only mean that we are lacking a human foundation of law and politics, it also means that the formulation of a normative foundation of law and politics becomes problematic. Why is that? Why does the freedom from the bindings of a 'human nature' not give rise to a free evaluation, transformation and evaluation of values? One answer would be that it is the natural law ghost - our longings for a universal foundation of law - which gives rise to the problems. Due to the fact that we cannot let go of the idea that we fundamentally *are* something and that our political purposes must have a universal foundation which is connected to that something, our attempts of formulating political purposes collapse into presumed necessity, neutralizations or pure arbitrariness. If only we could let go of the natural law ghost, we would realize that we are fundamentally free with respect to formulating purposes and visions for our own lives. Or at least that the way would be paved for such normative establishments, however painful the implications thereof. That would be an answer in Nietzsche's spirit. Another answer would be that we need the idea of a human foundation in order to be able to formulate purposes at all - purposes which are both in accord with that foundation, but which also break with it, some way or the other. For the reasons given above and in the Introduction, I would adhere to the second answer.

In any case, however, the combination of the fact that we are left with the constructed human nature and the presence of the natural law ghost obstructs the formulation of political purposes and visions - and hereby the fundamental idea that law and politics rest on a strong normative foundation.

There are different ways in which to respond to the fact that we are left with an entirely constructed human nature.

Firstly, the positivistic approach is based on the presumption that law and politics as well as other kinds of regulation are social constructions and that the functioning of these respective kinds of regulations does not depend on any foundations beyond the mechanisms and norms of these regulations themselves - and that, therefore, these regulations may be analyzed without recourse to such foundations, whether that be foundations as to the nature of human beings or moral foundations. As far as the field of jurisprudence is concerned, positivism in its classical formulations in the 1920's was a formalistic approach holding that law could be described as a system of its own - according to internal structures, norms and logics. A sharp distinction between law in-itself and the sociology of law (including political interests and motives) was implied herein.⁹³ In the 1950's-60's, due to the developments of positivism carried out by Hart, this distinction became blurred. Hart developed legal positivism under the influence of the late Wittgenstein - with the consequence that the description of the functioning of law could no longer be limited to a presumed pure and formal system of law, but that the general acknowledgement of law by those subjected to it as well as the development of law through law itself and the problematic of legal dispute would have to be taken into account.⁹⁴

Dworkin's theory of law can in fact be seen as a continuation of these developments by Hart, rather than as a break with them. Dworkin is most commonly referred to as a natural law philosopher. But this 'natural law' has nothing to do with classical and modern natural law for the simple reason that no concept of 'nature' is involved. What Dworkin did was to continue the development of 'expanding' the understanding of law which had been begun by Hart. Dworkin argued that moral considerations constitute an intrinsic part of law. He argued as well that legal application and interpretation imply overall considerations as to the consistency and meaningfulness of the legal system as such, and not just in isolation, but in the light of society as a whole

⁹³ Hans Kelsen: *Reine Rechtslehre*

⁹⁴ H.L.A. Hart: *The Concept of Law*

and the historical situation of those who apply and interpret the law. But this does not mean that law has a human or moral foundation beyond law itself. It only means that law itself can only be understood in the light of a comprehensive understanding. This comprehensive understanding is still empirically given, though. When Dworkin argues, for instance, for the relevance of the concept of 'dignity' as a foundation of human rights, his argument relies on the presumption that 'dignity' is what we all (across different countries and opinions as to the nature of human rights) *actually* presuppose when talking of human rights. Dworkin's position is a hermeneutic position which is more adequately described as a continuation of the development of legal positivism than as a natural law position. He is being called a natural law philosopher because he emphasizes the moral aspect of law. But that moral aspect is an empirically given aspect of law. In that sense it is 'positive'. From this point of view, Dworkin could even be described as a positivist.⁹⁵

There is, however, an aspect of Dworkin's thinking by virtue of which it would be difficult to see him as a positivist, and this is of course the ideal aspect which is encapsulated by the metaphor of Judge Hercules. Judge Hercules is an ideal construction representing an ideal judge. What characterizes judge Hercules apart from his wisdom and complete knowledge is the fact that he presupposes the consistency and meaningfulness of the law as a whole. Any particular case is decided from this perspective. That is, in connection with each particular case, judge Hercules will have to construct a theory of the law as a whole, namely the theory which best fits and justifies law as a whole from the point of view of the particular issues implied in the particular case.

Judge Hercules does in no way bring Dworkin's theory closer to a natural law theory. But it introduces the element of an ideal self-reflexivity of law as a whole. This element could be said to correspond to a hermeneutic border conception: the ideal possibility of a complete reflexion of the historical situation. Or, it could indeed be said to correspond to Hegel's absolute spirit. From a hermeneutic perspective, Judge Hercules, being immensely wise and with complete knowledge, cannot be compared to a person (a person would always be characterized by a limited perspective, by particular preconceptions etc.). Judge Hercules would rather represent the ideal possibility of the self-reflexivity of law as a whole in the light of the historical situation in question.

⁹⁵ Dworkin: *Law's Empire*. I had the pleasure of participating in a seminar at NYU, New York, in which Dworkin presented his reflexions regarding the concept of 'dignity' as a foundation of human rights.

Apart from positivism which - as argued - culminates in hermeneutics to the extent that it seeks to take into account everything which has been historically manifested, there are other ways in which to respond to the fact that we are left with the constructed human nature. Obviously, this is also the starting point for various kinds of constructivism. Constructivism differs from positivism in that it does not merely presume the constructedness of social phenomena, including law and human beings, it directs the attention towards the mechanisms of constructions. So, instead of merely describing, for instance, law as it unfolds, as it is manifested, it seeks to uncover the conditions for the manifestations of law. This may be discursive, institutional and historical conditions. Constructivistic approaches often have a diagnostic purpose, refraining from positive normative agendas themselves (because such agendas could not be formulated beyond the discursive, institutional and historical world which is the object of analysis). However, they may carry with them the unspoken normative agenda of what we might call 'de-naturalization', that is, opening our eyes to the fact that many of the phenomena which we believe to be natural or unquestionable are not and could in fact be otherwise. In this sense, constructivism might carry with it a certain hope of liberation - liberation in the sense of insight and acknowledgement of the possibility of change.⁹⁶ However, constructivistic approaches are also often applied in a strategic manner. We may say that normatively speaking, constructivism has a double-face: since it reveals the mechanisms of power it may function as a critique of power; but it may also be used in the service of power, helping to refine existing power techniques.

As far as legal philosophy is concerned, the movement Critical Legal Studies can be associated with constructivistic approaches. It should be borne in mind, though, that this movement is an extremely diverse movement (today even more than in the 1970s and 80s) which has introduced a variety of theoretical approaches to the legal field. Even if we may dare to present the overall goal of the movement in a single term, that of 'critique' - that is, the critique of law as an expression of power - it must be emphasized that such critique is not necessarily based on constructivism in the consequent meaning of the term. A critique the purpose of which is to reveal the mechanisms of power in order for us to see the 'true' interests at play (whether they be class interests, interests of the established systems of power or interests connected

⁹⁶ Naturally, I have Foucault in mind, - but also discourse-analysis philosophers like Ernesto Laclau and Chantal Mouffe

with sex, race or religion) would not be a constructivistic critique. In the early years, this latter kind of 'revealing' or 'demystifying' critique dominated the movement (largely from a marxistic point of view). But later, and certainly today, approaches which do not presuppose the existence of a positive truth (neither of human beings nor of society) behind the revelations brought about by critical analysis play a dominant role.⁹⁷

Finally, there is the approach which I would adhere to and which is the foundation of the dissertation. This approach has a lot in common with hermeneutics for which reason it can also be said to have a positivistic aspect. It is not foreign to constructivism either - although it does not exactly seek to reveal the mechanisms or conditions of the constructions with which we are confronted. It acknowledges the constructed nature of law and everything that law refers to, including human beings, but rather than seeking to reveal the nature of these constructions, it embraces them and pursues their conceptual implications. Of course, we are dealing with very subtle distinctions. The difference between a 'condition' or mechanism' and an 'implication' may not always be unambiguous. When deriving, for instance, a variety of 'logics of rights', it could very well be said that I am revealing the mechanisms of the law. However, the difference is important. It concerns exactly the question of whether the analysis aspires to be merely diagnostic or recognizes its own constructive role. To the extent that the analysis is constructive itself, it cannot claim to unveil 'conditions'. Rather, it pursues 'implications'. 'Implications' are double-sided: they concern the nature of the empirical material itself, but they also add something to it, moves and transforms it. 'Implications' are an expression of the pursuit of the inherent possibilities of the material, but as such, they involve creation as well - decisions, breaks with determination.⁹⁸

In other words, the approach I am talking about can be associated with the other three, positivism, constructivism and hermeneutics - although it has most in common with the hermeneutic approach. But what distinguishes it from the other three is its immanent-transcendent foundation, - that it assumes the inescapability of the question of the human foundation of law and of the question of the normative foundation of law, although both of these questions are paradoxical questions when raised on the basis of

⁹⁷ For an excellent assessment of the significance and import of the critical legal studies movement, see Alan Hunt: "The Theory of Critical Legal Studies", in Coustas Douzinas and Colin Perrin (ed): *Critical Legal Theory. Critical Concepts in Law. Volume I*, chapter 13

⁹⁸ Obviously, this is my own understanding of the meaning of 'implications'. 'Implication' could be defined in a much stricter logical way. 'Implication' could be said to mean that which is entailed in a concept (or a statement), adding nothing to it (corresponding to Kant's use of the term 'analytical').

an acceptance of the loss of 'nature', including 'human nature'. This is the approach which I have developed above. It is deeply indebted to the dialectical philosophers, and as such, it could be called 'the negative approach'. However, it does not only rely on negative methods, but is also deeply indebted to Derrida's ways of *working with* the overflow of meaning so that it also *remains with us* instead of being captured in the secrets of the 'non-identical' or in the dialectical force of negativity. From the perspective of the Derrida-inspiration, the approach could be called 'the spectral approach'. However, since I have developed this approach in the tensions between dialectic and deconstructive philosophy, we may simply call it 'the approach marked by the paradoxes of law'.

It must be underlined that the characterizations of the different approaches and the relationship between them can certainly be discussed. For instance, I have said that the hermeneutic approach can be seen as a culmination of positivism, as the most comprehensive version of positivism. Not everyone would agree, I am sure. And certainly, the more dominating the element of self-reflexivity becomes (the self-reflexivity of law or of the historical situation), the more problematic the comparison between hermeneutics and positivism. The element of self-reflexivity requires negativity. Likewise: exactly how the lines of demarcation should be drawn between constructivism, hermeneutics and deconstruction can certainly be discussed. Hermeneutics and deconstruction may indeed uncover conditions of constructions, - just as constructivism may sometimes pursue consequences and implications. The characterizations given above should not be understood as definitive; rather, it has been my purpose to draw a landscape of the different theoretical possibilities with which we are left as a result of the 'constructed human nature'.⁹⁹

Considering the situation of political philosophy today, it is clear that none of the approaches characterized above are capable of establishing a normative foundation of law or politics. They are only capable of analyzing that which is empirically given, serving the self-reflexivity of that which is given, examining its conditions or seeking its borders, both in terms of its possibilities and impossibilities.

In my opinion, the approaches mentioned above (including, of course, any number of possible variations and combinations) constitute the most serious and consequent

⁹⁹ Clearly, there would be other positions than the mentioned ones, system-theory, for instance. However, system-theory could be related to the above-mentioned positions, or more precisely, related to the tensional theoretical field they constitute

approaches today because they all presume the 'created human nature'. But naturally, there are philosophers today who do not share this presumption and who do indeed build normative orders.

Habermas, being one of the most refined of those ordering-building philosophers, is worth mentioning. It is interesting that the transcendental philosophy which originally, when formulated by Kant, was directed against the idea of 'unconstructed nature' ('das Ding an-sich'), now appears as the last bastion for a position wishing to save a foundation which cannot be reduced to historical and social constructedness. Certainly, the universal principles of communication derived by Habermas are not 'nature' in the sense of a nature which transcends human knowledge. However, these principles of communication are still presented as 'conditions of possibility of rational communication and argumentation'. It can be discussed whether Habermas is a transcendental philosopher. He would claim, himself, that he is not. But in any case, the principles of communication he derives are granted a universal status, and accordingly, they are not reducible to historical and social constructedness.¹⁰⁰

In spite of the fact that the principles of communication derived by Habermas are purely formal, I shall argue that they still tell us something universal about human beings *and* about the building of political order. Habermas would certainly understand human beings as historically and socially constituted, and likewise, he would hold that norms of social order are being (and should be) developed in particular historical situations. However, the universal principles of communication constitute a universal feature of communication and hereby a *universal feature of intersubjectivity* (which for Habermas is the basic concept of subjectivity). Consequently, they tell us something about human beings. It could be argued that these universal features of communication are only ideal features and therefore do not characterize the empirical human being. But if we take seriously that they are conditions of possibility of meaningful communication at all, I do find that it would be hard to deny that they constitute, as well, a universal feature of the existing, historically manifested intersubjectivity. In this sense, they tell us something about who we are - ideally *and* empirically. Likewise, from the universal principles of communication Habermas is able to derive certain normative principles of political order, such as formal principles of democracy and human rights. Again, since the universal principles of communication constitute

¹⁰⁰ Jürgen Habermas: „Treffen Hegels Einwände gegen Kant auch auf die Diskursethik zu?“ In: *Erläuterungen zur Diskursethik*, p. 9-30; Jürgen Habermas: *Kommunikatives Handeln und detranszendentalisierte Vernunft*

conditions of possibility of meaningful communication at all, the political formal principles are not just ideal principles which may sometimes be satisfied, other times not, they are principles which must be satisfied (in some form or another, and at least to some degree) in order for a political regime to be morally good and justifiable at all. Habermas's theory is, as I see it, a very sophisticated expression of the identity-thinking. The universal principles of communication constitute fundamental features of intersubjectivity in an ideal and empirical sense, - and from these principles, normative principles of political order are derived.

It is clear, though, that we are not confronted with any utopian principles of political order - neither 'utopian' in the literal sense of a non-place, an unattainable political ideal, nor 'utopian' in the more moderate sense of an ideal which stands in sharp contrast to existing forms of order. In 1985, Habermas wrote that our utopian energies had been used up.¹⁰¹

Are there any utopias left, or would Habermas' universal foundations constitute the most daring attempt of political-philosophical order building? In his book, *The last Utopia*, Samuel Moyn argues that the idea of human rights constitute our last utopia. If this is true, then it would be a strong confirmation of my claims concerning the dominance of identity-thinking today.

I have argued that the establishment of political purposes and visions have become increasingly difficult, and that these difficulties are associated with the loss of a 'human nature', with the fact that we are left with the created human nature. There is still a 'natural law' ghost haunting us, and this combination of the lack of a positive concept of nature and the presence of the natural law ghost gives rise to a particular identity-thinking (and a variety of different symptoms hereof) - a collapse of presumptions as to who we are and who we aspire to be. It can be discussed whether the difficulties regarding the establishment of political purposes and visions stem from the presence of the natural law ghost, or whether they are rooted in the loss of a 'human nature'. Do we necessarily need a 'human nature' in order to establish a normative foundation of law and to form political purposes? However that may be answered, the present combination of an entirely created human nature and the natural law ghost obstructs such normative establishments.

¹⁰¹ Jürgen Habermas: "Die Neue Unübersichtlichkeit. Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien", in *Merkur. Deutsche Zeitschrift für europäisches Denken* 29, p. 1-14

We may still say, as Leo Strauss said in the 1960's, that political philosophy is in a crisis. Political philosophy has learned to live with that crisis, though; a number of profound, original, perceptive, complex and rich theoretical approaches as well as analyses of our historical situation have been developed - approaches and analyses which take as their starting point the created human nature. Just think about Foucault, Derrida and Deleuze¹⁰². However, it is clear that none of the theories in question are capable of establishing, in a direct and positive sense, a normative foundation of law or politics.

The same can be said about this dissertation. It does not offer a normative foundation of law or politics as such. It offers a construction of an 'ideal order' - but a particular 'ideal order', based on analyses of a particular empirical rights regime. However, I believe it to be crucial that this construction is carried out on the basis of a theoretical tension between the human and the normative foundation of law, that is, in the light of the possibility that those two foundations may not be identical. The dissertation takes the natural law ghost seriously while simultaneously seeking to step out of its shadow; instead of assuming the possibility of free and creative establishments of political purposes on the basis of the created human nature, it assumes that we need the tension between a human foundation of law and a normative foundation of law in order for constructive reflections with respect to the latter to be possible at all.

The tension between a human foundation of law and a normative foundation of law, in its turn, depends on the tension between the createdness of human nature and the unpredictability of human nature, that is, the existence of something which defies constructions and which cannot be captured by any calculability. This is the tension which underpins the thinking of both Derrida and Schmitt and by virtue of which it is possible to pursue a double agenda: firstly, accepting the loss of a 'human nature', accepting that we are left with the created human nature, and secondly, challenging the identity-thinking which, as argued, dominates today. By building on the tension between 'createdness' and 'incalculability', it is my hope that not only the inescapable question regarding the relationship between law and those subjected to law, but also the question of the normative foundation of law in the sense of overarching purposes and visions of social order may be reflected both more radically and creatively.

As already emphasized, within this dissertation, such reflections will not be carried out in abstraction or in general, but through conceptual analyses of a particular empirical

¹⁰² In the 1950's-60's, when Strauss presented his diagnosis, rich and complex theories reflecting the historical conditions of the human situation existed as well - like the theories of Adorno's or other Frankfurt School members. These theories are, however, shamelessly ignored by Strauss.

rights regime, namely EU social rights. In the following chapter, it will be explained more specifically how this will be done.

Chapter 3

Structuring and Grasping the Material: Signifiers, Categories, Temporalities and Ghosts

The dissertation relies on a tensional theoretical foundation, as developed in the last chapter on the basis of a complementary reading of Carl Schmitt and Derrida, but involving other philosophers as well, most notably Hegel, Adorno and Deleuze.

This tensional foundation revolves around the intimate connections between law in the narrow sense of the word (understood as the juridical field) and law in the most wide-reaching sense of the word (involving all sorts of informal manifestations of law and ultimately language itself); around the possible undermining of law due to a crucial element of law itself, namely legality or calculability, and the possibilities of establishing a 'legitimacy regime', founded in the cultural habits and conceptual landscapes of a given time; and around the fundamental paradox of law - that although law can never be just, we cannot escape the question of the 'justice of law', it is part of law.

This tensional foundation unfolds on the basis of an understanding of concepts according to which concepts constitute our reality in that they imply the rationality forms of reality; these forms of rationality are multiple, though, and will continuously collapse - with devastating as well as transforming effects. Moreover, they are never 'pure', but always muddled and unclear. This is due to the fundamentally unstable, fragile, dynamic, manipulative and seductive nature of language. We may say that the rationality forms of reality never rest safely in the arms of language, it may always turn out that they are resting just next to an enemy. Finally, it should be emphasized that although concepts constitute our reality, they do not exhaust reality. The speechless - that which escapes concepts and cannot be grasped by concepts - constitute a dynamical source of language and of conceptual transformation.

Due to this understanding of concepts and language, the tensional foundation embraces both deconstruction and the pursuit of overall conceptual meaningfulness, or more precisely, the alternation between the two. Furthermore, it builds on negative

dialectic, but also on more free and associative interpretations, on 'overflows of meaning'. And most notably, it acknowledges the aspect of creation and decision in any interpretative act for which reason the relationship between those elements - deconstruction and the pursuit of overall conceptual meaningfulness, dialectic and associative interpretation - cannot be determined in advance. This also means that the normative implications of an investigation carried out on the basis of this tensional foundation cannot be determined in advance: the 'Diagnostician', the 'Reconciler' and the 'Critic' will all be in play.

Finally, this tensional foundation comprises two tensional relationships presumed to be interrelated: firstly, the tensional relationship between the createdness and unpredictability of human nature, and secondly, the tensional relationship between a human and a normative foundation of law.

Instead of speaking of a 'method' or an 'analytical strategy', I prefer to speak of a tensional theoretical foundation. Just like Gadamer would emphasize that hermeneutics should not be seen as a method, and just like Derrida would distance himself from any attempt of making deconstruction into a model or method, I shall also reject that the approaches which I have developed in the last chapter would amount to 'a method'. The dissertation is based on a theoretical foundation, not on a method. That is, it is based on thorough considerations concerning the nature of and relationship between law, language and social order, the nature of conceptual analysis, the tensions between the creations of the researcher and the logical forces of the empirical material itself, between construction and de(con)struction, between negative dialectics and deconstruction, normativity and diagnosis - and concerning our 'metaphysical situation' today. This theoretical foundation is tensional and restless, rather than safe and firm, but nonetheless a foundation. As such, it comprises certain *approaches* in the sense of ways of understanding the empirical material and the relationship between researcher and material.

In fact, we may speak of a certain attitude towards the empirical material. This attitude implies that the exact way of proceeding, of moving forward analytically, cannot be determined in advance. What I have referred to as 'sensitivity towards the material' depends, firstly, on contemporary horizons which cannot be defined in advance, and secondly, on creation and therefore on decisions which cannot be reduced to any predictability or calculability (if they could, they would not be decisions).

When that is said, however, I have established a particular structure. This structure has already been indicated as far as its most overall features are concerned. In Part I, the legal empirical material is being analyzed. In Part II, the political-philosophical construction takes place - in the form of a building of a particular social order, the 'ideal order'. The constructions carried out in Part II are based on the analyses of Part I. The very last section of the dissertation (called 'Ending and Beginning') entails a summary of the main results and some concluding remarks, but it also entails three last reflexions which seek out the *potentials* of the 'ideal order. The radicality of the nature of the conceptual analysis - more precisely, the radicality of the pursuit of overall meaning, of deconstruction and of the alternation between the two - will increase in the course of the dissertation and culminate in the last reflexions presented in the last part of the dissertation.

The structure I have established is also more detailed than that, though. Its more detailed structure is based on certain 'grasps' - ways of structuring, holding, opening and creating the empirical material - so that we may begin analyzing and constructing at all. In overall, there are four 'grasps'. The first concerns the *signifiers* of law (in relation to the right-holders), the second the *political-philosophical categories* of law, the third the *temporalities* of law and the fourth the *ghosts* of law.

These 'grasps' certainly reflect the theoretical foundation, but they also have a different status. They have been developed in close interaction with the empirical material. To some extent, they have only arisen in the course of the analytical work. And in any case, they have found their precise form in the course of the work.

Different kind of signifiers of right-holders - corresponding to different kinds of logics of non-discrimination-rights

The overall structure of Part I springs from a consideration as to the nature of the right-holders. Rather than structuring the analyses according to different legislative acts (Directives and Regulations) or according to different legal problematics, Part I follows the right-holders. More precisely, I ask: What definitions of right-holders are entailed in this rights regime, and what rights are attributed to them?

Why 'names' and not 'categories'?

The rights regime under consideration entails uncountably many different definitions of right-holders. A given legislative act does not only lay down who are covered by the act as such, it also usually entails a range of specifications with respect to particular

criteria which must be met in order to be able to claim particular rights. Accordingly, definitions of right-holders may be quite extensive. An example could be: 'A family member of an EU-citizen worker residing in a different member state than the state in which he or she is a national citizen and who has resided there for more than 6 months.' Such *general* definitions of right-holders entailed in legislation must be distinguished from the *particular* definitions of right-holders which we encounter in judgments - or in connection with any particular application of a given legislative act. Whenever a legislative act is applied in relation to a particular case, a particular definition of the person (or persons) involved in the case will be established, and that definition will be compared to one or more of the general definitions entailed in legislation. The relationship between the general and the particular definitions is dynamic, though. Particular definitions will affect the understanding of the general definitions. A particular definition established in a particular judgment may even be used as a general definition in a subsequent judgment in the sense that this judgment may rely on the existing case-law.

I shall refer to such definitions of right holders as 'names'. General definitions of right-holders give rise to general names, and particular definitions to particular names. Apart from that, I shall distinguish between overall names (such as 'EU-Citizen', 'Worker' or 'Third Country National') and sub-names (such as 'EU-citizen capable of self-support', 'Retired Worker', 'Unemployed Worker' or 'Long Term Resident' (a sub-name of 'Third Country National')). Obviously, combinations of different names are also possible, hereby giving rise to new names ('EU-citizen Worker' would be an obvious example).

Why not simply refer to these definitions as 'categories', why 'names'? By using the term 'name' and not 'category' it is my intention to underline the creational aspect of the legal definitions of right-holders. These definitions are not identical with the right-holders, they are merely signs of possible right-holders. An invincible difference exists between the definitions and the right-holders who are signified by them. The legal definitions are human creations which must be claimed by the right-holders in order for them to be right-holders at all. The right-holders must fit the definitions. But this fitting does not follow by itself. A right-holder must be established as 'a someone' who fits the relevant definition.

A 'category' could of course also be seen as created, but categories may also be regarded as something natural. Furthermore, a category could be seen as something

independent, as something in itself. A 'name', on the contrary, is something which is *given*. The act of giving the name, the act of naming, cannot be separated from the name itself. In addition, the name is given to someone. These two features of the name - that it corresponds to an act, and that it is intended for someone - gives the name its special status: it is arbitrary (created by humans, springing from human decisions); yet, it seeks to reach towards something which already exists. Even if carrying idealizations, the name is supposed to name someone who is presumed to exist independently from the name. And as such, it is supposed to be suitable, to fit that someone. But it is also so that through the name, that someone becomes a particular someone.

Accordingly, by using the term 'name', I wish to underline the tension between the createdness and the incalculability of the right-holders. They are created in order to be right-holders at all, they are created by the law who names them and they are created by themselves when reaching out towards the creations of the law in order to be the creations which fit the law. Simultaneously, they are not simply identical with these creations.

What we shall be analyzing is the names of the law and not the incalculability which escapes the name. But even if the latter is not accessible to us, the dynamics which the relationship gives rise to are certainly accessible. As already implied, in connection with any particular application of a given act of legislation, it will have to be established whether a particular person can actually claim one or more of the names implied in that act. This requires the establishment of a particular name which will be compared with the relevant general name - a comparison which, in turn, involves an interpretation of the general name in the light of the particular name. These dynamics will be most obvious whenever the general names of the law are very open, unclear or muddled - or ambiguous for other reasons (they may, for instance be 'unfitted' for the social order within which they are enforced because they are outdated or because they disregard the lifeforms of that order). But in principle, these dynamics are in play in connection with every particular application.

When choosing the term 'name', I was inspired by the film director Greenaway. 'Naming' figures as a crucial theme in several of his films, if not in them all. 'A Zed & Two Noughts' is one of my favorites. The twin brothers Oliver and Oswald have lost their wives in an accident and are tormented by grief. In this state, they become obsessed with images of decay. They study and photograph, systematically, the decomposition of the living, beginning with vegetative life forms, continuing with

animals and ending with human beings (themselves). Simultaneously, they watch videos on the origins of life. The film as such is permeated with categorizations of the living. The brothers work in a zoo. Continuously, names of animals are spoken out, by the brothers and other characters of the film, according to various systems, for instance the alphabet or as part of riddles or scary children songs. Naming, life, death and the absurdities of categorization flow together.

Another film, 'Drowning by Numbers', revolves around similar features. Also the characters of this film are obsessed with naming and killing according to absurd systems, number systems or systems stemming from children's games. Both films depict the intimate connection between naming, contingency and death. The characters are driven by a desire to uncover the mysteries of life. But their obsession with names, categories and systems turn out to be more related to death than to life. The absurdities of their attempts become obvious. Their systems - such as the alphabet, numbers or rules of children's plays - are completely arbitrary. It is clear that the original impulse, the fascination of life and its mysteries, is being exposed as (or has been turned into) complete alienation.

In other words, 'names' concern a desire to know the world, to know it in truth. 'Names' concern the idea of an original connection between language and the world - the hope that we may be able to know the *true names* of things and beings of the world. In the two films, this hope is honored and ridiculed at the same time.

'Names' constitute a deep concern for Derrida as well. His starting point is somewhat different, though. The names in Greenaway's film are closely related to categories and categorization. But they still carry with them the hope of an original connection between language and world, the aspect of a reaching out towards the living; as such, they are acts, acts of giving language to the living, but also acts of killing the living. As acts, the names in Greenaway's films are exactly names, and not just categories. Derrida, on his part, considers proper names, that is, names which are meant to be unique and singular, given only to one person. Proper names are, in principle, not related to categories; rather, they stand in contrast to categories, to any generalization.

For Derrida, proper names concern the singularity of 'the other', the impossible possibility of a unique language of 'the other' - and therefore justice and transcendence.

'To open a name is to find in it not something but rather something like an abyss, the abyss as

the thing in itself.¹⁰³ The act of giving a name is an act which defies calculability: it involves no exchange, it is a giving of something which one does not have.¹⁰⁴ However, since we cannot speak the language of the other, since we cannot open '*the thing in itself*', but only confront it as an abyss, the proper name becomes a sort of code-name: a 'pseudonym' covering the real name, or a cryptonym secretly referring to another name. Accordingly, the proper name is both unique and a code for something else which will remain hidden from us. A proper name is a 'homonymic mask', as Derrida says, a plurality in a singular fashion, a plurality of threads leading into a labyrinth.¹⁰⁵ - For this reason, the proper name is related to death. As a part of the 'community of masks' it becomes detached from the bearer of the name. What we ascribe to the name is not ascribed to the bearer of the name. Since only the name can inherit, and not the bearer of the name, '*the name is always and apriori a dead man's name, a name of death*'. What is given to the name never returns to the living.¹⁰⁶

So, even if Derrida considers the name as singularity and 'otherness' - in contrast to Greenaway for whom names and categories are closely related - his thinking amounts to the same paradoxes as those springing from Greenaway's films: the hope of speaking the language of the living, the hope of an original connection between language and world, unfolding as a mysticism which ultimately becomes alienation and death.

The names of the law which I shall analyze in Part I of the dissertation are obviously related to categories just like Greenaway's names, they are not proper names. In addition, they correspond to social categories, not presumed natural categories - for which reason their 'createdness' is very obvious. Nonetheless, they are not created as independent, self-sufficient names. They are names given to and intended for someone (even if that someone is an unknown someone), they reach out towards the living. They seek to capture the realm of the living while simultaneously and inevitably creating the living: being subjected to the law implies being named by the law. This naming is

¹⁰³ Jacques Derrida: Acts of Religion p. 213-214 (full quote: '*The name hidden in its potency possesses a power of manifestation and occultation, of revelation and encrypting. What does it hide? Precisely the abyss that is enclosed within it. To open a name is to find in it not something but rather something like an abyss, the abyss as the thing in itself.*')

¹⁰⁴ Jacques Derrida: *On the name* (the essay "Sauf le nom (Post Scriptum)")

¹⁰⁵ Jacques Derrida: "Otobiographies: The teaching of Nietzsche and the Politics of the Proper Name", in Christie McDonald, Claude Lévesque (eds): *The Ear of the Other. Texts and Discussions with Derrida. Otobiography, Transference, Translation*, p 11

¹⁰⁶ Ibid, p. 7

ultimately a kind of killing of the living in the form of a fixation of it. But due to the fact that the names of the law are never stable and fixable, but always dynamic and contestable, the killing is never complete. Something remains, some sort of resistance or doubt on behalf of the living. Or, in our terminology, a tension between createdness and incalculability.

Names, non-names and double-names - corresponding to as-if-rights, non-significance rights and determinately reduced non-significance-rights

So, this explains the meaning of the term 'name' within the context of the dissertation - in so far as 'names' can be explained at all.

But why do I also need to speak of 'non-names' and signifiers in-between names and non-names? Originally, this was not my intention, but it became necessary because of the principle of non-discrimination - constituting the core principle on the basis of which the majority of EU social rights are formulated.

Firstly, let me draw attention towards the special and indeed peculiar nature of the principle of non-discrimination. 'Non-discrimination' means non-difference or non-differentiation. In its unqualified form it simply says: there shall be no difference. If we consider this for just a short moment, it is clear that the principle of non-discrimination is the most radical and shocking principle one could imagine. Law would be impossible without difference. Law establishes distinctions, law differentiates between different people, situations, rights, duties, crimes, punishments and so forth. Law is all about difference - just like language in general relies on difference. Naturally, the principle of non-discrimination is not unfolded in its unqualified radicality. It is specified *in what respects* there shall be no difference. More precisely, particular discrimination grounds are laid down, along with a specification of material scope. - However, this does not save the principle of non-discrimination from a fundamental paradoxicality: it states that as far as certain discrimination grounds are concerned, we should not make any distinctions - but by doing that, the principle points to the very possibility of distinctions springing from the discrimination grounds in question.

Within the regime of EU social rights, we encounter another principle, namely the principle of equal treatment. Or is it another? According to the CJEU, the principle of non-discrimination and the principle of equal treatment are but two different expressions of the same principle (the principle of equal treatment and the principle of non-discrimination should be understood as *'two labels for a single general principle of*

*Community law*¹⁰⁷). This view is generally accepted in the literature; we are merely confronted with a positive and a negative formulation of the same principle.

I shall argue that if we consider the logical features of the two principles, it is clear that they are different. The principle of equal treatment presupposes the designation of a particular group of right-holders which is being compared to another group of right-holders. For example: *'all Union citizens residing [...] in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State [...]'*¹⁰⁸. In this example, *'all Union citizens residing in the territory of the host Member State'* is being compared to *'the nationals of that Member State'*. The principle implies that the two groups of people are to be treated equally, or more precisely, the former group is to be treated as the latter group. The principle of non-discrimination, in contrast, does not presuppose the designation of any particular group of right-holders. This also means that it does not presuppose any specification of the comparison which is to be carried out. For example: *'there shall be no direct or indirect discrimination based on racial or ethnic origin'*¹⁰⁹. This formulation does not imply that a particular group of right-holders should be compared to another group of right-holders. Naturally, in order to apply the principle, a particular comparison must be made possible, that is, two different groups must be defined and subsequently compared. For instance, one could compare the group of black people within a given community with the group of white people in the same community. But the point is that it is only in connection with particular applications of the law that such comparisons are established. In this sense, we may say that the particular right-holders are not defined in general, they arise and die in connection with each particular application of the principle.

Accordingly, the two principles are not only logically different in the sense that one corresponds to a positive, the other to a negative formulation, they are also different in the sense that one presupposes the designation of two particular groups of right-holders which are to be compared with each other, and the other does not. However, as soon as two groups are defined and the comparison is made possible, the two formulations can be used interchangeably. It can both be said that the two groups are to be treated equally and that there shall be no discrimination between the two groups.

¹⁰⁷ Case C-422/02, *Europe Chemi-Con (Deutschland) v Council*, par. 33

¹⁰⁸ The principle of equal treatment as we encounter it in Directive 2004/38/EC, art. 24(1)

¹⁰⁹ The principle of non-discrimination as we encounter it in Directive 2000/43/EC, art. 2(1)

From a logical point of view, it would have been more consequent had the law only referred to the principle of equal treatment whenever two particular groups of right-holders are designated and to the principle of non-discrimination whenever that is not the case. But this is not what the law does. The two principles often appear together, even within the same sentence, indicating that they are one and the same (for example: *'For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination [...]'*¹¹⁰). When that is said, however, the law usually makes clear which one of the principles is the operative one, - but there are also cases where this is not evident.

Consequently, I will have to agree with the CJEU and the literature: Within the context of EU-law, the two principles do amount to one and the same principle - for the simple reason that they are used interchangeably. But this does not mean that we cannot distinguish between the two different logics which are at stake. In order to avoid any confusion I shall call the two logics something different than 'equal treatment' and 'non-discrimination'. Whenever two particular groups of right-holders are designated for the purpose of a comparison, I shall be speaking of an *as-if-logic*. The *as-if-logic* implies that a particular right-holder is to be treated *as-if* he or she was in a different situation than he or she actually is (for instance: *as-if* he or she was a national citizen of the state of residence). However, whenever no particular groups of right-holders are designated, I shall be speaking of a *non-significance-logic*. The *non-significance-logic* simply implies that a given aspect (like 'racial or ethnic origin') shall be insignificant within a given area of rights.

Non-names are what springs from the *non-significance-logic*. No right-holders are designated in advance, only discrimination-grounds are designated¹¹¹. The discrimination grounds we shall be dealing with are the following: 'racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief'. These discrimination grounds make out the conceptual foundation on the basis of which particular names (and hereby particular comparisons) may arise and die in connection with each new application of the law. On the basis of the discrimination ground 'religion or belief', for instance, we may define a particular group of right-holders, like 'Christians' which can be compared to non-Christians. In so far as the discrimination

¹¹⁰ Art. 2(1), Directive 2000/43/EC

¹¹¹ Admittedly, a designation of personal scope will always be given (such as 'everyone' or 'the working population'). But the potential victims of discrimination are not pointed out.

grounds make out the foundation of particular names, I shall refer to them as non-names. They are non-names because they are not really names, but give rise to names - names which are granted no general status, but are given and taken in connection with each new application. In addition, these names which rise and die continuously are fundamentally unwanted. According to the non-significance principle, they are exactly meant to be non-significant; they correspond to differences which are only mentioned for the purpose of being abolished.

As already implied, it turned out (in the course of analysis) that the discrimination grounds 'racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief' are connected to the non-significance-logic and therefore to non-names, whereas the discrimination ground 'nationality' is connected to the as-if-logic and to names.

As far as concerns the last discrimination ground we shall be dealing with, namely 'sex', I thought for a long time that this discrimination ground could be analyzed as a non-name. However, I discovered that I was in fact facing a third kind of logic. I have called this logic *the determinately reduced non-significance logic*. The determinately reduced non-significance logic is related to the non-significance-logic in that it does not presuppose the designation of a particular group of right-holders. But it does reduce the space of potential right-holders by implying that the particular names which can be established in connection with the application of the law are the names 'Man in contrast to being woman' and 'Woman in contrast to being man'. I shall refer to these names as *double-names* because they depend on each other, they are not stated independently, but only in the light of the other name. The determinately reduced non-significance logic implies that the aspect of 'being one or the other sex' shall be insignificant within a certain area of rights.

But as far as concerns the discrimination ground 'sex', this is not all. It turned out that the discrimination ground 'sex' has given rise to a variety of different logics - logics, however, which somehow relate to the overall logics mentioned above. More precisely, they can be said to lie 'in-between' the as-if-logic and the non-significance-logic - just as the determinately reduced non-significance logic can be said to lie in-between those two logics. For this reason, I shall be talking of '*signifiers in-between names and non-names*'.

The overall structure of Part I springs from these distinctions between different signifiers of right-holders - reflecting, in each their way, the tension between the createdness and the incalculability of the right-holders.

First, we shall analyze names (relating to the discrimination ground 'nationality'); afterwards, non-names (relating to the discrimination grounds 'racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief'); and lastly, signifiers in between names and non-names (relating to the discrimination ground 'sex')

Hierarchies, logics of rights, fundamental presumptions and horizons

As unfolded in the Introduction, political-philosophical construction will be carried out in accordance with four political-philosophical categories: *social structure*, *social means*, *purposes* and *human foundation*. In order for the analyses of Part I to function as a basis for this construction (carried out in Part II), they must be directed towards these categories.

The overall structure of Part I sets the stage for the first category, 'social structure'. This category concerns the hierarchical features of the 'ideal order'. Who are granted the stronger rights, and who the weaker rights? Who are excluded? But this category also concerns the issue of non-hierarchical features. The social structure may turn out to have fluid aspects (disrupting the possibility of a complete social hierarchy) as well as egalitarian features.

In Part I, I shall examine the names, the non-names and the signifiers in-between names and non-names so as to make possible a construction of the social structure of the ideal order in terms of its hierarchical as well as non-hierarchical features. More precisely, I shall examine them according to their substances and their attributes. By 'substances' I mean their conceptual definitions or lack of the same. To what extent is a given signifier defined in a precise and unequivocal way? To what extent is the definition open or ambiguous? Does its openness function as a strength or a weakness (does the CJEU make use of its openness so as to extend the personal scope of a given provision or to limit it; are we confronted with a flexibility that unfolds according to overall understandings which can be ascribed a certain meaningfulness, or does it amount to arbitrariness)? What are the conceptual implications of the definition, what kind of differences are at stake? etc. By 'attributes' I mean the rights that are granted to the different signifiers. That may be strong rights (in the sense of rights which opens substantial life possibilities for the right-holders or support such possibilities) or weaker rights (in the sense of rights which only open limited possibilities or grant limited support, are full of exceptions or may - for other reasons - easily be eroded). Just like the definitions of signifiers may be ambiguous, the rights which are attributed

to the various signifiers may be unclear. Naturally, such unclarities must be taken into account. It must be analyzed to what extent the unclarities in question can be seen as something which serve the right-holders in the sense that they give rise to a fruitful flexibility (that is, a flexibility that functions on the basis of certain principles or overall understandings), or whether we are confronted with considerable legal uncertainty.

It is clear that names, non-names and signifiers in-between names and non-names cannot be brought together in the same hierarchy. In fact, only the analysis of names will in a direct way tell us something about the hierarchical features of the social structure. The analysis of non-names may indirectly lead to hierarchical features of the social structure to the extent that the particular names which arise on the basis of non-names in connection with the particular applications of the law can also be seen as general expressions of the understanding of the rights in question. In other words, the CJEU might, over time, develop certain understandings of who the potential right-holders would be, in stead of upholding the radical flexibility which is the logical implication of non-names. This means that non-names may gradually be transformed into names, as a result of a growing caselaw. As far as signifiers in-between names and non-names are concerned, we are facing a chaotic mixture: the discrimination ground 'sex' is both being interpreted as a double-name ('Man in contrast to being woman' and 'Woman in contrast to being man'), but it is also being dealt with as a non-name which has been transformed into a number of names (such as 'Woman on maternity leave', or 'Transsexual person' f.inst.).

So, since the different nature of the signifiers in question means that they cannot be brought together in the same hierarchy, they shall give rise to three different hierarchies. And only on the basis of these three different hierarchies will it be possible to construct a social structure which extracts the hierarchical as well as the non-hierarchical features from all of them. It should be noted that especially the hierarchy of non-names falls out. When building a hierarchy of non-names, we are not building a hierarchy of defined right-holders, we are building a hierarchy of fluent right-holders (but where the fluidity relates to certain concept in the form of particular discrimination grounds)

As it appears, the overall structure of Part I (according to which we follow the right-holders, or more precisely the signifiers of right-holders in the light of their tensional relationship to the right-holders) sets the stage for the first political-philosophical

category, 'social structure'. But how does Part I prepare for the construction according to the other three categories?

'Social means' are constructed on the basis of logics of rights. By 'logic' I understand a particular relationship between different conceptual elements - formulated dynamically, that is as a particular movement of the relationship between conceptual elements which are brought together on the basis of the logic in question. The *as-if-logic* mentioned above implies that certain people (according to a particular conceptualization) should be treated *as-if* they had been in a different situation (according to another particular conceptualization). The *as-if-logic* implies, in other words, a movement from a relationship of difference to a relationship of similarity but on the basis of simulation. The two situations which are brought together on the basis of the logic are not made equal, they are merely moved towards a state of simulated equality.

Throughout Part I, I shall seek to analyze the logics of the non-discrimination rights with which we are confronted. The three overall kinds of non-discrimination logics have already been mentioned. It is important to emphasize that I have not in any way presupposed these overall logics. As explained above, it was during the course of analysis that I discovered that I was confronted with different overall kinds of non-discrimination logics. These overall kinds influenced the overall structure of Part I (since logics of rights have implications for the nature of the signifiers of rightholders). The analysis shall not stick to the three overall kinds of logics, though. It will pursue the different variants or modifications of these logics, not to mention possible combinations of logics. To the extent that we shall also be confronted with rights which are not non-discrimination rights, other logics will be added as well. - In Part II, it will be considered what these logics of rights mean when considered as *social means*. How do they affect the possibilities and limitations of the right-holders? What problematics do they involve, as such?

The third political-philosophical category is 'human foundation'. The construction of a human foundation must be based on presumptions as to the existence of a fundamental human nature inherent in the law. In other words, I shall continuously watch out for concepts and statements which some way or another imply (however indirectly) that human beings in general can be characterized in a particular manner, that is, that human beings can be characterized in a fundamental manner. There are not many such concepts and statements, but they can be detected. Especially the non-discrimination

rights related to the discrimination ground 'sex' and the discrimination ground 'religion or belief' turn out to imply presumptions as to the existence of a fundamental human nature.

Finally, the fourth political-philosophical category is 'purposes'. Hereby I mean purposes of the social order as such, not just the purposes of particular parts of the law - or indeed purposes of the rights regime as a whole. Naturally, the distinction between purposes of the rights regime as a whole and purposes of the social order is delicate. In a certain sense, they will be the same (the social order in question is exactly the order which is implied in the rights-regime, according to the double-meaning of 'implied', as explained in the last chapter). When distinguishing between the two, I only wish to emphasize that a given purpose must be reflected *as a purpose of social order*. For instance, 'free movement' certainly constitutes a declared overall purpose of the rights regime we are dealing with. But what does it mean as a purpose of social order? It is not enough to conclude that people may work and reside in different European countries. We must ask what kind of 'freedom' is in play and to what extent this freedom is bound to something else which rather resembles necessity. We must also ask what kind of 'movement' is in play; what is it that moves, and what is being moved (people, markets, lifeforms, desires)?

The construction of 'purposes' will to some extent be based on the explicit purposes of EU social rights (such as, for example, 'free movement', 'a social inclusive labour market', 'facilitating access to the labour market', 'improvement of the rights of Third Country Nationals', 'special protection of women'). But first and foremost, it will be based on analyses of the interpretational horizons within which the judgments of the CJEU are carried out. That is, in Part I, I shall seek to establish the nature of the interpretational horizons which are in play in the judgments of the CJEU.

Some clarification is required as far as concerns the role of 'horizons'. Clearly, 'horizons' are significant to the dissertation as a whole. In this sense, there is no part of it that does not depend on and interplay with horizons. However, when introducing the concept of 'horizon' as a particular 'grasp' - as a way of structuring, holding, opening and creating the empirical material - I give it a more specific role. In this role, it is meant to help me grasping those elements of the judgments which cannot be grasped in any other way. At a certain point, definitions, implications logics and declared purposes will not suffice. They will take us far with respect to understanding the argumentations provided by the CJEU, but in order to fully understand the meaning of

a judgment we need something more - a world vision of some kind, a more comprehensive conceptual landscape. In my view, this will always be so. But sometimes it is more obvious than other times. It will be most obvious whenever our 'automatic horizons' are not sufficient, that is, whenever we are surprised or puzzled by a judgment. Accordingly, when speaking of particular horizons established by the CJEU, I do not mean to imply that horizons are only established sometimes, and not always. I only mean to emphasize that sometimes, it is very obvious that particular world visions are in play. Such world visions I call 'horizons'. Horizons are in principle infinite. They imply an endless range of concepts and logics, - but also taboos and speechlessness. The concept of 'horizon' constitutes the most comprehensive concept we may think of from a human perspective. But even if horizons are always infinite, we may still talk about 'particular horizons', horizons which are characteristic in a certain way. Clearly, whenever I seek to describe the characteristics of a horizon that I encounter in a judgment, a horizon that speaks to me from a judgment, I can only do that from the perspective of my own horizon. I shall never be able to describe the horizon as such.

In this encounter, I shall be especially focused on the purposes of social order which the horizons comprize. I may both encounter understandings which confirm the declared purposes of the law - understandings that make these purposes meaningful as purposes of social order. But I may also encounter understandings which add other purposes to my construction, or understandings which cast doubt over the declared purposes.

When constructing 'purposes' in Part II, on the basis of the horizons analyzed in Part I, I shall of course focus on the relationship between the different horizons? Are we indeed confronted with several different horizons? If there are several, may we then distinguish between more or less dominant horizons? Are they connected or overlapping or rather contradictory? Can they ultimately be said to constitute one overall horizon or not?

So, analyses of the different signifiers of right-holders in terms of their substances and attributes prepares for the construction of a 'social structure'; analyses of the logics of rights prepare for the construction of 'social means'; the extraction of fundamental presumptions implied in the law prepares for the construction of a 'human foundation' ; and the analyses of interpretational horizons established by the CJEU prepare for the construction of 'purposes'.

The analyses of the different signifiers of right-holders in terms of their substances and attributes will be carried out systematically (they follow the overall structure of Part I). Logics of rights, fundamental presumptions and horizons shall be analyzed ad hoc, that is, as a part of the different signifiers of right-holders and according to relevance ('horizons' will for instance dominate the analyses of 'non-names', but play a less visible role in the analyses of names, - while 'logics of rights' and 'fundamental presumptions' will play a huge role in the analyses of signifiers in-between names and non-names).

The four different 'grasps' correspond to different focus points of the conceptual analysis. The substances and attributes of the signifiers concern *conceptual definitions*; the logics of rights concern *relations between conceptual elements*; the fundamental presumptions concern *conceptual presuppositions*; and finally, 'horizons' concern *any kind of conceptual connection whatsoever*.

However, these different kinds of analysis still all reflect the theoretical foundation developed in the last chapter. In other words, tensions between deconstruction and the pursuit of overall meaning, negative dialectic and associative ways of working with the 'overflow of meaning', concepts and speechlessness, the forces of the material itself and the aspect of creation are in play in them all.

Temporalities of law: Tensions between a presumed and an ideal order

As unfolded above, the overall structure of Part I springs from a differentiation between different kinds of signifiers of right-holders. Part II, in its turn, is structured in accordance with what I shall claim to be the fundamental temporal logic of human, historical law.

I shall argue that human, historical law is necessarily characterized by the following two features: It is meant to change the world in which it is implemented, but it is also based on the existing order of that world.

If a law were not meant to change the world in which it is implemented, then there would be no reason for enforcing it. This is true even for the most conservative laws. A law which mainly confirms an already existing order still confirms it by law. This 'confirming it by law', 'enforcing it as law' constitutes a transformation in itself. But it is clear that laws vary a lot as far their changing nature is concerned. Some laws break significantly with the existing order - either so radically that they are revolutionary

laws or laws that form part of a an actual 'new order', or more moderately in which case we may call them progressive laws.

Admittedly, there are laws which have become obsolete. There are even laws which have been superfluous from the beginning. Such laws are dead laws - unused and likely to be forgotten. Such laws do not change anything. But this is due to the fact that they do not function as laws. However, potentially they are still laws. As long as the dead laws are, in principle, still in force, they may be awoken and become living laws.

But there is also the other feature of law. Any historical law is based on existing orders - on the idea of law as such, on the institutions and basic concepts of law which have been historically developed, on other existing laws, various formal and informal institutions, established lifeforms, habits and general expectations. - As mentioned in the previous chapter, for more than 2400 years, political philosophers have thematized the relationship between law, culture and habits - and emphasized the aspect of continuity as a condition of the functioning of law, also as far as revolutions and new constitutionalizations of order are concerned.

On the basis of these two features which necessarily belong to historical, human law - at least to the extent that law can be said to function as law and not be a meaningless grimace of law - I shall argue that historical, human law implies a particular normative-temporal logic in the shape of a tensional relationship between a *presumed order* and an *ideal order*. The *ideal order* is the order meant to be realized by the law. For instance, if laws against murder have been drafted and enforced, then the ideal order meant to be realized by those laws would be an order in which people would not murder each other. The *presumed order*, on the other hand, is the order which is presumed to exist prior to the law. That would be an order in which people do indeed murder each other. The ideal order intervenes in the presumed order with the intention of changing it.

It is crucial to understand that the tensional relationship between the ideal order and the presumed order will continue to exist as long as a given law or law regime is in force. In other words: It is *not* so that the ideal ideal order replaces the presumed order at the very moment when the law enters into force. On the contrary: the presumed order will continuously belong to the law. If it did not, then the law would be obsolete. If it was not presumed that people might still murder each other, also after murder had been forbidden by law, then laws against murder would not be necessary. The possibility of breaking the law is presumed by the law itself; the existence of sanctions is the most clear expression thereof. This is what makes historical human laws

essentially different from natural laws or divine laws: historical human laws can be broken; in fact, they presume that they will be broken.

But the presumed order should not only be seen as something which the law is intended to break with. As explained above, any historical law is based on existing orders, not only negatively, in the sense of breaking with them, but also positively, in the sense of building on them. In other words: any given law presumes the existence of a range of other laws, institutions, particular life forms and informal rules in the sense that its possibility for being implemented and understood at all depends on them.

Neither the negative nor the positive aspect of the tension between the ideal and the presumed order is straightforward from the point of view of an analysis of law. Even if it may be clear that a given law introduces an intervention in the order which it presumes to exist and hereby breaks with that presumed order, that 'breaking with it' may be ambiguous - due to limitations, exceptions, open formulations, possibilities of justification etc. And, on the other hand, even if it may be clear that a given law builds on certain institutions which are presumed to exist already, it may also alter those institutions which it builds on in the sense that it conceptualizes them in particular ways.

Accordingly, when engaging in a construction of the 'ideal order' which is implied in the regime of EU social rights from the point of view of the fundamental tension between the presumed order and the ideal order, I shall be extremely aware of the complexities of that tension. Especially the positive aspect of the tension gives rise to difficulties. Let me explain a little more carefully what these difficulties consist in, within the context of the dissertation.

On the basis of the analyses of Part I, I shall conclude that EU social rights presume the existence of certain institutional orders - which I shall call 'anchors of order' - namely the 'National Labour Market', the 'National Welfare Systems', the 'Employment Relationship', the 'Internal Market', the 'Family' and the 'State as One'. These 'anchors of order' are presumed to exist prior to and independently from EU social rights in the sense that they are necessary for the implementation of those rights. It is also clear that by presuming the existence of those orders, EU social rights also presume something about them, that they can be characterized in certain ways. More precisely, conceptualizations of those orders are implied in EU-social rights. The difficult question which arises is the following: are these conceptualizations a part of the presumed order or of the ideal order? My answer is that they are both. They are

necessarily a part of the presumed order - since they are conceptualizations of orders presumed to exist prior to and independently from EU social rights. But to some extent, they are also a part of the ideal order: The conceptualizations in question are not just normatively neutral conceptualizations, they also imply normative instructions with respect to the proper understanding of those orders. That is, directly and indirectly, EU-law (and especially the case-law) instructs the member states with respect to the meaning of their own national institutional orders.

What I shall do is to distinguish between the *basic logics* of those orders and the *qualified logics*. The basic logics belong to the presumed order; they are the logics which are presumed to exist prior to and independently from EU social rights. The qualified logics belong to the ideal order; they represent the particular qualifications of the basic logics. The basic logics can be derived from legislation as well as case-law. The qualified logics are primarily developed by the CJEU. They arise in connection with the interpretation of the rights in question. When applying and interpreting those rights in connection with particular cases, the CJEU will often need to qualify the nature of the institutional foundation in more particular ways. Such qualifications become more than qualifications of the presupposed, preexisting order; they become ideal institutional definitions themselves.

It must be underlined that this is a theoretical construction. In truth, there is no way in which I could distinguish exactly between the basic logics and the qualified logics. It is not necessarily so that the basic presumptions concerning the institutional orders are developed *before* the more particular qualifications which form part of the ideal order. Within the law itself, they might very well be developed together. They might even be woven together within the same statement, or in assumptions underpinning particular argumentations. An explicit definition (or an implicit assumption) of what 'the family' is, for instance, might very well appear to be real and ideal at the same time: If 'the family' as institutional order is conceptualized as an order of 'internal dependencies' and of 'dignity', does that then mean that 'internal dependencies' and 'dignity' are presumed to be the basic features of families (and that the purpose of the law is merely to protect these already existing features), or does it mean that they are ideal features of the order of 'the family', that they describe 'the family' as it ought to be?

However, I shall argue that the lack of clear means of distinguishing between the basic logics and the qualified logics of the institutional orders does not mean that the tension between them is not underpinning the law. It has to, even if the law itself will often blur

the relationship. In fact, the blurring of the tension is as fundamental to the law as the tension itself. Because - as the example regarding 'the family' illustrated above - also the world as it is presumed to be must be conceptualized through the law - and hereby it will be idealized as well.

In other words: I shall claim that the tension as such - between the presumed basic logics and the normative qualifications of those logics - is indisputable. Only, it must be emphasized that within the context of empirical law, the distinction between the two cannot be drawn in an indisputable way; the analysis can only draw the distinction in a tentative way. In spite of this fundamental problem, I shall stick to the fundamental tension as a structuring principle and dare to draw the distinction. That is, I shall construct, firstly, the presumed order - in which connection I shall derive and analyze what I believe to be the basic logics of the six anchors of order. Afterwards, I shall construct the ideal order - in which connection I shall derive and analyze certain particular qualifications of the basic logics.¹¹²

So, this is the overall structure of Part II: A construction of the 'presumed order', followed by a construction of the 'ideal order' seen in the light of the 'presumed order'. It should be clear by now that 'the ideal order' is called so for two different reasons. The first reason was unfolded in the previous chapter. The construction of the ideal order is based on a reduction of the multiplicity of rationality forms implied in the regime of EU social rights. Not every trace is followed, only certain *characteristic* traces. This reduction, in turn, occurs within the tension of the conceptual forces of the material itself and the creations of the researcher - both of which depend on contemporary horizons. But in truth, it is not only the reduction that happens within this tension. The rationality forms themselves are only derived as a result of this tension. This means that the construction itself along with its building stones - the rationality forms - spring from creations, that is, singular events or decisions which break with the very horizons they depend on. Accordingly, the ideal order is 'implied' in the regime of EU social rights in this double sense: it springs from rationality forms which belong to this regime of rights as conceptual forces of it, but simultaneously, these rationality forms result from creations.

¹¹² This establishment and characterization of a particular temporal-normative logic of historical human law is my own, - but I have found inspiration in reflections on time in the works of Augustin, Ricoeur and Koselleck.

The other reason for the expression 'ideal order' has just been given. The social order 'implied in' the regime of EU social rights stands in a tensional relationship to a 'presumed order' also 'implied in' this rights regime. In this sense it is an 'ideal order', it is an expression of the normative-temporal logic of law: that law is meant to intervene in existing orders, presumed as such. It should be underlined that also the 'presumed order' depends on idealizations - that is, on reductions and creations. Accordingly, the 'presumed order' is also an 'ideal order' according to the first meaning of 'ideal order'. The distinction between 'presumed order' and 'ideal order' is the result of a consideration which presupposes this first meaning of 'ideal order' and which must be understood on the basis thereof.

As I just said: Firstly, I shall construct the presumed order, afterwards the ideal order. But there is something in-between the two, namely the Interzone-chapter. In this chapter, I shall engage in an investigation as to whether a human foundation is implied in the regime of EU social rights. It will be clear that we stand confronted with a different normative-temporal logic than the one characterizing historical, human law. As will be explained in the Interzone-chapter, this logic is a universal logic. It implies a different relationship between the presumed order and the ideal order. More precisely, the human foundation in question is both at once. For this reason, the investigation of this foundation neither belongs to the 'presumed order' nor to the 'ideal order', but in-between the two, in an 'Interzone'.

The construction of the 'ideal order' makes out the greater part of Part II. This part, in its turn, is structured according to the three remaining political-philosophical categories (the category 'human foundation' being dealt with in the Interzone-chapter). That is, a 'social structure' is established (on the basis of the construction of three hierarchies, the hierarchy of names, the hierarchy of non-names and the hierarchy of signifiers in-between names and non-names); the 'social means' are considered (on the basis of the logics of rights derived in Part I, followed by an analysis of fundamental problematics of non-discrimination rights); and finally the 'purposes' of the ideal order are discussed.

But after these constructions, an extensive analysis of what I believe to be the qualified logics of the six anchors of order follows. This part of the dissertation is, together with the Interzone-chapter, its most important part. Let me emphasize that originally, it was not my intention that the analyses of these institutional orders should be so important. It was only my intention that they should add certain features to the ideal order as

constructed on the basis of the four political-philosophical categories. I had not imagined to what extent the CJEU actually develops substantial understandings of the institutional orders in question. I ended up concluding that the qualifications of those institutional orders as developed by the CJEU make out the very essence of the ideal order

Ghosts

In connection with the analyses of the institutional orders, we shall be meeting ghosts. These ghosts arise from the analyses of the basic logics of the six anchors orders, carried out under the perspective of the 'presumed order'. More precisely, the ghosts will raise questions in relation to the basic logics. They shall point to inconsistencies or taboos, to ambiguities or to what would appear to be unintended consequences of the basic logics. Or they shall make us aware of the limitations and borders of those logics and ask what lies on the other side?

When we return to the six anchors of order, under the perspective of the 'ideal order', we shall seek to answer the ghosts. In other words, we shall consider whether the qualifications of the basic logics provided by the CJEU will be able to satisfy the ghosts with respect to the problems they have pointed to? If so, does that then leave us with harmonic institutional orders, or will new ghosts arise from the qualified logics?

As already mentioned in the last chapter, this introduction of ghosts functions as a way of systematizing the radicalization of the conceptual analysis - that is, the intensification of deconstruction, the pursuit of overall meaning and the alternation between the two. Clearly, this ghost-structure (ghosts arising, asking questions; ghosts being answered, new ghosts arising) can be compared to a Hegelian structure: a logic is being presented, but turns out to be problematic; this leads to a more comprehensive logic which still entails the former logics; but also the new logic turns out to be problematic, etc. However, there are some important differences. The ghost-structure does not necessarily imply that the first-presented logic (the basic logic) will be undermined completely and collapse. And the questions raised by the ghosts do not only spring from internal inconsistencies of the basic logics. In other words, the ghost is ultimately not an expression of dialectics (although the ghost does make use of dialectics). The ghost feeds on something else - that 'something else' which both Derrida and Deleuze/Guattari add to dialectics, an overflow of meaning which cannot

be reduced to any pre-given meaning. For this reason, they remain with us along with the logics they question.

So, this is why I am introducing ghost - instead of 'figures' or 'levels'. Ghosts do not merely arise because of logical inconsistencies, they point to something beyond those logics. As such they remain with us together with the orders they are haunting. Qualifying those orders and hereby answering the ghosts does not mean bringing those orders to a higher level of reflection. It simply means specifying them in a particular way.

But let me explain a little more thoroughly what I mean by ghosts. Naturally, Derrida plays a role in this connection.

Originally, I was inspired by the film 'Les Enfants terribles' by Melville (in collaboration with Cocteau). More precisely, I was inspired by the spaces of the film. In the first part of the film, the main characters, the siblings Paul and Elisabeth, live in the apartment of their sick, bed-ridden mother. In their shared bedroom, they play 'The Game', a special power play, involving humiliations, insults and deliberately annoying behavior. After the death of their mother, the siblings move to a huge house, largely empty and unused. The house was owned by Elisabeth's husband who died after just one day of marriage. Here they isolate themselves from the world together with two friends. In the part of the house called 'the Gallery', Paul builds a replica of the siblings' old bedroom. The tragedy that follows (as a result of a sinister plot on behalf of Elisabeth) takes place in this 'replica-bedroom'.

What interests me in particular is the fact that the important spaces of the film have been arranged by dead people. The huge house was owned and decorated by Elisabeth's now deceased husband, and within it, Paul recreates a part of their old apartment, owned and decorated by the now deceased mother. In the replica-bedroom, haunted by two dead people, the power play between the siblings repeats itself and intensifies - culminating with the death of both of them.

So what does this mean, that we live in spaces decorated by dead people, haunted by dead people? It means, of course, that we live in spaces which we have inherited. We have inherited our language, our institutions, our life-forms - everything which we might call 'culture', including dreams and fears. But it also means that everyone who has been repressed or neglected in the inherited spaces in order for these spaces to be what they are, will exist in them as well, as dead people in a double sense.

When Derrida speaks of 'specters', we recognize some of the same elements. A 'politics of memory, of inheritance' is involved¹¹³. Being with specters or listening to specters means remembering those who are no more. In particular, it means recalling the crimes and the exclusions of the past. They haunt the present because the present builds on them; its modes of power depends on them. In this sense, these crimes and exclusions are past and present at once. *'Hegemony still organizes the repression and thus the confirmation of a haunting. Haunting belongs to the structure of every hegemony.'*¹¹⁴

But Derrida's specters do not only concern the past. They concern the future as well. In fact, in the specter, past and future are brought together '*beyond the living present*'. The specter is an experience of '*the past as to come*'. A spectral moment is '*a moment that no longer belongs to time*'.¹¹⁵

Specters are, of course, all about justice and deconstruction, about doing justice to the other. Specters are what haunt us in the present. By revealing to us the crimes of the past they also point to the hope of the future. However, to experience a specter, or a 'spectral moment' is as impossible as deconstruction and as inaccessible as justice. It would require an opening towards the '*non-contemporaneity with itself of the living present*'¹¹⁶ - that is, an experience of the time being '*out of joint*' with itself, being non-identical with itself.

As it appears, specters imply a very special form of temporality - a form which disrupts the apparent simple presence of the present and displays it as non-presence. Something else is present in the present, namely the specter - but the specter is present while being absent, it is present by virtue of being absent. The specter belongs to the past and the future and not to the present, but as such, it is present in the present. The specter breaks down any borders between *the present, the actual or present reality of the present, and everything that can be opposed to it: absence, non-presence, non-effectivity, inactuality, virtuality[...]*'.¹¹⁷

It is clear that again, Derrida's thinking borders on negative dialectics. But he insists on the *being there* of the specter; the specter is not negativity. The specter is '*beyond the living present in general*', but it is also '*beyond its simple negative reversal*'.¹¹⁸ The

¹¹³ Jacques Derrida: *Specters of Marx*, p. xviii

¹¹⁴ Ibid., p. 46

¹¹⁵ Ibid, p. xix

¹¹⁶ Ibid, p. xviii

¹¹⁷ Ibid, p. 48

¹¹⁸ Ibid, p. xix

'spectrality effect [...] consist[s] in undoing this opposition, or even this dialectic, between actual, effective presence and its other.'

As Derrida points out, the specter *'begins by coming back'*, it is always a revenant.¹¹⁹ In other words, it was already there, independently of us. He also characterizes the specter by way of what he calls the *'visor-effect'*: The specter has the power of seeing us (or the other in us) without being seen itself.¹²⁰ The presence of the specter (the presence of the absence) is not controlled by us; rather, we are exposed to the gaze of the specter. That is: we are exposed to the non-identity of the present with itself, to the crimes, exclusions and power forms we have inherited and which we build on.

However, Derrida indicates that there is something we can do ourselves in order to open up to *'spectrality'*. By mourning, remembering and localizing the dead (finding and knowing their graves), the dead may speak to us. And if we listen, we might witness the *'work'* of the specter, that it transforms itself.¹²¹

It can certainly be questioned whether the ghosts introduced in this dissertation are *'specters'* as Derrida would understand them. Do I let the ghosts come to me? Do they look at me without being seen themselves? And do I listen to them? Yes - to all of that. But I also construct the ghosts. I *introduce* them and systematize them.

When constructing ghosts, I seek to give voice to certain aspects of all the death which inhabits our inhabited spaces - and speak to it. One may express it like this: I seek the graves, I evoke the ghosts and I give them voices. I listen to their questions and I attempt to answer them. The danger is of course that I will rationalize the ghosts. And to some extent, this will happen. On the other hand, the ghosts do spring from the analyses which I carry out. I have not planned them in advance. Even if I give them voice, it is not my voice alone. It is a voice of sorrow hiding in the material itself.

As far as the siblings, Paul and Elisabeth, are concerned, we may say that they are being ruined by the rooms of the dead. They repeat, blindly, the tragedies of these rooms - with their power games, rituals, and calculating plots. The ghosts I introduce are meant to help me to articulate such tragedies. There is a danger in this, because it may just lead to a different kind of blindness. However, it is an attempt to make the dead work, to witness its transforming powers.

¹¹⁹ Ibid, p. 11

¹²⁰ Ibid, p. 6-8

¹²¹ Ibid, p. 9

The overall structure of the dissertation
(including an indication of which chapters are the most important)

As a result of the particular 'grasps' described above - ways of structuring, holding, opening and creating the empirical material - the dissertation has acquired the following overall structure:

Part I: Chasing the right-holders

Part I.1: Names

Part I.2: Non-names

Part I.3: Signifiers in-between names and non-names

(Part I pursues the characteristics of the various signifiers of right-holders according to their substances and attributes, as well as logics of rights, fundamental presumptions and interpretational horizons - hereby preparing for a political-philosophical construction according to the four categories)

Part II: Political-philosophical construction

Part II.1: The presumed order

Part II.2: The Interzone

Part II.3: The ideal order

Part II.2 concerns the category 'human foundation', whereas the other three categories 'social structure', 'means' and 'purposes' are dealt with in Part II.3. In addition, Part II contains an analysis of institutional orders, first under the perspective of the presumed order (in which connection the basic logics are being analyzed), then under the perspective of the ideal order (in which connection the qualified logics are being analyzed)

The last part of the dissertation: An Ending and Beginning

The last part of the dissertation entails an extensive summary of the main results and some concluding remarks in this respect, but also three reflexions which seek out the potentials of the 'ideal order'.

The dissertation has developed into a very long and complex work. On this basis, it is only fair to indicate which chapters are the most important (at least from my own point of view).

Obviously, the goal of all the analytical work carried out is the construction of the ideal order. For this reason, all the last chapters of Part II.3 are very important (chapter 25-33). Chapter 28-33 concern the institutional orders (the six 'anchors of order'). Among those I would emphasize the last one, chapter 33, in which the meaning of

three constitutional principles, 'democracy', 'fundamental rights' and 'rule of law', is being analyzed.

Apart from that, chapter 21 (the 'Interzone'-chapter), concerning a human foundation, is hugely important (and probably my own favorite chapter). I build on this chapter in a number of ways in the remaining parts of the work.

As far as concerns Part I, it should be emphasized that all chapters are necessary for the construction of the 'ideal order'. Together, they constitute the building blocks of the 'ideal order'. But if I should point to any particular chapters it would be those in which the conceptual analysis becomes more 'radical'. That would be chapter 10 (about 'racial or ethnic origin'), chapter 13 (about 'sexual orientation'), chapter 14 (about 'religion or belief') and chapter 16 (about maternity-related names). Finally, chapter 7 (about the name 'Worker') is a central chapter.

Naturally, the last part 'An Ending and Beginning' is hugely important from the point of view of the concerns underpinning this work (concerns related to the presence today of a 'natural law' ghost in the form of an 'identity'-thinking - as unfolded in the Introduction and in chapter 2).

The empirical material

The reasons for choosing EU social rights as the object of political-philosophical analysis have been given in the Introduction. The regime of EU social rights can be seen as a manifestation of essential contemporary problematics relating to the concept of rights. This is both due to the particular nature of EU-law (that it involves rather intricate relationships between national law and EU-law as well as various sources of international law), to the principle of non-discrimination and finally to the fact that social rights have a particular and fragile status for which reason they tend to absorb a range of other political issues. As a consequence of the latter point, we shall not only be dealing with 'social rights issues' in a narrow sense, but also with issues of 'the stranger' (the geographical, legal, social and 'ideological' stranger), issues of religion and belief, of sex and sexuality and of the ideological foundations of the modern state.

But when that is said, how do we distinguish between social rights and other kinds of rights? Clearly, the meaning of 'social rights' is historically changeable.

As a starting point, I have focused on what is categorized as 'social rights' within EU-law itself, namely social security rights (especially those which concern sickness, invalidity, unemployment, retirement, survivors, maternity, paternity and family

benefits) and social assistance rights (understood as rights which compensate for the lack of sufficient resources). But a problem arose as far as the distinction between social rights and workers rights are concerned. The two are closely connected within EU-law. First of all, they are often dealt with within the same Directives. Secondly, a number of social security rights spring from the employment relationship and are being treated as 'pay' by the CJEU. Thirdly, even those social rights which do not spring from the employment relationship (for instance certain unemployment benefits) are being connected directly with the right to access to work. Fourthly, in a number of cases it is contestable whether the rule under consideration related to 'retirement pensions' or to 'dismissal'. In short: social rights and *certain* worker's rights are so closely connected within EU-law that separating them would be meaningless. For this reason, I also include those worker's rights. More precisely, that would be rights related to access to work and general working conditions , including pay and conditions governing dismissal. More specific worker's rights (like for instance rights concerning security and health in relation to specific sectors of work) are not included.

Apart from that, the social rights laid down in relation to the discrimination ground 'nationality' are intimately connected to a range of substantial EU rights, namely mobility, residence and family reunification rights. These different rights complement the social rights in the crucial sense that they secure the possibility of being able to benefit from the social rights at all. But to some extent, they also function as 'closing mechanisms' in relation to social rights. These rights must necessarily be included in the examination.

Also, it should be mentioned that a few substantial rights regarding issues of pregnancy and maternity exist. They do not have a crucial complementary role in relation to non-discrimination rights like the above-mentioned rights. None the less, they will be taken into account in connection with analyses related to the discrimination ground sex.

Non-discrimination rights constitute our main issue of concern. Far the majority of EU social rights (including the worker's rights in question) are non-discrimination rights. However, we shall be aware of how non-discrimination rights interplay with other kinds of rights. Just as we shall be aware of the different kinds of non-discrimination rights which are being manifested in EU-law.

We shall be dealing with legislation (Treaty provisions, provisions of the Charter of Fundamental Rights, Regulations and Directives) and case-law. The relationship

between the two will vary somewhat throughout Part I. In connection with the discrimination grounds 'racial or ethnic origin', 'age', 'disability', 'sexual orientation', 'religion or belief' and 'sex', the case-law analyses will play a dominating role. This is due to the fact that the relevant non-discrimination Directives are formulated in broad, ambiguous and open terms, leaving it to the CJEU to provide the necessary conceptual clarifications and specifications. In other words, the law 'happens' in the case-law. In contrast, in connection with the discrimination ground 'nationality', legislation will play a more dominating role. The relevant Directives and Regulations are much more detailed. This is so because issues of nationality (both non-discrimination issues and issues related to mobility, residence and family reunification) have already had a long history within EU-law, and the new legislative acts entail a number of specifications which have been provided by the CJEU over the years in relation to earlier Directive and Regulations. The case-law is still very important, though; obviously, also the new acts give rise to conceptual problematics of various kinds. And as far as the situations of 'third country nationals' are concerned, entirely new Directives (without a history) apply.

The material is huge: 18 Directives/Regulations and 115 judgments (a substantial part have been subjected to detailed analysis). But of course, the material could have been much bigger. As far as the old discrimination grounds are concerned ('nationality' and 'sex'), an enormous case-law exist, along with a range of now amended legislative acts. I have chosen to focus on the legislative acts which are presently in force and on the more recent case-law (after 2000). Only on a few occasions, I go back in time.

In this sense, the historical dimension is not dominating. Apart from some overall remarks, the history of the rights in question is not pursued. Not that I do not consider the historical development of EU social rights important. But my primary ambition has been to analyze the political-philosophical features of the regime of rights which is presently in force - and, not least, the conceptual problematics inherent therein. It should be emphasized though, that the history of this regime of rights to a large degree is entailed in the present regime. The historical political and legal battles over these rights are reflected in the present regime - in the form of specifications, exemptions, delineations of material scope and conceptual definitions. It is very obvious that the newer non-discrimination rights (related to the 'new' discrimination grounds, 'racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief') are far less conceptually developed than the older non discrimination rights (related to the

grounds 'nationality' and 'sex'). Yet, these newer rights have absorbed a number of elements developed in relation to the discrimination ground 'sex'. Certainly, EU-law develops rapidly. But the CJEU also builds on its previous case-law. The present regime of EU social rights is the manifestation of elements which have been specified, clarified, complicated, refined or muddled over time. Although some problematics may have disappeared (either because they have been solved or because they are no longer relevant), the majority of the problematics which we shall encounter when analyzing these rights are not new. But their particular ways of manifestation may be new. My focus has been the contemporary manifestations of these problematics.

As has already been made clear, I analyze EU social rights, not particular national implementations of EU social rights. As extensively argued in chapter 2, I believe that exactly the *shadow realm* of EU social rights should be taken seriously as such. Even if the rationality forms implied in EU-social rights will never be fully manifested anywhere, but only more or less reduced or transformed in the different member states, due to their collisions with other rationality forms in connection with their implementation, they are still both real and important. This does not mean, of course, that it could not be interesting, in another study, to analyze such collisions. But this dissertation revolves around the *shadow realm*. It should be noted, though, that we are going to discern the contours of such battles over and over again. Every new case considered by the CJEU concerns, one way or the other, collisions between EU rights and national rights.

Finally, it could be asked: why only legislation and case-law, why not also preparatory acts, policy papers and reports of various kinds, especially those stemming from the European Commission? My answer would be that that would have muddled the analysis. Certainly, the views of the Commission make out an important horizon: they reveal some of the intentions behind the law, and as such, they also play a role to the CJEU. Yet, they do not constitute a binding source of law. The CJEU is not obliged to agree with the Commission. An analysis seeking the multiple rationality forms implied in the law should not privilege any particular political understanding of the law. I am pursuing implications of the law - not the intentions which motivated it.

A last remark. In a single chapter, chapter 14, I examine the European Convention on Human Rights and the case-law of the European Court of Human Rights, in stead of EU-law. I do this due to the lack of CJEU-case-law related to the discrimination ground 'religion or belief'. This may be seen as an inconsistency. And it is. Especially because I

also build on the analyses of chapter 14 when constructing the ideal order; in fact, chapter 14 constitutes a particularly important chapter. However, I believe I am justified in doing what I do. I do not build on the exact outcomes of the ECtHR-judgments, but on the deep-lying conceptual dilemmas inherent in these judgments. I argue that these dilemmas, including the presuppositions on the basis of which they arise, would be as relevant to the CJEU as they are to the ECtHR. A more detailed argumentation will be provided in chapter 14.

Limitations

First of all, this dissertation has grown far bigger than I intended. This is due to the nature of the project. I would not have been able to carry out the ambitions and hopes connected to this project, had I not embarked on such comprehensive analyses. As mentioned above, I believe that all elements are necessary. In other words, it is the idea of the project itself, rather than its realization, which - somehow - is madness. And yet, maybe both. In the Introduction and in these first three chapters I have explained why I believe that such madness is not only madness, but also constitutes a meaningful endeavor. - Now, it must be for the reader to assess whether that is so.

In truth, I would have liked to have integrated even more material. I would have liked to have pursued the historical developments of the rights I examine. Also, it could have been interesting to draw some historical and contemporary perspectives in relation to other legal systems (national as well as international). Finally, there are aspects of the regime of EU social rights which I neglect. Most notably, I neglect the discrimination ground 'part time work' and 'fixed term work'.¹²²

Also, I would have liked to have engaged in discussions with certain parts of the EU-literature.

My horizon has been - and is - political philosophy. I have argued that today, it has become extremely difficult to understand the interplay between human beings and law as a dynamic interplay which may both serve and undermine law. Just as it has become difficult to formulate overall political purposes and visions. As unfolded above, these difficulties are associated with the loss of a 'human nature', with the fact that we are left with the 'created' or 'constructed' human nature. In this contemporary situation, I

¹²² Simply for reasons of limitation. I found that these non-discrimination rights have so far not given rise to conceptual problematics which I had not dealt with from the point of view of the other rights I examine. Still, it would have been more systematic to have included them. (They are briefly mentioned in chapter 7, though)

believe that political philosophy has an important role to play in relation to the analysis of empirical law.

But when that is said, I do, in the course of this work, touch upon some problematics which are intensely discussed in certain parts of the EU-literature (by legal scholars, but also others). I may touch upon these problematics from a different angle than what is predominantly the case, and on the basis of different concepts and different analytical 'grasps'. None the less, it would have been fruitful and interesting to engage in explicit discussions with the literature in question. For reasons of limitation, I have chosen not to.

However, let me briefly indicate what kind of discussions I have in mind.

First and foremost, the issue of legal pluralism constitutes a focal point of concern. Today, practically all EU-scholars are pluralists. And with good reason, of course. The particular nature of EU-law means that not only one legal system determines the manifestation of EU-law. A huge literature exist which examines the complicated constitutional nature of the EU from the point of view of pluralism. However, recently, the unquestionable status of legal pluralism has been brought into question. Not that the position is being rejected. But a more nuanced position is being called for.¹²³

In relation to the position of legal pluralism, it is clear that my claim that EU social rights constitute an important object of analysis as such, exactly as a *shadow realm*, might be provoking. As should be clear, I do not reject pluralism. But I do hold that these rights imply a conceptual universe with wide-reaching political-philosophical consequences. My analysis more than confirmed this initial presumption. I encountered substantial visions of order. Not visions of super-national order, though. No, visions of national order. In this respect, it is important to draw attention towards the conceptual creations of the CJEU. It is not only so that some concepts are defined as 'EU-concepts'. Conceptual criteria are being established in relation to practically all important concepts of the EU-law, also those which are meant to acquire their meaning through national law.

Secondly, the interpretational methods of the CJEU are being discussed. Recently, new attention has been directed towards some of the established 'truths' about these methods (such as their teleological and uniform nature; the important role of

¹²³ Gráinne de Búrca and J.H.H. Weiler (ed.): *The Worlds of European Constitutionalism*; Daniel Augenstein (ed): *'Integration through Law' Revisited. The Making of the European Polity*; Neil Walker, Jo Shaw, Stephen Tierney (ed): *Europe's Constitutional Mosaic*

fundamental rights).¹²⁴ According to my analyses, the CJEU makes use of a number of different approaches, some of them literal, some of them teleological, some of them logically strict, some of them rather associative of nature or carried out on the basis of broad social evaluations, some of them logically inventive. Not that these methods do not imply some sort of regularity and that they cannot be systematized to some extent. I examine them carefully from the point of view of their logical nature. But ultimately, I claim that the regularity which speaks through them concerns the establishment of certain stable interpretational horizons. This result may not be very satisfactory from a legal point of view. On the other hand, however, my identification of different logics of rights, and of different ways in which the CJEU meets certain fundamental problematics adhering to non-discrimination rights, as well as my examination of the argumentative role of fundamental rights in the judgments of the court, could, I believe, fruitfully be brought in connection with a number of legal discussions as to the nature of the interpretative methods of the CJEU.

Finally, it is clear that I would have something to say to the many 'identity'-considerations which are unfolded in relation to the political order of the EU. As already indicated, they vary a lot. Some of them merely repeat the dogmas: 'human rights', 'democracy', 'pluralism', 'diversity'. Others are so complex so that they probably should not be called 'identity'-reflexions at all (even if that is what they call themselves).¹²⁵ I have already made my position clear. What I share with those who engage in reflexions on the overall political purposes and visions of the EU is the belief that such reflexions are both important and necessary. But I believe that these questions must be considered on the basis of an analysis of the various and complex rationality forms implied in the rights and rules laid down by EU-law, rather than in abstraction. In addition, I believe that they must be dealt with on the basis of a non-identity-thinking.

¹²⁴ Ulla Neergaard, Ruth Nielsen, Lynn Roseberry (ed): *European Legal Method - Paradoxes and Revitaliation*; Ulla Neergaard, Ruth Nielsen, Lynn Roseberry (ed): *European Legal Method - in a Multi-level EU Legal Order*; Ulla Neergaard, Ruth Nielsen, Lynn Roseberry (ed): *European Legal Method - towards a New European Legal Realism?* See also Gunnar Beck: *The Legal Reasoning of the Court of Justice of the EU*

¹²⁵ Some of the analyses carried out by Joseph H. H. Weiler would be examples of 'identity'-considerations which rather point to the non-identical nature of that which we believe in (due to their historically and conceptually complex nature), the 'dark sides' of our common values. See for instance "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in European Space," in Riva Kastoryano and Susan Emanuel: *An Identity for Europe, The Relevance of Multiculturalism in EU Construction*, chapter 4

PART I

Chasing the Right-holders

PART I.1: NAMES

Among the various signifiers we shall encounter, *names* are the least complex. Names spring from definitions of rights-holders entailed in the law, explicitly or implicitly. We may say that names correspond to categorizations of people.

We shall see that sometimes, a name implies its own definition; other times, the name is defined by means of additional criteria. Some names appear as relatively clear, others as highly ambiguous. No names are entirely unambiguous, though. For this reason, they are dynamical as well. It is not given with the articulation of the name who may be able to claim it.

The number of names implied in EU social rights is practically endless - if all criteria and all possible combinations of criteria are taken into account. Naturally, I shall not mention them all. I shall begin with the most comprehensive names ('Human' and 'Everyone') and proceed with other more specific, yet still comprehensive names ('EU-citizen', 'Third Country National', 'Worker' and 'Family-member'). Some of these comprehensive names give rise to sub-names - of which some only relate to the comprehensive name in question, others result from combinations of different comprehensive names.

We shall seek to draw a picture of the dominating comprehensive names within the regime of EU social rights, including their most important sub-names and the relationship between comprehensive name and sub-names. But we shall not only analyze them according to their substances, but also their attributes, that is, the rights which are attributed to them.

Chapter 4

'Human' and 'Everyone'

The most comprehensive names within EU-law are 'Human' and 'Everyone'. In many situations, these names could easily be substituted for one another. But it is also clear that they do not necessarily carry the same meaning.

‘Human’ and ‘Everyone’ - advanced by the Charter of Fundamental Rights and resonating ambiguously within a human rights horizon surrounding EU-law

The name ‘Human’ occurs seldom within EU primary and secondary legislation. The fundamental rights laid down in the Treaties do not apply to ‘Humans’ or to ‘Everyone’, but only to EU-citizens. But we do find the name ‘Human’ indirectly established, in adjectival form: *‘The Union is founded on the values of respect for human dignity [...] and respect for human rights’*. In article 6 the reference is twofold indirect in that it concerns another source of international law: *‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] shall constitute general principles of the Union’s law.’*¹²⁶

The reference to the European Convention constitutes a recent step within a long, gradual development of the relationship between EU-law and the Convention. It is now - since the Treaty of Lisbon came into force in 2009 - a Treaty-based obligation of the EU to respect the Convention. For decades, the relationship between the two systems of law has been ambiguous and a major subject of discussion. On the one hand, the CJEU has held that the Convention should be regarded as an integral part of EU-law and has drawn on it in its case-law¹²⁷; on the other, the EU had not ratified the Convention, and was not competent to do so at its earlier stages of development, also according to the CJEU¹²⁸.

Ambiguities are far from over. The EU is still not a Party to the Convention. Still, the human rights guaranteed by the Convention constitute *‘general principles of the Unions*

¹²⁶ Art. 2 and art. 6(3) TEU

¹²⁷ *‘As the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories [...]. The European Convention on Human Rights has special significance in that respect.’* (Case C-260/89, *ERT v DEP*, par. 41). Only five years earlier, in a judgment from 1986, the formulation chosen by the CJEU was more moderate (which gives an indication of how dynamic the development has been): *‘[...] as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law’*. (Case C-222/84, par. 18)

¹²⁸ In an opinion from 1996, the CJEU concluded that *‘as Community law now stands, the Community has no competence to accede to the Convention’* (Opinion 2/94, par. 36), and gives the following reason: *‘Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order [...] with equally fundamental institutional implications for the Community and for the Member States [...]. It could be brought about only by way of Treaty amendment.’* (par. 34-35). All this in spite of the fact that *‘Respect for human rights is [...] a condition of the lawfulness of Community acts.’* (par. 34)

Law', as we just saw. Even if the EU does in fact accede to the Convention - the EU is now both competent and obliged to do so¹²⁹ - future implications of the relationship between the two systems of law are highly uncertain.¹³⁰ The EU advances its own fundamental rights, as we shall see during the following chapters, and many of them are not comparable to 'human rights', they are EU-citizen's rights. Further, the potential collisions of rights (across the two systems of law as well as within them) - and therefore also the potential negotiations and new interpretations of rights - are manifold.

In the course of Part I, we shall be witnessing the complexities of the manifestations of relationship between EU-rights and the rights of the Convention, both before and after the Lisbon Treaty, in connection with a number of judgments. For the purposes of this chapter, we shall simply take note of the fact that the name 'Human' is brought into the EU-Treaty through reference to another source of international law, and that the future implications hereof are far from clear. We may say that the now Treaty-based relationship between EU-law and the Convention builds around EU-law a huge horizon of human rights. How powerful this horizon is remains to be seen. So far, the name 'Human' resonates strongly, but ambiguously within it.

The Treaties are no longer the only sources of EU primary law. The Charter of Fundamental Rights acquired a new status with the entry into force of the Lisbon Treaty. The Charter now has the same legal status as the Treaties and is directly legally binding.¹³¹

The history of the Charter is not unrelated to the history of the relationship between EU-law and The European Human Rights Convention. The Charter was initiated and drafted in 1999 and signed and proclaimed as a soft law declaration in 2000. From the beginning, its possible incorporation into EU-law was discussed. And from the beginning, its legal status was ambivalent. Although not formally legally binding it was said to bring together and make visible fundamental rights which were already established as such within EU-law. Some would argue that since its only function was to clarify what was already established, it would be legitimate for the CJEU to draw

¹²⁹ Art. 6(2) TEU

¹³⁰ For a comprehensive examination of the implications for the EU's legal system of the accession to the European Convention on Human Rights, see Paul Gragl: *The accession of the European Union to the European Convention on Human Rights*

¹³¹ Art 6(1) TEU

upon it. Others would worry that the CJEU was hereby given yet another tool for developing EU-law through the back door. The CJEU did in fact draw upon the Charter before it was given Treaty-status in 2009, but mostly in a supplementary manner; at that time, the European Convention would generally play a relative bigger role.¹³²

The Charter in its present manifestation as legally binding primary law includes both fundamental EU-rights - some of them old, like non-discrimination-rights and free movement rights - and rights comparable to 'human rights', taken from or inspired by the European Convention. Within the context of the Charter, they are not called 'human rights', though, but 'fundamental rights'. Other important sources are the constitutional traditions of the EU Member States, the Council of Europe's Social Charter and the Community Charter of Fundamental Social Rights of Workers. The Charter is entangled in the same long and complicated history of the development of fundamental rights within EU-law as is the European Convention on Human Rights. More precisely, by including both old, fundamental EU-rights and 'human rights', the Charter can be seen as a manifestation of the tension between the two. This tension is now inscribed in the Treaty, in a two-fold way.

In the Charter of Fundamental Rights, one would expect the name 'Human' to be strongly present. But it only plays a part under Title I: *Dignity*. Article 1 proclaims : '*Human dignity is inviolable*'; and 'human' reappears in article 3,4 and 5 - both as an adjective and as a noun - in connection with the prohibition of cloning, torture, degrading treatment and trafficking. Title I as such centers on the human body, on physical violence. 'Mental integrity' is mentioned as well, but neither definitions nor examples are given as to what is meant.¹³³

In the remaining parts of the Charter, the name 'Everyone' is predominant, though not the only signifier of right-holders. More specific names play important parts as well, like 'Worker', 'EU-citizen', 'Old person' or 'Child'. Obviously, in this context 'Everyone' is very close to being synonymous with 'Human'. But it is less heavy with conceptual heritage, more indefinite of nature; a more modest and neutral name, one might say.

To 'Everyone' is attributed the classical rights of freedom, political rights, due process rights and equality before the law, the right to security, protection of data, the right to

¹³² In chapter 33, we shall analyze a number of judgments in which fundamental rights play an important role, - and in this connection, we shall examine the respective roles of the Charter and the European Convention

¹³³ Art. 1-5, Charter of Fundamental Rights

found a family, to education and work. The right to education includes ‘access to vocational and continuing training’ and ‘the possibility to receive free compulsory education’.¹³⁴ The right to work is specified as follows: ‘Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.’¹³⁵ This is however not the same as the right to seek work on freely chosen terms; only EU-citizens have ‘the freedom to seek employment [...] in any Member State’¹³⁶.

Likewise, the fundamental EU-rights of free movement and residence are only granted to EU-citizens.¹³⁷ As regards the two old and fundamental principles of EU-law, ‘non-discrimination on the grounds of nationality’, and ‘equality between women and men’, they are stated without specifying who the right-holders would be. The formulation of the former implies that only EU-citizens can claim this principle as a right¹³⁸, whereas we must presume that the latter implies a silent ‘Everyone’¹³⁹. A much broader prohibition of discrimination is laid down as well, also without specifying who the right-holders would be: ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’¹⁴⁰ We must presume that this prohibition - which does not include ‘nationality’ as a discrimination ground - constitutes a right of ‘Everyone’.

It must be noted that neither the broad discrimination prohibition nor the other fundamental rights of ‘Humans’ or ‘Everyone’ are absolute. They ‘shall be exercised under the conditions and within the limits defined by [the] Treaties’; and limitations may be made ‘if they are necessary and genuinely meet objectives of general interest recognised by the Union [...]’. Further, the rights of the Charter shall both ‘be interpreted in harmony with

¹³⁴ Art. 14(1,2), *ibid*

¹³⁵ Art. 15(1), *ibid*

¹³⁶ Art. 15(2), *ibid*

¹³⁷ Art. 45 *ibid*.

¹³⁸ Art. 21(2) of the Charter reads: ‘Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited’. The prohibition of discrimination on the grounds of nationality is laid down as a basic principle in the Treaty (Art. 18, TFEU) and applies to EU-citizens only. As we shall see during the following chapters, discrimination on the grounds of nationality as regards non-EU-citizens constitutes a dominant feature of EU-law.

¹³⁹ Art. 23, *ibid*: ‘Equality between women and men must be ensured in all areas, including employment, work and pay’.

¹⁴⁰ Art. 21(1), *ibid*

[national] traditions' and mean '*the same as those [corresponding rights] laid down by the said Convention*'¹⁴¹.

We see that the rights of the Charter are inscribed within the complicated relations touched upon above: relations between EU-law, the European Convention and the case-law of the ECtHR and national traditions. The rights of the Charter are intended to be fundamental only on the conditions provided by those three sources of law and the interplay between them.

Does this mean that the rights of 'Everyone' of the Charter are only to be interpreted in connection with other rights, rules and principles - meaning that they will function as *interpretational aspects of other rights, rules or principles*, rather than as independent rights? As we shall see in the course of this work, this is indeed how rights of 'Everyone' (whether springing from the Convention or from the Charter) function in the case-law of the CJEU. They are never considered alone, only together with EU-rights (that is, EU-rights laid down in the Treaties or in secondary legislation). They unfold their potential power in relation to more specified rights - rights which do not apply to 'Everyone'. In this role, they may both collide with EU-rights, but they may also serve to strengthen them.

We cannot say whether the new legal status of the Charter will, over time, mean that the rights of 'Everyone' laid down in it can be developed into independent rights, rights 'in their own right', so to speak, - or whether they will merely take over the role that the 'human rights' of the Convention used to play. Due to the fact that the rights of the Charter are bound to the conditions and limitations of the Treaties (which primarily grant rights to EU citizens or other specified right-holders, or provide the basis for secondary legislation which apply to specified right-holders), the former scenario is the least likely. Presently, the fundamental rights of the Charter are certainly not unimportant, but their importance lies in their role as interpretational aspect of other rights. In other words, they have the power to clarify or even to strengthen rights granted to specified right-holder such as 'EU-citizens' or 'Workers'.

The Charter includes other social rights than the educational and working access rights already mentioned. What these rights are concerned, their function as interpretational aspects of other rights, rules or principles is almost stated explicitly: '*Everyone residing and moving legally within the European Union is entitled to social security benefits and social*

¹⁴¹ Art. 52(1-4) *ibid* (under Title VII: General provisions governing the interpretation and application of the Charter)

advantages in accordance with Union law and national laws and practices'.¹⁴² This fundamental right is not attributed to 'Everyone' although it sounds as if that was the case. First of all, only legal 'Everyones' can claim this right. Secondly, this right comes close to being an empty or tautological right in that it only confirms the social rights which already exist. A small interpretational opening could be found, though: It could be argued that 'Everyone' who is legal is granted the right to *some* kind of social benefits even in cases where the relevant legislation excludes some people entirely from benefits. Again, such an interpretation would be possible only within the context of other rights, rules and principles.

Almost the same remarks would apply to the health care rights of the Charter: *'Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices*'.¹⁴³ But here 'legal' is not a condition.

Finally, article 34 states that *'the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices*'.¹⁴⁴ Does this mean that 'Everyone who lack sufficient resources' have a right to social assistance so as to ensure a decent existence? Or should the formulation be understood more vaguely, as a kind of recommendation to the member states? In any case, we are again facing a provision which primarily confirms the social rights that already exist.

The social rights we find within secondary legislation do not apply to 'Humans' or 'Everyone', but are attributed to narrower names, - if not to 'EU-citizen', then to 'Third Country National', 'Family-member', 'Worker', 'Pensioner', 'Job-seeker' or some other name. We do occasionally find a reference to 'human rights' in the preambles of Directives or Regulations, first and foremost in what I will refer to as the non-discrimination Directives. These Directives deal with different discrimination grounds - but not nationality - and some of them do in principle apply to everyone within certain

¹⁴² Art 34(2), *ibid*

¹⁴³ Art. 35, *ibid*

¹⁴⁴ Art. 34(3), *ibid*

institutional areas. However, due to the limitations laid down in these Directives, I will argue that it would give a distorting picture to claim that they apply to 'Everyone'.¹⁴⁵

In search of a qualification of the name 'Human' - the concept of dignity

Before moving on to 'Individual' and 'Person', let me dwell for a while on the heavier name 'Human' in order to look for a possible qualification of it. No definition of the name is given, but we have seen that it predominantly occurs in connection with the concept 'dignity'; it is indicated that 'dignity' is something that applies to human beings as such. 'Dignity' is not defined either. But the articles under the title 'Dignity' all center on forms of violence to the human body: death penalty, medical experiments, torture, slavery and trafficking. It appears that 'dignity' has to do with not losing one's body to other people, not being physically owned, as if an object, by other people - or being manipulated with.

'Human' does not reappear in the Charter after title I, but 'dignity' does. In article 25, the 'elderly' are granted the right *'to lead a life of dignity and independence'*. And in article 31, 'every worker' is granted the right *'to working conditions which respect his or her health, safety and dignity'*. In both articles, 'dignity' could refer to the same: not being physically owned - or controlled - by other people. But the use of the concept is vastly indefinite, it could mean all sorts of things. One notices, though, that it is being connected with 'independence'.

The concept also plays a part outside the charter. The non-discrimination Directives we will be dealing with in connection with non-names all include a definition of harassment as a kind of discrimination. Harassment is defined as a conduct *'with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'*.¹⁴⁶ In these Directives, 'dignity' is clearly not being opposed to physical violence, but to psychological humiliation.

Furthermore, the concept of 'dignity' can be found in connection with EU-citizens' mobility and residence rights: *'Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured [...] and also that obstacles to the mobility of workers shall be*

¹⁴⁵ Some of the Directives dealing with the discrimination ground 'sex' only apply to the 'working population'. The new non-discrimination Directives do in principle apply to everyone, but either their material scope is limited to matters of work, or exceptions are laid down which indirectly influence who may benefit from these rights.

¹⁴⁶ Art. 2(3), Dir. 2000/43/EC. The same definition of harassment can be found in Dir. 2000/78/EC, Dir. 2004/113/EC, Dir. 2006/54/EC and Dir. 2010/41/EU

*eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country'*¹⁴⁷. It is not clear whether 'dignity' is here being associated with equality of treatment, or the right of the EU-citizen to bring his or her family to another member state, or both.

In the Residence Directive, we also find 'dignity' to be associated with family life, in a rather ambiguous manner. As regards the rights of family members to retain their rights of residence in a member state in the case of death of or divorce from the EU-citizen through whom they had first gained their right of residence, it is stated: *With due regard for family life and human dignity [...] family members [...] retain their right of residence exclusively on a personal basis.*¹⁴⁸ Again, 'dignity' and 'human' occurs together, and again, 'dignity' could mean all sorts of things. Two lines of thought are apparent, though: Either 'dignity' implies respect for the family, a respect which should be prolonged after the termination of the family; or it centers around the opposite, namely personal independence.

The concept of dignity does not play a dominant role in caselaw, either, but a few examples can be found. These examples more or less confirm the associative constellations which can be derived from legislation. 'Dignity' is being associated with non-discrimination as concerns a transsexual person (*'to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled'*¹⁴⁹); equality between men and women (*'the requirement of equal pay for men and women is founded mainly on the principles of human dignity [...] not on objectives which are economic in the narrow sense'*¹⁵⁰); and residence rights for family-members (*'those provisions seek to facilitate the integration of the migrant worker and his family in the host Member State [...] in compliance with the principles of liberty and dignity'*¹⁵¹). Non-discrimination, equality and respect for the family are the focal points in these examples, whereas 'independence' is not explicitly mentioned, but may be seen as implicated in all of them. We may also take note of the fact that 'dignity' is being opposed to *'economic in a narrow sense'*.

¹⁴⁷ Recital 9, Reg.(EEC) 1612/68

¹⁴⁸ Recital 15, Dir. 2004/38/EC

¹⁴⁹ Case C-13/94, *P v S*, par. 22

¹⁵⁰ Joined Opinion of Advocate General Cosmas, delivered on 8 October 1998, par. 80 (concerning Case C-50/96)

¹⁵¹ Case C-413/99, *Baumbast and R*, par. 59

This little detour to different uses of ‘dignity’ within the Charter, secondary legislation and case-law was taken because this concept constitutes our only possible mean of approaching the substance of the name ‘Human’. We have gained a little, though not much, on our detour. Our access to the concept of ‘dignity’ has been associational and mainly negative, based on what it means when dignity is violated. On the basis thereof it can be concluded that ‘dignity’ has to do with not being physically owned or controlled by other people, not being humiliated, and realizing some sort of personal independence; further, family life is possibly implied in that which may be violated when ‘dignity’ is violated. Equality plays an obscure part as well; equality concerns dignity in a non-economic sense, but dignity as equality may very well be manifested in terms of the requirement of equal economic conditions. Obviously, great uncertainty characterizes these considerations; ‘dignity’ functions as a vastly indefinite term the legal power of which can certainly be questioned¹⁵². However, for our purposes it is interesting that the name ‘Human’ in its rare appearances is connected to a concept which refers to an indefinite something, but a something which can be violated when personal independence is violated, either physically or mentally.

The examples mentioned leave us with no doubt that dignity can be *violated* (the non-discrimination-directives even state it explicitly), contrary to the proclamation of title I of the Charter: ‘*Human dignity is inviolable*’. But can it be lost? This question is parallel to the question of whether ‘humanity’ can be lost. The universal aspirations of the concept would make us think no. And yet, we learn from title I that when human dignity is harshly violated, we enter the field of the ‘inhuman’¹⁵³. This touches on the deep logical problem of the name ‘Human’ and its qualifying concept ‘dignity’. They are both torn between establishing a foundation of universality and loosing it in the very attempt to protect it. The overall conceptual vagueness serve to veil this problem; it would be easy to conclude that both concepts are only there for ideological, not legal reasons, as embellishments. And maybe they are. But that does not change the fact that a universal

¹⁵² In his Opinion in case C-36/02, *Omega Spielhallen* (which also touched upon the concept of human dignity, in connection with the operation of a laserdrome in which killing is simulated), the Advocate General Stix-Hackl reflects on ‘human dignity’ as a legal concept within EU-law and within national and international legal traditions, in order to assess its potential usefulness to the case in question. He concludes that the concept ‘*is in fact a generic concept for which there is not, as such, any traditional legal definition or interpretation in the true sense; it is rather the case that its substance has to be set out in more concrete form in each individual case, especially by way of judicial findings*’, and suggest that (in the present case) alternative legal routes should be found, due to ‘*the inchoate nature of the concept of human dignity*’ (par. 85 and 92)

¹⁵³ Article 4 of the Charter prohibits ‘*torture and inhuman or degrading treatment or punishment*’

foundation of right holders - however vague - is claimed and lost, as part of the same gesture.

In conclusion: Powerful horizons - and a significant fictitious name

Hereby, we can end the examination of the most comprehensive names and conclude that the heaviest name from a substantial point of view and the name which truly aspires to universality, 'Human', is also the weakest; and that its more modest and possibly more functionable sibling, 'Everyone', must be prepared for future negotiations with other, narrower names, - negotiations in which the potential power of fundamental rights mainly lies in their function as interpretational aspect.

The name 'Human' is, on the one hand, a seldom occurring name within EU-law, vaguely applied and entangled in inconsistencies. As such it is a weak name, not a name to rely on, neither what its substance nor attributes are concerned. On the other hand, the Treaty-based relation between EU law and the European Convention on Human Rights builds around EU-law a huge horizon of human rights. How powerful this horizon is remains to be seen. But it cannot be ignored. Human rights play an enormous role in connection with widespread hopes of creating a normative foundation for the EU, a European 'demos', 'narrative' or 'common culture' which could encompass national differences and nourish the popular legitimacy of the EU.

In other words, the doubleness of weakness and strength of the name 'Human' must be emphasized. Its strength, however, is a matter of controversy and lies primarily in its horizon; a horizon constituted by a complex architecture of national and international law, historical conceptual power and contemporary political hopes.

The more neutral sibling 'Everyone' appeared more often. No doubt, 'Everyone' and 'Human' should be seen as synonymous. However, it is noteworthy that it is the ideologically more neutral name 'Everyone' which is preferred. To the name 'Everyone' is attributed a number of fundamental rights. However, so far these rights function as interpretational aspects of other rights attributed to specified right-holders, rather than being independent rights themselves. Due to the fact that they are bound to the conditions and limitations of the Treaties and (especially what social rights are concerned) to pre-existing national rights, it is hard to imagine a development of these rights as independent rights - although we cannot exclude the possibility.

In its role as a holder of interpretational aspects in relation to other rights, the name 'Everyone' is not insignificant, though. However, it is not really a name of law (the

universal name which captures all possible social situations), it is rather a principle. Or, we may say that it is an important *fictitious name* in the sense that it does not stand by itself, neither in terms of its substance, nor in terms of its attributes - but that it affects our understanding of other, more specific names, both with respect to their substances and their attributes.

Chapter 5

‘EU-Citizen’

‘Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union [...]’. So the Treaty.¹⁵⁴ National citizenship and EU-citizenship always come together, and national citizenship comes first. A double name is established. Although the two names cling together, they are obviously different. I will focus on ‘EU-Citizen’; the way in which this name interacts with ‘National Citizen’ will show along the way. The rights which apply to the two names are deeply interconnected.

A complex whole: mobility, residence, family reunification and social rights

The Treaty and the Charter grants every EU-citizen *‘the right to move and reside freely within the territory of the Member States [...]’*.¹⁵⁵ This right is however subject to certain conditions, specified in secondary law, especially in *Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* - which we shall refer to as the Residence Directive¹⁵⁶. Free movement across borders is an unconditional right of EU-citizens (unless they are seen as a danger for public policy, public security or public health¹⁵⁷), but residence for longer periods within a given state is not.

¹⁵⁴ Art 20(1) TFEU, Art. 45(1) Charter of Fundamental Rights

¹⁵⁵ Art. 21(1) TFEU

¹⁵⁶ *Dir. 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*

¹⁵⁷ See Chapter VI of *Dir. 2004/38/EC*: ‘Restrictions on the right of entry and residence on grounds of public policy, public security or public health’.

Apart from being itself subject to conditions, the right to free movement and residence within the EU is also the basis of other rights, including social rights and family unification rights. In other words, an EU-citizen has to cross borders in order to be able to enjoy these social rights and family unification rights. Consequently, the social rights in question are intrinsically connected to EU mobility and residence rights, and all these different kinds of rights - including family reunification rights - must be investigated together, as a complex whole.

It is important to mention that recently, it has been brought into question whether movement across borders is a necessary condition for being able to enjoy these other EU-citizen's rights. In the Zambrano-judgment from 2011, the CJEU granted family reunification rights to EU-citizens who had not crossed borders. It should be mentioned that the EU-citizens in question were small children, and they were granted the right to family reunification with their parents who were not EU-citizens. The judgment was based on the argument that the children would not be able to enjoy their EU-citizens rights if their parents were being forced to leave the EU; they would be *deprived* of the possibility of enjoying these rights.¹⁵⁸ A later judgment, the McCarty judgment, clarified that that would still mean mobility rights and EU-citizens rights in *other* member states.¹⁵⁹

Accordingly, the Zambrano-judgment does not change the fact that EU-citizen's rights are triggered by the crossing of borders. But it does make use of a remarkable logic of argumentation. We shall call this '*the condition for being able to enjoy the right*' logic. It implies that it is not only so that a right-holder must be ensured the possibility of enjoying the rights granted to him or her; the *conditions* for being able to enjoy these rights must also be taken into account. In the Zambrano-judgment, the possibility of being able, in the future, to enjoy fundamental EU-citizen's rights was being secured by the court in the sense that particular residence rights which could otherwise not be derived from EU law were being granted. In other words, the logic implies that for the sake of observing certain particular rights, other rights must be granted.

In any case: The children in the Zambrano-case had not *actually* crossed borders within the EU (the argumentation relied on the idea that they might potentially want to, in the future), - and still they were granted family reunification rights by virtue of their status as EU-citizens. '*Citizenship of the Union is intended to be the fundamental status of nationals*

¹⁵⁸ Case C-34/09, *Zambrano*, par. 42-44

¹⁵⁹ Case C-434/09, *McCarthy*, par. 53

of the Member States', the CJEU emphasized.¹⁶⁰ The Zambrano-judgment demonstrates very clearly that the legal implications of the EU-citizenship are subjected to dynamical development.

The rights of EU-citizens in light of the *as-if*-logic

Let us take a closer look at the rights of EU citizens. An EU-citizen can move freely to another member state and reside there for 3 months without being subject to any conditions. The family can come as well, - also family members who are not EU citizens.¹⁶¹ Even family members who used to reside illegally in the EU may accompany an EU-citizen who moves to another member state.¹⁶²

EU-citizens also have working access rights in other member states, including the freedom of establishment. As briefly mentioned in the last chapter, the Charter of Fundamental Rights grants every EU-citizen '*the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State*'¹⁶³. For decades - since 1968 - this right has been laid down in *Regulation 1612/68 on freedom of movement for workers within the Community*¹⁶⁴ - the Free Movement Regulation, as we shall call it. The Regulation is still in force, although amended many times since then. The first six articles of the Regulation regards working access rights and the removal of national hindrances, including discriminatory measures, for the possibilities of foreign workers to seek work in the member states. This part of the Regulation concerns rights of EU-citizens. '*Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.*'¹⁶⁵ And: '*A national of a Member State who seeks employment in the territory of another Member*

¹⁶⁰ Case C-34/09, *Zambrano*, par. 41

¹⁶¹ Art. 6, Dir. 2004/38/EC

¹⁶² Case C-127/08, *Metock and others*

¹⁶³ Art. 15(2), Charter of Fundamental Rights

¹⁶⁴ Reg. (EEC) No 1612/68 on freedom of movement for workers within the Community

¹⁶⁵ Art. 1(1), Reg. (EEC) No 1612/68.

*State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment.'*¹⁶⁶

For our purposes, the Free Movement Regulation gives rise to two important remarks. First, the Regulation does not define the difference between a worker and non-worker, yet encompasses the tension between the two. The working access rights mentioned apply to all EU-citizens, whereas the later parts of the Regulation concerns the rights of workers. As we shall see in the next chapter, the question of how to define the difference between a worker and a non-worker constitutes one of the most complicated and certainly also one the most important problematics of the field. The Regulation can be seen as a precursor of this problematic in that it encompasses both 'EU-citizens' who are *potential workers* and 'Workers', without specifying under which conditions a potential worker should be regarded as a 'Worker', if at all. In this chapter, we are concerned with the rights which apply to all EU-citizens, including non-workers. Working access rights undoubtedly apply to all EU-citizens. We may say that all EU-citizens are free to pursue the name 'Worker' in addition to the name 'EU-citizen', but this does not mean that all EU-citizens can in fact claim the name 'Worker'.

The second remark concerns the logic implied in expressions such as '*in accordance with the provisions [...] governing the employment of nationals*' and '*the same assistance as that afforded [...] to their own nationals*'. EU-citizens from other member states have working access rights *on the same conditions* as nationals of the state in question. They are to be treated *as if* they were nationals of that state, in spite of the fact that they are not. Accordingly, I shall characterize this logic as the *as-if-logic*. Mostly, as we shall see, it is the expression '*equality of treatment*' - and not '*in accordance with*' or '*the same as*' - which is being used in secondary legislation. The *as-if logic* is of course a particular kind of non-discrimination logic (as already explained in chapter 3) and governs major parts of the field of EU social rights, more precisely those connected to the discrimination ground 'nationality'.

The *as-if logic* is more complicated than one should think. In the next chapter I shall analyze some of the major problematics it gives rise to. For now, we shall just take note of the overall idea implied in this expression, and return to the rights of EU-citizens.

¹⁶⁶ Art. 5, *ibid.* Similar rights of employers are granted as well: '*Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force [...]*'. (Art. 2)

So, an EU-citizen, including his or her family, can reside in another member state for 3 months without being subject to any conditions. The EU-citizen is granted equal treatment rights (as-if-rights) in this state in relation to his or her right to seek and apply for work.

Social security and social assistance rights are governed by a Regulation from 2004¹⁶⁷ which replaces earlier legislation with a view to '*modernising and simplifying*'¹⁶⁸ the rules of this field. The new Regulation is, however, still both very long and complicated.

The new Social Security Coordination Regulation lays down that equality of treatment should be a general principle as regards the access to the social benefits covered by the regulation. EU citizens, including their families, '*shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof*'.¹⁶⁹ The following branches of social security are covered by the regulation: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; and family benefits. Also, certain social assistance benefits falls within the scope of the regulation.¹⁷⁰

The Residence Directive also lays down a principle of equal treatment which applies to all EU-citizens residing legally in a member state. However, certain restrictions are specified: '*[...] the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence [...] nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies [...] to persons other than workers, self-employed persons, persons who retain such status and members of their families.*'¹⁷¹

The distinction between 'social assistance' and 'social security' is crucial. 'Social assistance' concerns minimum benefits needed for subsistence, whereas 'social security' concerns a wide range of social rights, as listed above. In the EU countries, far the majority of the social security benefits are contributory benefits, that is, they correspond

¹⁶⁷ Reg. (EC) No 883/2004 on the coordination of social security systems. This regulation is introduced in stead of Regulation (EEC) No 1408/71 which had been amended many times and significantly so. 1408/71 does however remain in force for the purpose of certain acts and agreements

¹⁶⁸ Recital 3, Reg.(EC) No 883/2004

¹⁶⁹ Art. 4 and art 2(1) (as regards the persons covered), *ibid*

¹⁷⁰ Art. 3(1) and 3(3), *ibid*

¹⁷¹ Art. 24(2), Dir. 2004/38/EC

to rights obtained over a certain period of time on the basis of contributions from the right holder. This means that an EU-citizen who has not obtained such rights is not only excluded from social assistance and study finance during the first 3 months, but also from a very large part of the social security rights of the host state as well. In many cases, there will not be much left. How much is left will depend on how the distinction between social assistance and social security is made within the specific national system, and the role herein of contributory rights vs non-contributory rights. - It is crucial to note, though, that the CJEU does not accept any national distinction between social security and social assistance rights. As we shall see in the following chapters, the court establishes certain criteria as far the meaning of those concepts are concerned - in spite of the fact that they are regarded as national concepts. Such criteria turn out to be significant with respect to a number of cases.

After the first 3 months in another member state, the EU-citizen is not automatically entitled to stay, but can be expelled.¹⁷² The situation is very different if the EU citizen can claim the name 'Worker' or a worker-related name, as we shall see in the next chapter. But here we are concerned with what the name 'EU-citizen' alone entitles to. EU-citizens have the right to stay after 3 months if they *'have sufficient resources for themselves and their family members not to become a burden on the social assistance system [...] and have comprehensive sickness insurance cover in the host Member State'*¹⁷³. It is for the member state in question to assess what *'burden on the social assistance system'* means; an EU-citizen may be expelled for the reason that he or she applies for social assistance, although this should *'not happen automatically'*.¹⁷⁴ It is also to a high degree the state in question which decides what *'sufficient resources'* means, although it is required that the state must not demand a higher level of resources, than what is otherwise considered minimum subsistence level within the national social system. Apart from this, the state should not rely on standard procedures but take account of *'the personal situation'*.¹⁷⁵

¹⁷² Art. 14, *ibid*

¹⁷³ Art. 7(b), *ibid*

¹⁷⁴ Art. 14(3), *ibid*: *'An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'*

¹⁷⁵ Art 8(4), *ibid*: *'Member States may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.'*

If the host state decides not to expel an EU-citizen who is without sufficient resources, then he or she is not only entitled to social security benefits (to the extent that such rights have been earned or that non-contributory social security benefits exist), but also to social assistance. But the restriction regarding study finance still applies, after the first 3 months.¹⁷⁶

Finally, after 5 years of continuous residence in another member state, the EU-citizen and family shall have the right of permanent residence without any conditions; expulsion is no longer a risk, unless the EU-citizen is absent from the state for a period exceeding two consecutive years.¹⁷⁷ The full right of equal treatment can be enjoyed, both social assistance and maintenance aid for studies are now available.

Tensions between primary and secondary law

These are the overall social rights of EU-citizens as laid down by secondary legislation. But EU-law is full of tensions. The case-law shows that there is another angle to the social rights of EU-citizens. That angle is provided for by primary law, more precisely by the Treaty-based principle of non-discrimination and the fundamental status of EU-citizenship.

In principle, secondary and primary law should not conflict. Secondary law should be based on the fundamental principles and rights of primary law. But more than that: Secondary law should also be interpreted and implemented in light of these fundamental principles and rights. The CJEU takes this hierarchy seriously: it takes into account both primary and secondary law, but gives weight to primary law, both in the sense that secondary law is interpreted in the light of the Treaty, but also in the sense that judicial findings may be based directly on Treaty articles.

This has proven to give rise to a very dynamic interpretational practice, as the result of which the understanding of both primary and secondary law develops fast and often unpredictably. Since the distance between the general and open-ended provisions of primary law and the more specific provisions of secondary law is often quite dramatic, it is no wonder that a case-law which gives weight to interpreting and developing the former will continuously create fields of tension between the two.

¹⁷⁶ Art. 24(2), Dir. 2004/38/EC. As quoted above: '[...] nor shall it [the state] be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies [...] to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

¹⁷⁷ Art 16(1-4), Dir. 2004/38/EC

As regards the social rights of EU-citizens, fields of tension exist in particular in the border zones between 'Worker' and 'EU-citizen'. One highly tensional field concerns the definition of 'Worker': Can EU-citizens who are not economically active still claim to be 'Workers', and under what conditions? This field will be addressed in the next chapter. Another tensional field concerns the rights of EU-citizens who are assumed not to be workers and who cannot support themselves. I will briefly discuss two judgments in order to demonstrate how Treaty articles can be used partly to *confirm* and partly to *strengthen* what is laid down in secondary legislation as regards the social rights of EU-citizens who are not workers and who cannot support themselves.

The Trojani-judgment concerns a French citizen residing in Belgium. Mr. Trojani was a former drug addict who was given accommodation in a Salvation Army hostel. He did various jobs at the hostel, in return for board, lodging and pocket money, and as part of a personal socio-occupational reintegration program. As he had no resources (and had to pay the hostel), he applied for social assistance, a Belgian benefit called 'the minimex'. First, the CJEU was asked to answer the question of whether Mr. Trojani could claim to be a worker according to EU-law. The CJEU answered that it was for the national court to examine that question, but specified the criteria which should guide the examination. I shall keep this part of the judgment for the next chapter. Secondly, the CJEU considered whether Mr. Trojani, in case he could not claim to be a worker, could rely on his EU-citizenship and the Treaty-based principle of non-discrimination in order to be granted a social assistance benefit. The ECJ found that Mr. Trojani could in principle be expelled: '*[...] it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence.*'¹⁷⁸ However, as long as Mr. Trojani resided lawfully in the state (and had resided there for a certain period of time), he could rely on the principle of non-discrimination in order to receive social assistance, on the same conditions as nationals of the state. '*[...] national legislation [...], in so far as it does not grant the social assistance benefit to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy the conditions required of nationals of that Member State, constitutes discrimination on grounds of nationality prohibited by Article 12 EC [now art. 18].*'¹⁷⁹

¹⁷⁸ Case C-456/02, *Trojani*, par. 45

¹⁷⁹ *ibid*, par. 44

This judgment *confirms* the rights laid down in secondary legislation by emphasizing that Mr. Trojani could lose his rights of residence as a result of his application for social assistance. But it also *strengthens* his social rights by making explicit what was only implicit in the Residence Directive. As far as non-workers are concerned, the general requirement laid down in that Directive is ‘sufficient resources’. The Directive does not state explicitly that a non-worker who is not expelled (although he could be) have a right to equal treatment with respect to social assistance. However, the conclusion of the CJEU is not based on an interpretation of the Directive, but of the principle of non-discrimination laid down in the Treaty.¹⁸⁰

The other judgment follows a very similar logic. It also concerns a French citizen in Belgium, Mr. Grzelczyk, applying for ‘the minimex’. The CJEU confirms that since Mr Grzelczyk is a student - and cannot claim to be a worker - he is not eligible for study finance. He may be expelled, but as long as he is not, he is not excluded from receiving social assistance benefits, but may apply for ‘the minimex’ on the same conditions as nationals, according to the principle of non-discrimination.¹⁸¹ In this case, the CJEU emphasizes that *‘in no case may [withdrawal of residence permit] become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State’s social assistance system.’*¹⁸² And the Court gives prominence to *‘a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties [...] are temporary’*.¹⁸³

The principle of non-discrimination on the grounds of nationality was mentioned already in the last chapter, but it should be introduced properly in the context of this chapter as well, - as a fundamental principle applying to EU-citizens. The Treaty article reads: *‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’*¹⁸⁴.

How does this formulation of the non-discrimination principle relate to the expressions *‘equality of treatment’*, *‘in accordance with’* or *‘the same as’*? Is the formulation of the Treaty a manifestation of the as-if-logic as well? It is, even though it does not look that way.

¹⁸⁰ *ibid*, par. 42

¹⁸¹ Case C-184/99, *Grzelczyk*, par. 46

¹⁸² *ibid*, par. 43

¹⁸³ *ibid*, par. 44

¹⁸⁴ Art. 18 TFEU

The expression '*on grounds of nationality*' would rather make us assume that no right-holders are designated in general, and that the discrimination ground 'nationality' might refer to all sorts of issues related to nationality. But this is not the case. The formulation means something much more specific. It means that there shall be no discrimination against EU-citizens on grounds of their nationality in comparison to other EU-citizens who are national citizens of the member state whose legislation is in question.¹⁸⁵ In other words, not only does 'nationality' not refer to any nationality or any issue of nationality, but only to 'nationality of a member state of the EU', it is even so that a comparison between two defined groups of right-holders is silently presumed. In other words, the Trojani- and Grzelczyk-judgments, based directly on the principle of non-discrimination in the Treaty article, are expressions of an *as-if-logic*, just as the principle of equal treatment laid down in the Social Security Coordination Regulation and in the Residence Directive. In fact, we are dealing with exactly the same principle. The difference concerns the flexibility with which the CJEU deals with the Treaty provision - manifested in expressions such as '*not the automatic consequence*', '*a certain degree of financial solidarity*' and '*if the difficulties are temporary*'.

There are also judgments in which the CJEU makes use of Treaty articles so as to go *beyond* the rights specified in secondary legislation.

The Carpenter-judgment from 2012 is particularly interesting from our perspective. It does not concern the principle of non-discrimination, but family unification rights seen in the light of the right to provide services within the territory of the EU. The latter right is a fundamental right of EU-citizens, just like the right to seek and take up employment in all member states. The judgment demonstrates that criteria laid down in secondary legislation may be disregarded. In addition, it gives us another example of '*the condition for being able to enjoy a right*'-logic. And finally, a human right is being involved.

Mr. Carpenter, a British National, was the sole owner of an undertaking established in the UK. Since a substantial part of the undertaking's business was conducted with customers established in other Member States, he regularly travelled to those other states for business purposes. Mr. Carpenter was married to a Philippine national. He attributed the success of his business to his wife who relieved him in caring for his two children of a previous marriage. - However, Ms. Carpenter's residence permit in the

¹⁸⁵ As far as the free movement of *people* is concerned. The prohibition may also concern goods, services and capital (also meant to move freely across borders, according to the four 'basic freedoms' of EU-law).

UK had expired already before the marriage. She applied to the British authorities for leave to remain as the spouse of Mr. Carpenter, but the application was refused.

When considering the case, the CJEU first establishes that the Residence Directive¹⁸⁶ is of no use to Ms. Carpenter. Only if she had crossed borders together with her husband, if she had accompanied him on his business travels within the EU, she would have acquired a right of residence through him. But since she stays in the UK with the children, she is not covered by the Directive.¹⁸⁷ Instead, the CJEU turns to a fundamental Treaty provision, article 49, guaranteeing EU-citizens the right freely to provide services within the EU. Naturally, it is not Ms Carpenter, but Mr. Carpenter who can rely on this provision.

A two-fold argument is established by the CJEU. Firstly, the CJEU argues that Mr. Carpenter's fundamental right to provide services would be infringed in case his wife would be denied residence in the UK. More precisely, a decision to deport Mrs. Carpenter would be harmful to the family-life of the Carpenter-family and *therefore* to Mr. Carpenter's possibilities of making use of his right to provide services within the EU: *'It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom'*.¹⁸⁸ We are confronted, again, with the *'the condition for being able to enjoy a right'* logic. Mrs. Carpenter's right of residence within the UK is seen as a *condition* for Mr. Carpenter's possibility of enjoying a fundamental EU-right, the right to provide services.

Secondly, the CJEU considers whether this obstruction of Mr. Carpenter's possibility of exercising a fundamental EU-right right can be justified? According to established CJEU-case-law, an obstruction of this kind may be justified if it is based on 'reasons of public interest' and if it satisfies the principle of proportionality. But instead of conducting an examination based on EU-law-criteria, the CJEU interprets and applies article 8 of the European Convention. All the criteria which play an argumentative role are derived from article 8 of the Convention and the case-law of the ECtHR. 'Reason of public interest' become *'a pressing social need'*. And the evaluation of the appropriateness and necessity of the measure becomes a balancing exercise between

¹⁸⁶ Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services - now repealed by Directive 2004/38/EC (dealt with above)

¹⁸⁷ Case C-60/00, *Carpenter*, par. 32-35

¹⁸⁸ *ibid*, par. 39

'the right of Mr. Carpenter to respect for his family life', on the one hand, and on the other *'the maintenance of public order and public safety'*.¹⁸⁹ The CJEU concludes that a fair balance has not been struck which means that the deportation of Mrs. Carpenter cannot be justified.

The two different parts of the argumentation appear as logically separated. In the first part, the protection of the family life of Mr. Carpenter only has a secondary status; it constitutes a condition for the possibility of enjoying the right to freedom of establishment. In the second part, the protection of the family life of Mr. Carpenter has a primary status; it constitutes a fundamental right. Yet, the two parts of the argumentation are presented within the structure of one overall argument. Ultimately, Mr. Carpenter's family life is only granted fundamental protection because he is an EU-citizen exercising a fundamental EU-right.

In chapter 33, we shall return to the Carpenter-judgment and analyze the nature of the relationship between the two parts of the argumentation (which concerns, of course, the relationship between a fundamental EU-right (applying to EU-citizens) and a human right (applying to 'Everyone'). For now, we shall merely conclude, firstly, that Treaty based fundamental EU-rights are more powerful than secondary legislation, secondly, that this may be manifested in the shape of the *'condition for being able to enjoy the right'* logic and thirdly, that a human right (a right of 'Everyone') may have the role of strengthening fundamental EU-rights.

In conclusion: 'EU-citizen' - an amputated name

In contrast to the names 'Human' and 'Everyone', the name 'EU-citizen' is a strong name with powerful transnational rights attributed to it: mobility rights, residence rights, working access rights and equal treatment rights with respect to social security and social assistance. Only mobility and working access rights are unconditional and unlimited, though. Residence and family reunification rights covering a period of three months in another member state are granted unconditionally as well. But residence and family reunification rights concerning a longer period and social assistance rights are subjected to conditions which can certainly not be satisfied by any EU-citizen. In general, those conditions center on being a 'Worker'. Alternatively, self-support is required. As far as social security is concerned, equal treatment rights (*as-if*-rights) are in principle granted to all EU-citizens. But since most social security rights of the EU

¹⁸⁹ *ibid*, par. 41-43

member states are contributory rights, only an EU-citizen who have earned such rights - by way of work and/or membership of national rights systems - will really be able to benefit from his or her equal treatment rights.

Control over national social rights are clearly operationalized through restrictions on residence rights rather than on social rights directly. Mobility is easy, residence harder to obtain for the EU-citizen. On the other hand, stability is rewarded. The longer an EU-citizen stays in the same country, the better his or her social rights, culminating with the right of permanent residence after 5 years. Also for the CJEU, residing in a member state for '*a certain period of time*' constitutes a relevant criterium what social rights are concerned.

As the reader might have noticed there is an atmosphere of 'amputation' characterizing the analysis of the name 'EU-citizen'. This is due to the fact that I have deliberately separated this name and cut off any other names, most notably the name 'Worker'. I wanted to evaluate the strength of 'EU-citizen' alone. As such, it does have a certain strength, but it also appears as a substratum, - a name meant to serve other names.

It is important to note, though, that the CJEU takes the EU-citizenship very seriously. The EU-citizenship is seen as constituting 'a fundamental status'. This gives rise to another dimension of rights, so to speak: rights concerning '*conditions for being able to enjoy*' the rights attributed to the EU-citizenship. The fundamental status of the EU-citizenship secures not only the actual, but also the *potential* use of these rights. In addition, we saw the potential power of the Treaty-based fundamental rights granted to EU-citizens. In this connection, the criteria established by the Court, '*not the automatic consequence*', '*financial solidarity*', '*temporary difficulties*' along with the '*conditions for being able to enjoy a right*'-logic and interplays between EU-rights and human rights, constitute a very flexible foundation for the interpretation of the fundamental rights of EU-citizens.

Chapter 6

'Third country national'

The name 'EU-citizen' has a counter-name. Those, who cannot claim the name 'EU-citizen' are called 'Third Country Nationals'. Also stateless people, refugees and illegal immigrants are included under this name. We are here entering a large grey field. The

existence of many different legal sources¹⁹⁰ give rise to a perplexing and uneven landscape where exceptions are often more important than general rules. As a result thereof a large number of sub-names has arisen.

I cannot possibly owe justice to all these names, but will attempt to unfold the main features of the overall name ‘Third-country National’ and of some of its sub-names as they appear within EU-legislation and case-law.

First, it should be noted that the rights of third country nationals are the subject of considerable political interest within the EU. At its special meeting in Tampere, October 1999, the European Council acknowledged the need for harmonization of national legislation with respect to third country national’s rights of admission and residence. These rights should be ‘*comparable to*’ and ‘*as near as possible to*’ those of EU-citizens. The goals of the meeting are cited in the preambles of three legislative acts from 2003, all establishing certain rights of third country nationals.¹⁹¹ The Treaty does not state that the rights of third country national’s should be ‘*comparable to*’ those of EU-citizens, but does underline the need to ‘*[define] the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States*’.¹⁹²

So, to what extent are the rights of third country nationals ‘*comparable to*’ the rights of EU-citizens? Third-country nationals have - by a Regulation from 2003 - been brought within the scope of the Social Security Coordination Regulation.¹⁹³ This means that when moving to another member state, they can in principle enjoy the same equal treatment rights with respect to social security and social assistance rights as EU-citizens moving to another member state.

¹⁹⁰ See Lynn Roseberry: “The Integration of Welfare Functions into EU Law through the Principle of Non-discrimination and the Consequences for Third Country Nationals”, in Ulla Neergaard, Ruth Nielsen, Lynn Roseberry (ed): *Integrating Welfare Functions into EU Law - From Rome to Lisbon*

¹⁹¹ Recital 2, *Dir. 2003/109/EC concerning the status of third-country nationals who are long-term residents*; Recital 3, *Dir. 2003/86/EC on the right to family reunification*; Recital 1, *Reg. (EC) No 859/2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality*

¹⁹² Art. 79(b) TFEU

¹⁹³ *Reg. (EC) No 859/2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.*

It should be noted that third country nationals are brought within the scope of the old Regulation, 1408/71 (which accordingly is still in force), and not the new Regulation, 883/2004, mentioned above.

However, as we saw above, transnational social rights a part of a complex whole. Without mobility and residence rights, third country nationals will not be able to make use of their social rights. Furthermore, work access rights are crucial. Even though we are still not analyzing the name 'Worker', the possibility of pursuing the name 'Worker' constitutes an important attribute of the name 'Third Country National' (as it does of the name 'EU-Citizen')

Also, it should be noted that the Treaty addresses legal third-country nationals. The same does the Social Security Coordination Regulation. Consequently, we are already faced with two sub-names: 'Legal Third Country National' and 'Illegal Third-Country National'.

When looking into the mobility, residence and working access rights of third-country nationals we are confronted with not just two, but a perplexing number of sub-names. There are no such rights granted to third country nationals as such, not even if we add 'legal'. We can only investigate the rights attributed to the sub-names. I shall examine three of these sub-names, all arisen because of recent directives, from 2000 onwards, and all expressing attempts of realizing the goals of the Tampere-meeting. The first two sub-names, 'Long Term Resident' and 'Blue Card Holder' belong to the more 'privileged' sub-names, whereas the third one, 'Victim of Trafficking' is a flawed name in many respects.

As far as Family reunification rights are concerned, they are attributed to these sub-names as well. But there is also a fourth sub-name to which certain minimal family reunification rights are attributed, 'Third Country National holding a residence permit in the state in question for one year or more, with stable and regular resources'. I shall deal with this sub-name by the end of the chapter.

The sub-name 'Long term resident'

I shall begin with 'Long term resident'. Definition and attributes of this sub-name can be derived from the Long Term Residence Directive from 2003.¹⁹⁴

Third-country nationals who have resided legally and continuously within a member state for five years, and can provide evidence that they can support themselves and their families and are covered by sickness insurance, are eligible for the status of 'Long Term Resident', if they choose to apply for it. Students are however excluded from this

¹⁹⁴ Dir. 2003/109/EC concerning the status of third-country nationals who are long-term residents

option as well as people who reside in the state on temporary grounds and people who are refugees waiting for an answer to their application for residence.¹⁹⁵

We see that these requirements resemble the requirements laid down for EU-citizens seeking to obtain the status of 'permanent residence' in another member state. However, EU-citizens who have resided 5 years in another member state do not have to provide evidence that they can support themselves in order to obtain permanent residence status. It is *during* those 5 years that they need to be self-supportive (and only if they are not workers or have not been granted a residence permit for other reasons). Furthermore, EU-citizens are subjected to the mentioned requirements in their *second member state*, third country nationals in their *first state* of residence within the EU. Third country nationals may lose their long term residence status if they are absent from the state for a period of 12 consecutive months, whereas EU citizens may lose their right of permanent residence after 2 years of absence. In addition, third country nationals will lose their long term residence status if they obtain the same status in another member state¹⁹⁶; this status can only be enjoyed in one state at a time.

Once a third-country national can claim the name 'Long Term Resident' he or she shall enjoy equal treatment rights as regards a wide range of conditions within the areas of employment, education and social rights.¹⁹⁷ However, the exceptions are significant. With respect to access to employment, long term residents are excluded from activities which '*entail even occasional involvement in the exercise of public authority*', and member states '*may retain restrictions to access to employment or self-employed activities in cases where [...] these activities are reserved to nationals, EU or EEA citizens*'¹⁹⁸. With respect to access to education, '*proof of appropriate language proficiency*' may be required¹⁹⁹. Finally, what social rights are concerned, member states '*may limit equal treatment in respect of social assistance and social protection to core benefits*'²⁰⁰. Member states are in other words granted enormous discretion with respect to limiting the extent of 'equal treatment'; they may almost limit it to the point of erosion of the rights in question.

¹⁹⁵ Art. 3, 4, 5, Dir. 2003/109/EC. For precise definitions of who are excluded, see art. 3(2)

¹⁹⁶ Art. 9(1)(c) and 9(4), *ibid*

¹⁹⁷ Art. 11, *ibid*

¹⁹⁸ Art. 11(1)(a) and 11(3)(a), *ibid*

¹⁹⁹ Art. 11(3)(b), *ibid*

²⁰⁰ Art. 11(4), *ibid*. Recital 13 provides that '*core benefits [...] covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care. The modalities for granting such benefits should be determined by national law.*'

The name 'Long term resident' also implies rights of movement to and residence in another member state, with the family in so far as it was constituted already.²⁰¹ These rights resemble the rights of EU-citizens: 3 months without conditions; after 3 months selfsupport and sickness insurance are required; entitlement to equal treatment social rights. But again, there are significant exceptions to these rights. With respect to access to employment, member states are granted almost complete discretion: *'Member States may examine the situation of their labour market and apply their national procedures regarding the requirements for [...] exercising such activities. For reasons of labour market policy, Member States may give preference to Union citizens, to third-country nationals [already residing in the state] [...]; member states 'may provide that [employed or self-employed persons] shall have restricted access to employed activities [...].'*²⁰² In other words, member states can practically decide whether long term residents from other member states should work within their territory or not. They can justify almost any limitation by referring to 'the situation of their labour market'.

Corresponding to these severe limitations, the residence rights of long term residents in their second member states are not improved if they are workers, as is the case for EU-citizens.²⁰³ Long term residents may apply for long term residence status in the second member state, according to the same conditions as in the first one, - but will, if granted, lose the status in the first member state.²⁰⁴

As is clear from this overview, the Long Term Residence Directive is characterized by vague rights which can easily be eroded - first and foremost due to the enormous discretion granted to the member states.

So far, the Long Term Residence Directive has not given rise to a huge caselaw. The Kamberaj-judgment from 2012 is worth mentioning, though. It shows us that the CJEU seeks to secure the rights of long term residents against undermining by way of conceptual clarifications. The concept of 'core benefit' is interpreted by the CJEU, and indications as to the meaning of 'social assistance' can be detected as well. A provision of the Charter of Fundamental Rights plays an important argumentative role in relation to both issues.

²⁰¹ Art. 16(1), *ibid*

²⁰² Art. 14(3) and 21(2), *ibid*

²⁰³ This is the indirect consequence of art. 15 of the Directive, in that all long term residents are subjected to the requirements of self support and sickness insurance

²⁰⁴ Art. 23, *ibid*

Mr Kamberaj, an Albanian national, had resided and been employed in the Autonomous Province of Bolzano for 16 years. He used to receive a housing benefit. But in 2010, his application was rejected on the ground that the funds for third-country nationals, living in Bolzano, were exhausted. Had Mr Kamberaj's rights been violated? The CJEU emphasizes that it is for the national courts to determine whether Mr. Kamberaj' enjoys the status of long-term resident. But if he does, then he is entitled to equal treatment rights in accordance with the Long Term Residence Directive.²⁰⁵ And according to the CJEU, the provincial law in question which allocates different funds to different groups of people (EU Citizens and Third Country Nationals) amounts to difference of treatment.²⁰⁶

Two questions must be clarified, though. Firstly, does the housing benefit in question fall within the material scope of the Directive? The Directive covers 'social security', 'social assistance' and 'social protection'. We see, in other words, how important national categorizations in relation to those concepts might be. The CJEU emphasizes, on the one hand, that these concepts are national concepts. But on the other hand, the court makes clear that not all national categorizations would be acceptable: *'when the European Union legislature has made an express reference to national law, as in Article 11(1)(d) of Directive 2003/109, it is not for the Court to give the terms concerned an autonomous and uniform definition under European Union law [...]. However, the absence of such an autonomous and uniform definition under European Union law of the concepts of social security, social assistance and social protection and the reference to national law in Article 11(1) (d) of Directive 2003/109 concerning those concepts do not mean that the Member States may undermine the effectiveness of Directive 2003/109 when applying the principle of equal treatment provided for in that provision.'*²⁰⁷

The CJEU underlines that it is for the national court to determine whether the housing benefit in question can be categorized as either 'social security', 'social assistance' or 'social protection' within the context of national law. But the court also provides certain criteria with respect to this examination. More precisely, it brings the Charter into the discussion, and more specifically article 34 in which it is stated that the Union *'recognises and respects the right to social and housing assistance so as to ensure a decent*

²⁰⁵ Case C-571/10, *Kamberaj*, par. 68-69

²⁰⁶ *ibid*, par. 70-75

²⁰⁷ *ibid*, par. 77-78

*existence for all those who lack sufficient resources*²⁰⁸ The CJEU explains that when determining the social security, social assistance and social protection measures defined by their national law, the Member States must comply with the Charter. Hereby, it indicates that the housing benefit in question should in fact be categorized as ‘social assistance’.

Secondly, it must be examined whether the housing benefit under dispute constitutes a ‘core benefit’ within the meaning of the Long term Resident Directive. As mentioned above, member states may limit equal treatment in respect of social assistance and social protection to core benefits. The CJEU considers, carefully, the meaning of the term ‘core benefit’, but fails to establish a clear connection between a housing benefit and a ‘core benefit’ on the basis of an analysis of the Directive itself. Instead, the court relies, again, on article 34 of the Charter. The ECJ concludes that in so far as the housing benefit in question ‘*fulfils the purpose set out in that article of the Charter*’ - namely to ‘*ensure a decent existence for all those who lack sufficient resources*’ - it does indeed constitute a ‘core benefit’ within the meaning of the Directive.²⁰⁹

The sub-name ‘Blue Card Holder’

‘Blue Card Holder’ is another of the more privileged sub-names. Third country nationals may apply for an EU Blue Card, either from outside EU, or from an EU-country in case they already have a temporary residence permission. Blue Cards are conceived for third country nationals with ‘higher professional qualifications’, entitling their holders to reside and work in a member state. To acquire a Blue Card is not a right; a member state can always say no, even if the applicant fulfills the requirements. In fact, the Blue Card Directive warns member states against being too generous and encourages them to consider whether the jobs in questions could be undertaken by people already residing in the state.²¹⁰ Not all third country nationals can apply, the list of people excluded from this option is extensive; long terms residents are f.inst. excluded.²¹¹

²⁰⁸ Article 34(3) of the Charter of Fundamental Rights, see C-571/10, *Kamberaj*, par. 80

²⁰⁹ *ibid*, par. 92

²¹⁰ *Dir. 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment*. Art. 5 lists the criteria of admission, including proof of work contract, education / qualifications and minimum salary requirements. The warnings are in art 8(2)

²¹¹ Art. 3(2), *ibid*

But once a Blue Card is obtained, there are rights connected to it. Blue Card holders have the right to work and reside with his or her family in the state in question, but during the first 2 years access to the labour market is extremely restricted. Only employment activities which meet the conditions for admission (employment which requires 'higher professional qualifications' according to specific criteria and where the salary fulfills specified minimum-criteria) are allowed. After 2 years, member states may grant Blue Card holders equal treatment rights as regards access to highly qualified employment. But restrictions similar to the restrictions laid down on long term residents in their first member state will now apply: restrictions concerning '*exercise of public authority*', '*safeguarding the general interest of the State*' and '*activities reserved to nationals, Union citizens or EEA citizens*'.²¹²

What social rights are concerned, there shall be equal treatment according to the Social Security Coordination Directive.²¹³ However, a member state may withdraw or refuse to renew an EU Blue Card when the EU Blue Card holder cannot supply him- or herself, and family, and applies for social assistance. Temporary, one-time unemployment, shall be accepted, though.²¹⁴

After eighteen months of residence in the first Member State, a Blue Card holder may move to another Member State with the family for the purpose of highly qualified employment. In that case he or she must apply once again for a Blue Card, according to the same conditions as the first time.²¹⁵ As mentioned, a long term resident cannot become a Blue Card holder, but a Blue Card holder may apply for long term residence status, under conditions which are slightly more flexible than outlined above.²¹⁶

The subtitle 'Victim of Trafficking'

EU social rights for illegal third country nationals are difficult to find, but 'Victim of Trafficking' has been established as a legal name for the illegal. 'Victim of trafficking' is defined in a Council Decision as someone who has been the subject of coercion, force, threat, abduction, deceit, fraud, abuse of authority or of a position of vulnerability, or who has become subject to the control of another person through exchange of payments/benefits, for the purpose of exploitation of that person's labour or sexual

²¹² Art. 12(1-4), *ibid*

²¹³ Art. 14(1)(e), *ibid*

²¹⁴ Art. 9(3)(b,d), *ibid*

²¹⁵ Art. 18, *ibid*

²¹⁶ Art. 16, *ibid*. Blue Card Holders may cumulate periods of residence in different Member States

exploitation. The consent of a victim of trafficking to the exploitation is considered irrelevant if any of these means have been used. And if a child is being exploited, the child shall be seen as a victim of trafficking even in cases where none of these means have been used.²¹⁷

A directive from 2004²¹⁸ grants social rights to victims of trafficking, but only on the condition of cooperation with the authorities, and only temporarily. The social rights are accompanied by a residence permission. However, that residence permission may be withdrawn any time.

Before the residence permit is issued, a ‘reflection period’ is granted in which the victim of trafficking may consider whether to cooperate with the authorities and provide them with information. The duration of this period shall be determined by national law and may be terminated any time by the authorities if they establish that the victim of trafficking has *‘actively, voluntarily and on his/her own initiative renewed contact with the perpetrators of the offences’*.²¹⁹ During the reflection period, the victims of trafficking are entitled to *‘standards of living capable of ensuring their subsistence and access to emergency medical treatment’*, and the state *‘shall take due account of the safety and protection needs’*. Further, they shall be provided with translation and interpreting services, and they may, if provided by national law, be granted psychological assistance and free legal aid.²²⁰

If a residence permit is granted after the reflection period, it shall be valid for at least 6 months and may be renewed. But the authorities may withdraw the permission any time, if they consider that cooperation with the victim of trafficking is no longer needed for the investigation, if he or she does not show a clear will to cooperate, is still in contact with the offenders, or for any other reasons related to public policy and national security.²²¹ After the issue of the residence permit the same rights apply as during the reflection period; further, those with special needs (pregnant, disabled or victims of violence) are entitled to assistance, and minors shall have access to the educational system under the same conditions as nationals. The conditions under

²¹⁷ Art. 1, 2002/629/JHA: Council Framework Decision on combating trafficking in human beings

²¹⁸ Dir. 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

²¹⁹ Art. 6, Dir. 2004/81/EC

²²⁰ Art. 7, *ibid*

²²¹ Art. 8 and 14, *ibid*

which the grown up victims of trafficking may have access to education and work are determined by the member states.²²² When the residence permit expires ordinary aliens' law will apply.²²³

The Victim of Trafficking Directive does not mention 'family-members' with a single word. Only very indirectly is it implied that a victim of trafficking might have children: *'Member States shall provide necessary medical or other assistance to the third-country nationals concerned, who [...] have special needs, such as pregnant women'*²²⁴

The social rights of 'Victims of trafficking' are clearly extremely vague. Member states are left with enormous discretion as regards their interpretation. And since no residence rights are granted, the whole arrangement is a matter of police investigation interests and mercy on the part of the state. 'Equal treatment' is not the operational principle, not even in a very limited version. Only minors are granted equal treatment with respect to education. The victims of trafficking are fundamentally 'aliens'; outside ordinary national law, only momentarily, for special reasons and on special conditions, given rights and help. They are subject to continuous suspicion; seen as always potentially collaborating with those who offended them, as being part of the crime committed to them.

The sub-name 'Third Country National holding a residence permit in the state in question for one year or more, with stable and regular resources'

As described in chapter 5, EU-citizens moving to another member state can bring their family, including family members who are not EU-citizens. Likewise, third country nationals are granted family reunification rights. As we saw above, long term residents may bring their family when moving to a second member state; and Blue Card holders have family reunification rights in all the member states in which they reside. Victims of trafficking, on the other hand, are granted no family reunification rights.

But family reunification rights are also given to third country nationals who are neither Blue Card holders, nor long term residents in their second member state. According to the Family Reunification Directive ²²⁵, member states shall authorize entry and residence for close family members of third country nationals holding a residence

²²² Art. 9-11, *ibid*

²²³ Art. 13(2), *ibid*

²²⁴ Dir. 2004/81, art. 9(2)

²²⁵ Directive 2003/86/EC on the right to family reunification

permit in the state in question for one year or more. The waiting time may be 2 or 3 years, though.²²⁶ Third country nationals who reside in the country on a temporary basis or are waiting for an answer to their application for refugee status, are excluded from this right.²²⁷ Further requirements are ‘stable and regular resources’ which are sufficient to maintain the sponsor as well as family ‘without recourse to the social assistance system’, sickness insurance and ‘*accommodation regarded as normal for a comparable family.*’ Evaluation criteria as to whether resources are stable, regular and sufficient, and whether accommodation is ‘normal’ are left to the discretion of the member states.²²⁸

A special chapter of the directive is dedicated to family reunification of refugees (‘Third Country National Refugee’ would constitute yet another sub-name). In a few respects, refugees have more favorable conditions. They are not required to have resided in a member state for a certain period, and administrative procedures as regards application and documentation are slightly more flexible.²²⁹

It is important to note that these are the rights of the so-called sponsor, that is, the person who wishes to be reunified with his or her family. The rights of the family members constitute an issue of its own. The rights of family members are *derived* rights, they are rights which depend on a persons relationship with another person. I shall analyze these rights separately, while dealing with the name ‘Family Member’ in chapter 8.

Obviously, it is crucial how the criterium ‘stable and regular resources’ is being interpreted. The Directive grants huge discretion to the member states in this regard. But again, the CJEU does not accept any national interpretation. The Chakroun-judgment from 2010 gives an example of that. It offers an interpretation of the criterium ‘stable and regular resources’ in connection with a definition of the concept ‘social

²²⁶ Art. 8, Dir. 2003/86/EC, reads: ‘Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her [...] where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.’

²²⁷ Art. 3 and 4, *ibid*

²²⁸ Art. 7(1), *ibid*

²²⁹ Art. 10(2), 12(2), and 11(2) and 12(1), Dir. 2003/86/EC. Also as regards the requirement of complying with integration measures and the rights of children, we find differences between refugees and non-refugees

assistance'. And again a right of 'Everyone' supports the argumentation, the right to family life.

The question is whether Mr Chakroun, who is of Moroccan nationality, living in the Netherlands, has 'stable and regular resources' which are sufficient to maintain the sponsor and family 'without recourse to the social assistance system' so that he may be granted the right to family reunification with his wife. In that regard, the CJEU points out that since *'the extent of needs can vary greatly depending on the individuals, [...] the Member States may indicate a certain sum as a reference amount, but not [...] impose a minimum income level'*. An individual examination must be carried out. *'To use as a reference amount a level of income equivalent to 120% of the minimum income [...] does not appear to meet the objective of determining whether an individual has stable and regular resources which are sufficient for his own maintenance'*.²³⁰

The amount suggested by the Netherlands authorities (120% of the minimum income) is connected to the national concept 'special assistance'. Above this amount, 'special assistance' cannot be claimed. Since 'special assistance' should, according to the Netherlands authorities, be seen as a kind of 'social assistance', someone whose income is less than 120% of the minimum income is entitled to claim social assistance and would therefore not satisfy the criterium 'without recourse to the social assistance system'.

So, apart from pointing out that no minimum income level must be fixated, the CJEU also needs to consider whether 'special assistance' should be seen as a kind of 'social assistance'. The CJEU emphasizes that 'social assistance' is not merely a national concept, but *'is a concept which has its own independent meaning in European Union law'*. According to this independent meaning, social assistance refers to *'social assistance granted by the public authorities, whether at national, regional or local level'*.²³¹ But in addition to this general meaning, the concept also has a more specific meaning which can be derived from the Directive. On the basis of an analysis of the concept within the context of the Directive, the CJEU concludes that *'the concept of 'social assistance' in Article 7(1)(c) of the Directive must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed'*.²³² Accordingly, the national concept

²³⁰ Case C-578/08, *Chakroun*, par. 48-49

²³¹ *ibid*, par. 45

²³² *ibid*, par. 49

‘special assistance’ which covers benefits the purpose of which is ‘to meet exceptional, individually determined, essential living costs’ cannot be seen as a kind of ‘social assistance’.

This means that according to the conceptual clarifications of the CJEU, Mr. Chakroun does indeed have ‘stable and regular resources’ which are sufficient to maintain the sponsor and family ‘without recourse to the social assistance system’ - even though he is entitled to ‘special assistance’.

Again, we see that the CJEU compensates for the weaknesses of the rights of third country nationals as laid down in secondary legislation by way of the establishment of conceptual criteria, hereby reducing the high level of discretion otherwise granted to the member states. Again, a right of ‘Everyone’ is involved, the right to family life, as enshrined both in the Charter of Fundamental Rights and in the European Convention for the Protection of Human Rights and Fundamental Freedom. However, this time, the reference to a fundamental right does not play an argumentative role in the judgment, it merely supports the interpretation: The CJEU explains that the provisions of the Directive must be interpreted ‘in the light of’ the fundamental right to family life.²³³

In conclusion: a flawed and perplexing name

The name ‘Third-country national’ opens up a huge, diversified and perplexing area. The further we would have made our way into this area, the more sub-names, the more exceptions, the more special conditions would have turned up. I have only covered very little - that which is regulated by EU Directives or Regulations. Two of the sub-names I have dealt with, ‘Long Term Resident’ and ‘Blue Card Holder’ are relatively ‘privileged’ and are signifiers for people who have gained rights either on the basis of stability and money, or professional qualifications. In contrast, the sub-name ‘Victim of Trafficking’ is a signifier for the most vulnerable and gives access to rights on an exceptional basis. The last sub-name, ‘Third Country National holding a residence

²³³ *ibid*, par- 44. The O. and S. judgment, delivered 2 years later, relies on and confirms the argumentation of the Chakroun-judgment. Also the O. and S. judgment relies on the definition of ‘stable and regular resources’ interpreted in conjunction with the concept of ‘social assistance’, just as it highlights the right to respect for family life within the meaning of the European Convention and of the Charter. The judgment mentions as well ‘*the obligation to have regard to a child’s best interests*’ and ‘*with account being taken of the need for a child to maintain on a regular basis a personal relationship with both parents*’, as expressed in the Charter (art. 24(2) and 24(3) of the Charter). See Joined Cases C-356/11 and C-357/11, *O. and S*, par. 76

permit in the state in question for one year or more, with stable and regular resources' only gives rise to family reunification rights.

Apart from the fact that several other sub-names could have been found, it is crucial to emphasize that a large number of people in the EU can claim the name 'Third Country National' but gain no rights from it, because they cannot claim any of the sub-names which are connected to rights. This is not just the case for the illegal. The Social Security Coordination Directive - which grants rights to all legal third country nationals - is of no use to those who have no mobility and residence rights. In other words, all those third country nationals who cannot satisfy strict criteria concerning length of residence, economic resources, education or work experience, will not be able to benefit from any EU-rights.

When comparing the rights of EU-citizens and third country nationals, a remarkably consequent pattern shows. EU-citizens are granted unlimited mobility and work seeking rights and very good transnational social security rights, but strongly reduced social assistance rights. The closing mechanism lies in the residence rights. Here, the main criteria is self support - unless one of the worker-related names can be claimed. EU-citizens may always be accompanied by their family (with the only restriction that if the EU-citizen is him or herself subjected to the requirement of self-support, then he or she must be able to provide for the family as well). Both social rights and residence rights will improve, the longer a EU-citizen has stayed in the same state; in that sense, stability is rewarded. - Legal third country nationals crossing borders have in principle the same social security rights as EU-citizens, but their access to social assistance is much more restricted. Also for third country nationals, the closing mechanism lies in the residence rights; only, the criteria for residence are much harder than for EU-citizens, all sub-names considered. In addition, they do not have a right to family reunification simply by virtue of the fact that they are crossing EU-borders. They only have that right if they are granted it by virtue of more specific conditions. As concerns legal third country nationals in their first member state, EU-legislation rarely applies, but if it does, restrictions on social rights and family reunification rights are severe. However, stability is rewarded, in the first as well as in the second member state. Accordingly, what social rights, residence rights and family reunification rights are concerned, the two names give rise to similar patterns, with the difference that criteria are always much stricter for third country nationals.

However, what mobility and work seeking rights are concerned, we do not just find a stricter pattern, we find a completely reversed pattern. These rights are unlimited for EU-citizens; for Third Country nationals they are subject to severe limitations. It is immensely hard for third-country Nationals to gain - on the basis of EU-legislation - the right to move to another EU country and reside there for a while, and work seeking rights are extremely restricted, both in the first and the second EU-country. The limitations of work seeking rights are more than anything due to the fact that they are bound together with very high levels of discretion on the part of the member states, so high as to put into question whether we may talk about rights at all. These restrictions are meant to serve '*the situation of the labour market*' in the respective member states.

When all this is said, though, it is noteworthy that the CJEU seeks to secure the rights granted to third country nationals against undermining by establishing conceptual criteria, hereby reducing the high level of discretion otherwise granted to the member states. Concepts such as 'core benefits', 'regular and stable resources' and 'social assistance' prove to be crucial in this respect. In this connection, rights of 'Everyone' (springing from the Charter or from the European Convention) play important roles, either as part of the argumentation provided, or as the horizon within which the argumentation gains its legitimacy.

The name 'Third country national' is according to its substance a negative name, it is the signifier of a non-'EU-Citizen'. According to its attributes, it is immensely flawed and characterized by poor imitations of EU-Citizen's rights. Most notably, it lacks the most crucial aspect of EU-citizen's rights, the aspect of mobility and the right to work. It is far from fulfilling the goals established at the Tampere-meeting, far from being 'comparable to' the name 'EU-citizen'.

Chapter 7

'Worker'

We may say that the name 'Worker' constitutes the most legendary name among the names we shall encounter. Legendary because it is the historical source of EU rights for people, and because it has undergone the most dramatic changes throughout the last 40 years.

In a certain sense this development culminated in the EU-Citizenship and the rights connected to it. Throughout the years, the concept 'worker' has been extended more

and more; initially it referred only to full time transnational workers, and gradually all sorts of other worker-related groups became included - part-time-workers, self-employed, unemployed and retired workers, just to mention a few. It could be said that the extension of the concept culminated in the EU-citizenship: 'worker' was pushed over its own conceptual edge and became 'citizen'. And it is true that EU-citizens now have fundamental mobility, residence and working access rights, as we saw in chapter 5, and that these rights used to be the fundamental rights of workers. However, it is also crucially important to keep the names 'Worker' and 'EU-citizen' apart. They are very different, as we shall see, both with respect to their substances and attributes.

Apart from being legendary and essential seen from the perspective of EU rights, the name 'Worker' is also highly complex and ambiguous, as I shall demonstrate in the following. But before digging into these ambiguities, I shall outline the basic Treaty-based rights of workers which testify to the importance of the name.

Fundamental rights of workers

In the Treaty, the name 'Worker' constitutes the ground for one of the four basic freedoms within EU-law and a range of fundamental rights are connected to it. These Treaty-based rights do not apply to third country nationals, only to EU-citizens. First, we find the right to free movement which is bound together with the right to work and rights of work: *'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'* And *'It shall entail the right [...] to accept offers of employment actually made.'*²³⁴ These provisions are quite similar to those of the old Free Movement Regulation analyzed in the previous chapter. Only, in this case the rights apply to 'EU-citizen Workers', instead of just to 'EU-citizens'. The tensional field between EU-citizens and workers is here being embraced from the other side, so to speak. Potential workers must already be considered to be 'Workers' in order to rely on these Treaty-guaranteed rights. For mobility and working access rights, this is less important, - since EU-citizens who are not workers can rely on the Free Movement Regulation in this respect, and on fundamental EU-citizen rights laid down in the Treaty and the Charter. But in order to enjoy equal treatment rights with respect to working conditions, including pay, a person must be able to claim the name 'Worker'.

²³⁴Art. 45(2), 45(3)(a) TFEU

For residence rights, it makes a huge difference whether an EU-citizen can claim to be a 'Worker' or not. The foundation for these differences is laid down in the above-mentioned Treaty-article as well, according to which workers may '*stay in a Member State for the purpose of employment*' and '*remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations*'.²³⁵

A few articles later, the Treaty introduces another name, 'Self-employed'. Firstly, it is introduced as a name for a special kind of worker: '*employed and self-employed migrant workers*'²³⁶; but in the following article, it appears as a name in its own right: '*Freedom of establishment shall include the right to take up and pursue activities as self-employed persons [...], under the conditions laid down for its own nationals by the law of the country [...]*'²³⁷. That is, self-employed are granted 'equal treatment' rights (*as-if-rights*) with respect to their special conditions of work.

Both employed and self-employed 'Workers' are subject to limitations as regards their freedom to work in another member state; this freedom shall not apply to employment in the public service, or to activities connected with the exercise of official authority.²³⁸

The former limitation is to be interpreted restrictedly, according to the CJEU; workers from other member states should not be excluded from employment in the public sector in general. Only activities entrusted with '*responsibility for safeguarding the general interests of the State*' are beyond the reach of foreign workers.²³⁹

In the Charter of Fundamental Rights we find a range of rights for workers, concerning information and consultation, access to placement services, collective bargaining and action, protection in the event of unjustified dismissal, and finally working conditions with respect to health, safety and dignity, working hours and paid leave.²⁴⁰ Most of these issues appear in the Treaty as well, though not stated as rights, but as policy fields.²⁴¹ Instead of '*collective bargaining and action*' the Treaty applies the more moderate terms '*representation and collective defence*' and '*co-determination*', and specifies that the

²³⁵ Art. 45(3)(c-d), *ibid*

²³⁶ Art. 48, *ibid*

²³⁷ Art. 49, *ibid*

²³⁸ Art. 45(4) and art. 51, *ibid*

²³⁹ Case C-149/79, *Commission versus Kingdom of Belgium*, par. 7

²⁴⁰ Art. 27-31, Charter of Fundamental Rights, title IV

²⁴¹ '[...] the Union shall support and complement the activities of the Member States in the following fields [...]', art. 153(1) TFEU

right of association, the right to strike and the right to impose lock-outs shall not be part of the policy fields in which the EU is to support the activities of the member states.²⁴² This does however not mean that these rights fall completely outside the scope of EU-law. The Charter lays down the right of workers '*to take collective action to defend their interests, including strike action*'²⁴³, and even before the Charter acquired binding legal status, the CJEU had ruled that the right to take collective action constitutes a fundamental right recognized by EU-law.²⁴⁴ In other words, the right of workers to take collective action has the same ambiguous role as the rights of 'Everyone'. It is not regulated by EU-law, but by the member states. Yet, it is being respected as a fundamental right.

The right to take collective action has been dealt with in two highly discussed judgments, the Viking- and the Laval-judgment. They both concern a conflict between this right and a fundamental EU-Citizen's right - the right to freedom of establishment ('Viking') and the right to provide services ('Laval'), respectively. In both judgments, the ECJ recognizes the right to take collective action as a fundamental right not only according to national law, but also according to EU-law, but argues that as such, it is subject to restrictions.²⁴⁵ More precisely, the CJEU argues that a restriction on the exercise of a fundamental EU freedom can be accepted if it pursues a legitimate objective and is justified by 'overriding reasons of public interest', and if the means by which the objective is pursued are suitable and necessary.²⁴⁶ The right to take collective action may indeed be seen as pursuing a legitimate objective, namely 'the protection of worker'.²⁴⁷ However, according to the court, it can be questioned whether it constitutes an appropriate and necessary mean in relation to that objective. In the Laval-judgment, the court finds that under the given circumstances, it does not: 'Collective action' cannot be justified if the national context in question is characterized by a lack of

²⁴² Art. 153(1)(f), 153(5), *ibid*

²⁴³ Art. 28, Charter of Fundamental Rights

²⁴⁴ Case C-438/05, *Viking*, and Case C-341/05, *Laval*

²⁴⁵ Case C-341/05, *Laval*, par. 91, Case C-438/05, *Viking*, par. 44

²⁴⁶ Case C-341/05, *Laval*, par. 101, Case C-438/05, *Viking*, par. 75. (The line of argumentation is based on the principle of proportionality - we shall encounter it many times during this work, especially in Part I. 2)

²⁴⁷ Case C-341/05, *Laval*, par. 103-107, Case C-438/05, *Viking*, par. 77-79 (In the Viking-judgment, the CJEU questions, however, whether the collective action taken actually serves 'the protection of workers, par. 81-83)

precise provisions with respect to minimum rates of pay.²⁴⁸ In the Viking-judgment, the CJEU asks whether ‘collective action’ does in fact serve ‘the protection of workers’ under the particular circumstances, and if it does, whether other measures could have been applied instead? And in any case, if collective action has the effect of obstructing the freedom of establishment (by preventing shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals), then it cannot be justified.²⁴⁹

It has been intensely discussed whether these judgments have the effect of undermining the right to take collective action or whether they are simply balancing different kinds of fundamental rights.²⁵⁰ In my view, the judgments do indeed undermine the right to take collective action as a fundamental right. Not so much because this right is subjected to restrictions. Very few fundamental rights are absolute (if any); it is not controversial that a fundamental right may be restricted when clashing with another fundamental right. No, what is problematic is the fact that the right to take collective action is reduced to a mean relating to another objective than itself, namely ‘protection of workers’. In other words: the two conflicting rights are not facing each other on the same level. The right to take collective action is not allowed to take the role as a fundamental right facing another another fundamental right. - We shall return to this discussion in chapter 33.

Entering the differentiated and grayish areas of the name ‘Worker’

Let me now dig into the complexities connected to the definition of the name and ask: what is a ‘Worker’?

We are confronted with yet another name which implies an endless number of sub-names, as already indicated. But in contrast to the name ‘Third Country National’, the name ‘Worker’ is greatly important as an overall name. The relationship between the overall name and its sub-names is complicated, though. It is far from clear what defines the overall name ‘Worker’, and consequently, it is far from clear where the sub-names begin and end. The name is not only characterized by vast grayish areas, but also by the lack of one core definition of the overall name.

²⁴⁸ Case C-341/05, *Laval*, par. 108-111

²⁴⁹ Case C-438/05, *Viking*, par. 81-83, 87, 88

²⁵⁰ For a very critical discussion of the two judgments, see Hans Petter Graver: *hva er Rett*, p. 72-75. Graver’s analysis is in line with my own in that he emphasizes that a hierarchy of rights have in fact been established.

The remuneration criterium and the 'real and genuine' criterium

The question of how to define the name 'Worker' touches upon a basic tension within EU-law: the tension between EU-definitions and national definitions of key concepts. We have encountered this tension already, in connection with the interpretation of concepts such as 'social assistance', 'core benefit' and 'regular and stable resources'. According to the CJEU, 'worker' is an EU-concept. On the other hand, secondary as well as primary legislation refer to national understandings of what 'employment' might be. This is an unavoidable consequence of the as-if-logic. For instance, according to the Social Security Coordination Regulation, *"activity as an employed person" means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists*²⁵¹. Just like the Treaty based equal treatment rights with respect to access to employment and work conditions, outlined above, necessarily presuppose the existence of national legislation with respect to work access and work conditions, and thereby also national criteria regarding the meaning of 'employment and 'work'.²⁵²

Would this not mean, then, that the definitions of the concept established by the CJEU are either superfluous or unusable? The case-law shows us that they are not. They have served to correct national understandings of the concept of 'worker' and hereby to extend the personal scope of national rights granted to EU-citizens from other member states by virtue of the principle of equal treatment. More precisely, even if a particular activity is recognized as 'work' in a particular member state, the person performing it may not be recognized as a 'worker' in that state for various reasons. But the CJEU also clarifies the meaning of 'work', not only the meaning of 'worker'. Accordingly, the CJEU does indeed interfere in national understandings of 'work'. This does not alter the fact that EU equal treatment rights (as-if-rights) depend on existing national rights and hereby on specific connections between national definitions of work and national rights. But it means that EU rights (residence rights, family reunification rights and equal treatment rights in general) may be granted to persons who according to national understandings would not necessarily be 'workers'.

The Vatsouras and Koupatantze-judgment from 2009 demonstrates the power of the EU-defined concept of 'worker' and clarifies its meaning. The judgment (based on the

²⁵¹ Art. 1(a) Reg. (EC) No 883/2004

²⁵² According to Art 45(3)(c) TFEU, free movement 'shall entail the right to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State'

joining of two cases) concerns two Greek citizens, Mr. Vatsouras and Mr. Koupatantze, both employed in Germany for a short period of time and for a salary below subsistence level. In the period of working and for a limited period thereafter, Mr. Vatsouras and Mr. Koupatantze received a benefit proclaimed to be a 'benefit in favor of jobseekers' and categorized as social assistance under national law. But at some point the granting of the benefit was terminated on the ground that '*foreign nationals whose right of residence arises solely out of the search for employment*' should be excluded from receiving it.

The judgment of the CJEU is based on the EU-definition of 'Worker'. The CJEU found that the national court had presupposed, in the questions referred, that Mr. Vatsouras and Mr. Koupatantze were not 'workers' within the meaning of the Treaty because the activities they had carried out in Germany were only '*brief minor*' activities which '*did not ensure a livelihood*' or '*lasted barely more than one month*'.²⁵³ But this premise is wrong, said the CJEU: '*according to settled case-law, the concept of 'worker' within the meaning of Article 39 EC [now art. 45] has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine [...], must be regarded as a 'worker. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration*'.²⁵⁴ And the CJEU continues: '*The fact that the income from employment is lower than the minimum required for subsistence does not prevent the person in such employment from being regarded as a 'worker'*', and '*with regard to the duration of the activity pursued, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 39 EC*'.²⁵⁵ Accordingly, it cannot be ruled out that the Greek citizens should indeed be regarded as 'workers' within the meaning of the Treaty. We shall return to the judgment later in this chapter in order to see how being a 'worker' versus not being a 'worker' would affect their rights to the benefit in question.

For now, we shall dwell on the definition of the name 'Worker'. According to the criterium formulated in the Vatsouras and Koupatantze-judgment (based on 'settled case-law'), a 'worker' is someone who '*for a certain period of time a person performs services for and under the direction of another person in return for which he receives*

²⁵³ Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, par. 24-25

²⁵⁴ *ibid*, par. 26

²⁵⁵ *ibid*, par. 28-29

remuneration'. In other words: being a 'worker' means being in a particular relation to another person, namely an employer. In this connection, the period of work and the level of the salary is irrelevant. We shall call this criterium the 'remuneration criterium'. It is important to note that not only persons who presently satisfies this criterium may claim the name 'Worker'. Also persons (like the two Greek men) who have satisfied the criterium sometime in the past may presently claim the name 'Worker'.

The Vatsouras and Koupatantze-judgment entails another criterium as well: A 'worker' is someone who performs activities which are '*real and genuine*'. What could that mean? This criterium is unfolded in another judgment, the Trojani-judgment.

We have already dealt with the Trojani-judgment in connection with the name 'EU-Citizen'.

As recalled, Mr. Trojani, a French citizen residing in Belgium, did various jobs at a Salvation Army Hostel (about 30 hours a week), in return for board, lodging and pocket money. Mr. Trojani was a former drug addict, and the arrangement was part of a personal socio-occupational reintegration program. The CJEU was asked whether Mr. Trojani could claim to be a 'worker' within the scope of EU-law? The CJEU answered that it was for the national court to examine that question, but laid down that the focal point of attention for the national court should be to determine whether Mr. Trojani's activities were '*real and genuine*'²⁵⁶ (in this case, there could be no doubt that the remuneration criterium was satisfied, Mr. Trojani did in fact receive remuneration for activities under the direction of another person). As to the meaning of 'real and genuine', the CJEU clarified that '*activities cannot be regarded as a real and genuine economic activity if they constitute merely a means of rehabilitation or reintegration for the persons concerned*'²⁵⁷. 'The national court would need to ascertain whether the services performed by Mr Trojani could be '*regarded as forming part of the normal labour market*.'²⁵⁸ In other words: to the extent that the activities were performed for the sake of Mr. Trojani himself, then they would not be '*real and genuine*' and not be a part of the '*normal labour market*'. When considering this criterium in conjunction with the remuneration criterium, we may say that a 'worker' is someone who stands in a particular relationship to another person, but this relationship in turn relates to something external to itself, namely the 'normal labour market'. The particular nature

²⁵⁶ Case C-456/02, *Trojani*, par. 22

²⁵⁷ *Ibid*, par 18

²⁵⁸ *Ibid*, par. 24

of this relationship, the length of it, the salary, the level of productivity, the nature of the work and the sources of the funds are all irrelevant²⁵⁹. But the purpose of the relationship is not irrelevant. If the employment relationship serves the worker him- or herself, instead of serving the relationship as such *as determined by the labour market*, then it does not constitute an employment relationship after all, and the worker is not a worker. The name 'Worker' implies a double relation: a relation between the worker and the employer, and a relation between the particular employment relationship and the labour market as such.

Unifying expressions

However, the question of what a worker is can not only be answered on the basis of the remuneration- and the 'real and genuine'-criterium. There are other entrances to the grayish field of the name. We encounter a number of unifying expressions, all referring to 'worker'.

A crucial unifying expression is 'status of worker'. We meet it in the Residence Directive: *'For the purposes of paragraph 1(a) [regarding workers' right of residence for a period longer than three months], a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person' if he/she 'is temporarily unable to work as the result of an illness or accident'; [...] is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker [...] or 'embarks on vocational training [...] related to the previous employment.'* Also those who have become involuntarily unemployed after less than a year shall retain the status of worker, but are only guaranteed six months.²⁶⁰ We are here confronted with at least three sub-names (and more, if all nuances are taken into account): 'Temporarily Unable to work', 'Involuntarily Unemployed after employment in the respective state' and 'Vocational Trainee in relation to previous employment'.

The unifying expression 'status of worker' confirms the understanding of the remuneration criterium that we already acquired: not only those who presently work, but also those who worked in the past (but not presently) are 'workers' - to the extent

²⁵⁹ '[...]neither the *sui generis* nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law'. C-456/02, *Trojani*, par. 16

²⁶⁰ Art. 7(3), Dir. 2004/38/EC

that the interruption is only temporary. However, since this expression includes 'self-employed persons', it is clear that it does not coincide with the remuneration criterium. There is another expression which sounds very similar to 'status of worker', namely 'members of the working population'. An example can be found in one of the non-discrimination Directives: *'This Chapter [regarding equal treatment between men and women in occupational social security schemes] shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.'*²⁶¹ This listing is broader than the listing under 'Status of Worker'. Retired and disabled workers are included as well as job seekers who do not already have an employment history. It should be noted as well that the meaning of the expression is kept open (the listing is not complete - as designated by the term 'including').

The sub-names which are included in 'members of the working population', but who are excluded from the 'status of worker' can of course also be connected to the remuneration criterium (and to the 'real and genuine' criterium) on the basis of temporal considerations. Retired workers have a working past, and job seekers who do not already have an employment history have, potentially at least, a working future.²⁶² In other words, these sub-names are characterized by a greater temporal distance to these criteria or simply by the lack of a past which can be linked to them. However, also this expression includes 'self-employed persons' who cannot be related to the remuneration criterium.

Consequently, the two expressions, 'status of worker' and 'belonging to the working population' form the basis of a huge number of possible sub-names which may, in most cases, be connected to the remuneration- and the 'real and genuine' criterium by way of temporal differentiations. However, the sub-name 'Self-employed person' (and related sub-names) cannot be connected to the remuneration criterium. Apart from that, the two expressions give us an impression of the diverse and diffuse use of the name 'Worker' within EU-law. And they indicate that there are different 'levels' of sub-names.

²⁶¹ Art. 6, Dir. 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

²⁶² 'Disabled workers' constitutes an ambiguous term in this connection (to the extent that they actually work (or used to work), they would simply be workers). What is meant is probably workers who have retired early because of disability (including occupational diseases)

Sub-names springing from problematics of transnational coordination

There are other sub-names than those occurring under unifying expressions as the above mentioned. The Social Security Coordination Regulation gives rise to what seems like an incalculable number of sub-names, due to the incalculable number of ways in which a person may need to combine rights from different national social security systems as well as transport and translate rights from one system to another. Equal treatment of non-nationals is by far a straight forward matter.

As mentioned already, the Social Security Coordination Regulation amounts to a long (more than 100 pages) and highly complicated legislative act, and I cannot possibly deal with it in all its parts. However, in spite of its very detailed nature, it is also based on certain general principles.

The first general principle is of course the principle of equal treatment already dealt with in the previous chapters. As explained in chapter 5, within the context of the Regulation, it represents an *as-if*-logic: A person crossing borders within the EU shall be treated *as-if* he or she was a national citizen of the member state in which the legislation at issue is laid down²⁶³. For instance: when residing in another member state, an EU-citizen shall be treated *as-if* he or she was a national citizen of that member state. But there are also other possibilities. The legislation which is at issue need not be the legislation of the state of residence. A person may for instance work in one state and reside in another. In that case, it would generally be the legislation of the state of work which would be applicable. The Regulation uses in this connection the term 'the competent state'. To find out, in a particular case, which state is the competent state, may in itself be a complicated matter. I shall not go into the rules governing this matter, only mention that in general, work weighs heavier than residence.²⁶⁴

The second general principle is the principle of 'aggregation of periods'. This means that social security rights which are earned in one member states (pension rights, for instance) may be translated into rights within the national systems of another member

²⁶³ Art 4 of Reg.(EC) No 883/2004 reads: '*Equality of treatment. Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.*'

²⁶⁴ Art. 11(3), *ibid*

state - with the effect that rights earned in different member states can be added together.²⁶⁵

The third general principle is the principle of 'waiving of residence rules'. This implies that social security benefits can be transported across borders.²⁶⁶

In relation to the second and the third principle, it should be mentioned that they should be implemented in a manner so as to avoid any overlapping benefits. In other words: Right-holders are not meant to be able to 'double' their rights (acquire the same kind of right in different member states at the same time). The principles of transnational coordination are meant to secure that a person does not lose any rights due to transnational mobility.²⁶⁷

On the basis of these three general principles, we may qualify the *as-if* logic. More precisely, we may differentiate between three different variants:

- 1) A person (an EU-Citizen or a Third Country national) going to another member state than his or her original member state (for the purpose of work or residence or both) shall be treated *as-if he or she was a national citizen of the new state*. In other word, such a person shall be treated as-if he or she *did not have a past in the original state*.
- 2) A person going to another member state than his or her original member state in which he or she has earned social security rights shall be treated *as-if these rights had been earned in the new state*. That is, such a person shall be treated *as-if he or she had a past in the new state*.
- 3) A person going to another member state than his or her original member state and are bringing benefits from the original state shall be treated *as-if he or she was still residing in the original state*. That is, such as person shall be treated *as-if he or she had a present in the original state*.

Now, the functioning of these three variants of the equal treatment logics requires certain mediating names. I shall distinguish between two kinds: transnational combination names and benefit-corresponding names.

²⁶⁵ Art. 6, *ibid*, reads: '[...] the competent institution of a Member State [...] shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.'

²⁶⁶ Art. 7, *ibid*, reads: 'cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated.'

²⁶⁷ Art. 10, *ibid*. Not 'losing' any rights does not mean that a person's rights may not become better or worse (since the welfare systems of the member states are very different). In fact, there are situations in which rights are lost completely (namely where no equivalent right exists in the new state).

Transnational combination names

The Social Security Coordination Regulation takes into account all sorts of possible transnational situations: rights obtained in one state but enjoyed in another; rights obtained in two, three or maybe more different states; a person residing in one state, working in another, with the family residing in one of these states or possibly in a third state; a person working in several states, or working in one state but having the employer situated in another - just to mention a few possibilities. The first 70 articles of the Regulation introduces at least as many names, corresponding to a variety of specific transnational situations.

It is clear that these transnational combination names are necessary in order for the *as-if*-logic to function. More precisely, they will regulate what variant of the logic shall apply in a particular case.

Now, one might ask, are all these transnational coordination names sub-names of 'Worker'? The Regulation applies to all persons moving within the EU, therefore also to non-workers. And certainly, someone who does not presently work can claim rights based on the Regulation which covers pensions, unemployment benefits, family benefits etc. But if we look through the Regulation with a view to the transnational coordination names it introduces, we find that most of them are worker-related names in the same sense as the sub-names we found unified under the expressions 'status of worker' and 'belonging to the working population'. The coordination names include 'Employed worker (being in this or that transnational situation)' and 'Self-employed worker (...)', 'Retired Worker (...)', 'Person who is intermittently unable to work (...)', and finally 'Job seeker (...)'.

The matter is more complicated than one should think. The Social Security Coordination Regulation used to apply to 'workers'.²⁶⁸ According to the old version of the Regulation (which, moreover, is still in force, applicable under certain circumstances), a 'worker' is a person who is insured for one or more of the contingencies covered by the branches of a social security scheme mentioned in art. 1(a) of the Regulation.²⁶⁹ The complicated formulations of the relevant provision seem to indicate that the schemes in question would be schemes for employed persons or, if not, that the person in question would at least need to be insured under another

²⁶⁸ See art. 2(1), Regulation (EEC) No 1408/71. The Regulation is still in force, it regulates f.inst. the rights of third country nationals who are not refugees or stateless persons

²⁶⁹ Art 1(a), *ibid*

scheme for employed persons. But the CJEU has made clear that within the meaning of the Regulation, a person has the status of 'worker' if *'he or she is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme referred to in Article 1(a) of that regulation, irrespective of the existence of an employment relationship.'*²⁷⁰ A woman who has taken unpaid leave in order to care for her child, for instance, and who is covered by a social security scheme that is unrelated to any past or current professional activity, may still very well be a 'worker' within the meaning of the Regulation. It could be that she would be covered by a retirement insurance scheme by virtue of the fact that she was engaged in raising her child.²⁷¹

I shall not go any deeper into these complexities. Only, we shall take note of the fact that within the meaning of the Social Security Coordination Regulation, a 'worker' is someone who is insured under a scheme which is covered by art. 1(a) of the Regulation. And such a person could be a person who has never worked and who never will work. The new Regulation - which applies to all EU-citizens, stateless persons and refugees crossing borders within the EU - has in a sense made this meaning of 'worker' redundant. But still, it belongs to the history of the Regulation and it has survived in the name 'Insured person' which is the dominant overall name of that Regulation. And apart from that, the old Regulation - which applies to 'workers' - is still in force; it is applicable in relation to third country nationals who are not refugees or stateless persons.

On the basis of these considerations (and the modifications, they imply) we may therefore conclude that the transnational combinations-names (except for names for family-members and survivors whose rights are derived rights) are all sub-names of the name 'Worker', but that 'worker' in this connection means something entirely different. 'Worker' means an 'insured person' (in relation to certain schemes), - and it is irrelevant whether that person will ever work in his or her life. Clearly, most of the schemes in question will be schemes intended for people who are working, have been working, or will be working in the future. But the criterium as such is independent from any working past, present or future. The criterium as such is completely cut off from the remuneration criterium and the 'real and genuine'-criterium. As such, it is irreconcilable with the expression 'status of worker' as it appears within the context of

²⁷⁰ Case C-516/09, *Borger*, par. 26

²⁷¹ *ibid*, par. 27, 32.

the Residence Directive. However, it can be associated with the broader expression 'members of the working population'.²⁷²

Benefit-corresponding names

The second variant of the as-if-logic implies translation between different social security systems. If a person has been insured and accumulated rights in different member states (f.inst. rights to unemployment benefits, or rights to benefits in the case of occupational disease), then the member state in which he or she is presently being insured shall take into account all the periods of insurance completed in other countries *as if they were periods completed under its own legislation, that is, as if he or she had obtained these rights in the respective state*. Obviously, this translation of rights implies two translations: translations of names and translation of benefits. Different national systems encompass different divisions, concepts and kinds of benefits, as well as different rules for how to obtain these benefits.²⁷³

But how are such translations possible? It is implied in the principle of equal treatment that it would be possible to translate the legal situation of a non-national citizen into a situation of a national citizen without the intervention of mediating concepts.

Indirectly, however, the Regulation does provide mediating concepts, namely concepts for the kinds of benefits covered by the regulation: sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits, family benefits.²⁷⁴ Particular names correspond to these categorizations of benefits, names such as 'Pensioner', 'Pre-retired', 'Person suffering from an occupational disease' etc. Throughout the Regulation, we encounter such benefit-corresponding names. However, they are not mentioned in the initial articles of the Regulation and not defined at any point. In fact, the Regulation often avoids the benefit-corresponding names and replaces them with the general overall name, 'The insured person'. None the less, even if undefined, often avoided and

²⁷² The CJEU is competely aware of the existence of different definitions: '*there is no single definition of worker/employed or self-employed person in European Union law; it varies according to the area in which the definition is to be applied. Thus the concept of 'worker' used in the context of Article 45 TFEU does not necessarily coincide with the definition applied in relation to Article 48 TFEU and Regulation No 1408/71.*' Case C-345/09, *van Delft and Others*, par. 88

²⁷³ With the term 'translation' I primarily mean to address the issue that different member states have different systems of social rights. But of course, the fact that these different systems are expressed and conceptualized in different languages does not make the matter any easier.

²⁷⁴ Art. 3(1), Reg.(EC) No 883/2004

therefore mostly indirectly present, the benefit-corresponding names are important EU-names. Together with the categorizations of benefits (with which they are obviously closely connected), these names establish the overall demarcation lines within which specific translations take place, they provide a structure for the comparisons between systems. They function as a sort of mediating concepts on EU-level: when translating a national right into a national right of another state, the translator will firstly need to consider whether the first name and benefit fall under one of the benefit-corresponding names and benefit-categorizations, secondly find a name and a benefit in the social system of the other state which fall under the same benefit-corresponding name and benefit-categorization and will do as a translation of the first name and benefit.

So, these names and categorizations provide a structure for the translation. There is yet another side to this, however: they presuppose an already existing structural similarity between national systems. Without a minimum of structural similarity, translation through the medium of these names would not be possible. When that is said, these names and categorizations might presuppose more similarity than what actually exists. In this sense, they also exert pressure on the national social systems. They spring from concepts established at EU-level - functioning as mediating concepts between national concepts.

The case-law confirms the mediating role of these concepts. They are defined as EU-concepts in a range of judgments (to the extent that they are not already defined in the Regulation²⁷⁵). In this respect, the CJEU holds that *'social security benefits must be regarded, irrespective of the characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object as well as the basis on which they are calculated and the conditions for granting them are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits.'*²⁷⁶ On

²⁷⁵ Definitions of 'pension', 'pre-retirement benefit', 'death grant' and 'family benefit' are provided in art 1(w,x,y,z), Reg.(EC) No 883/2004

²⁷⁶ Case C-228/07, *Petersen*, par. 21. Social security benefits as such are also defined in this judgment: *'a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71'* (par. 19)

the basis of this criterium, the CJEU defines the precise nature of particular benefits, such as ‘unemployment benefits’²⁷⁷, ‘invalidity benefits’ and ‘sickness benefits’²⁷⁸.

Naturally, the transnational combination names and the benefit-corresponding names will be combined within the context of the Regulation. Whereas the former are almost endless, the latter are limited in number. Together, as combined, they give rise to a vast multiplicity of sub-names of ‘Worker’.

Rights attributed to sub-names close to the two cores of the name ‘Worker’

So, on the basis of these initial considerations as to the substance of the name ‘Worker’, it is already clear how differentiated the name is. The overall name ‘Worker’ is certainly important (and not just the particular sub-names), but the overall name cannot be given a single and uniform definition. None the less, the different overall definitions of the name can certainly be associated with one another (even if the respective criteria they depend on are irreconcilable from a logical point of view). For this reason, we shall still talk about the same overall name; but we shall say that it has more than one core.

Firstly, we encountered the remuneration criterium and the ‘real and genuine’ criterium. These two criteria should clearly be understood together. As such, they tell us that being a ‘worker’ implies a double relationship: a relation between the worker and the employer, and a relation between the particular employment relationship and the labour market as such. As far as these conjoined criteria are concerned, we may talk about sub-names which are *closer to or further away from the core* - in terms of temporal differentiations (presently working versus having worked in the past or intending to work in the future). This way of understanding the name appears to be relevant to the fundamental rights of workers laid down in the Treaty and in the Residence Directive.

Apart from that, we have encountered the sub-name ‘Self-employed Worker’. As a sub-name, this name is ambiguous in that it sometime appears as a name in its own right, and other times as a sub-name of ‘Worker’. In any case, it is not characterized by the remuneration criterium. A self-employed worker is a person who deploys his or her ‘*freedom of establishment*’. He or she does not work under the direction of another person, but employs him- or herself. That is, in stead of standing in a particular

²⁷⁷ Case C-228/07, *Petersen*; Case C-406/04, *De Cuyper*

²⁷⁸ Case C-503/09, *Stewart*; Case C-388/09, *da Silva Martins*. Obviously, such definitions are not only relevant to the problematic of translation, but also to the other variants of the as-if-logic in that they concern the determination of material scope (both of the Regulation as such and of the different parts of it)

relationship to another person, a self-employed person stands in a *particular relationship to him or herself*. Whether, however, the 'real and genuine' criterium would apply to a self-employed worker is ambiguous.

In spite of these differences between an employed worker and a self-employed worker, there are also great similarities. The two sub-names can both be differentiated into a multiplicity of other sub-names which mirror each other. Clearly, a self-employed worker can also be 'involuntarily unemployed', 'interrupted by illness', 'retired', in a particular transnational situation, insured or not insured - just like an employed worker. We may say that the two sub-names give rise to similar networks of (other) sub-names, due to temporal differentiations as well as other differentiations.

Accordingly, the name 'Worker' splits in the outset, into two different cores of the name. However, since these different cores give rise to similar networks of sub-names, and since they might share the 'real and genuine' criterium, it is still reasonable to hold that they belong to the same overall name.

Finally, the Social Security Coordination Regulation gives rise to an incalculable number of 'Worker'-sub-names due the problematics of coordination and translation it entails. To some extent, these names overlap with the sub-names surrounding the two cores mentioned by virtue of temporal differentiations; also in this Regulation, we are faced with persons who are presently working, persons who used to work and persons who intend to work in the future. But the sub-names of the Regulation also add a whole new dimension to the name 'Worker', namely that of being insured. Since that dimension, none the less, still revolves around 'work', it does not constitute a third core, but rather a criterium which is significant to the border areas of the name 'Worker'.

When now turning towards the attributes of the name, we shall begin with the names attributed to the sub-names close to the two cores. Naturally, it would neither be possible, nor necessary for the purposes of this dissertation to go through a whole range of sub-names. An overall picture will be drawn. Afterwards, we shall pay attention to the border areas of the name.

Contrary to EU-citizens who are not workers, EU-citizens who are workers or self-employed may stay in another Member State - in which they are working - for a period of longer than three months, without being subject to the criteria of self-support.²⁷⁹ In

²⁷⁹ Art 7(1)(a), Dir. 2004/58/EC

no case may an expulsion measure be adopted against them.²⁸⁰ Those who are given the 'status of workers' may enjoy the same rights - that is, those who can claim one of the sub-names 'Temporarily Unable to Work', 'Involuntarily Unemployed after employment in the respective state' or 'Vocational Trainee in relation to previous employment'.²⁸¹

This means on the other hand that people who can claim some of the other sub-names we have encountered, 'Pensioner', 'Pre-retired' and 'Person suffering from an occupational disease', are not given the 'status of worker' and therefore not exempted from the criteria of self-support or the risk of expulsion. But they are compensated in another way: They are eligible for permanent residence before having stayed in the state for 5 years, whereas workers must wait 5 years, just like other EU citizens. 'Pensioners' or 'Pre-retired' who have been working in the state in question for at least the preceding 12 months before ceasing to work and have resided there continuously for more than 3 years shall enjoy the right of permanent residence. And a person who used to be a 'Worker' or 'Self-employed' in the state in question and have become permanently incapable of work shall enjoy the same right if he or she has resided 2 years in that state. A person who suffers from an occupational disease which entitles to a benefit payable by an institution in the state in the state of residence shall enjoy the right of permanent residency regardless of how long he or she has resided there.²⁸²

As can be seen, pensioners and pre-retired as well as permanently diseased people are only given more favorable residence rights in case they have a working history in the state in question. Working history includes non-working periods for reasons which do not stem from the person's free will.²⁸³ In general we may say that the stronger the ties to the state in question, in terms of residence and working history, the better the residence rights. In contrast, people who are already pensioners, pre-retired or permanently diseased before moving to a particular state are not privileged in any way, but have the same residence rights as EU-citizens who are not workers.

What social rights are concerned, the same conditions apply to all EU-citizens during the first 3 months, workers as well as non-workers: the state is not obliged to confer entitlement to social assistance, whereas the principle of equal treatment with respect to

²⁸⁰ Art. 14(4)(a), *ibid*

²⁸¹ Art. 7(3), *ibid*

²⁸² Art. 17(1)(a-b), *ibid*

²⁸³ Art. 17(1), last paragraph, *ibid*

social security rights will apply right away. For those who are presently working or have the 'status of worker', social security rights are very likely to be valuable rights; rights already earned in other member states will be translated into rights in the new state, and work and contributions to social security schemes in the new state will mean earning new rights within the new systems. So, even if access to social security rights are in principle the same for all during the first 3 months, the national rights which may be claimed will vary immensely.

After 3 months, those who have the 'status of workers' will be able to claim social assistance as well as social security. Pensioners, pre-retired and permanently diseased people can, in principle, do the same - but only on the same conditions as EU-citizens, that is, only if they are allowed to stay. They may be expelled as a result of claiming social assistance. Study finance is only granted to 'Workers', 'Self-employed' and those with the 'status of worker'.²⁸⁴

Consequently, we see that residence rights and study finance rights differ significantly depending on the sub-name of 'Worker' which can be claimed, whereas social security and social assistance rights are the same for all of the sub-names dealt with above. In principle, that is. The crucial differentiating factor is the number and quality of the rights a person brings with him or her to the new state (which may either be enjoyed directly in the new state or be translated into national rights of the new state) as well as the number and quality of the rights earned in the same. National differences and translation issues play important parts in this, but generally speaking, it is the *personal working history* which sparks differences of rights.

Rights attributed to unemployed without a working history

We shall now focus on some of the sub-names which can be said to belong to the border areas of the name 'Worker' - sub-names the rights of which are weak, ambiguous or uncertain. Just above, I described the rights of those who presently work or used to work, including the unemployed with a working history in the state in question. But how about the unemployed without a working history in that state? Or at all?

Unemployed EU-Citizens who move to another member state in order to work, but who do not yet have a working history in that state are still given better residence rights than EU-citizens in general: *'Union citizens [who] entered the territory of the host*

²⁸⁴ Art. 24, *ibid*

*Member State in order to seek employment [...] may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.*²⁸⁵ In other words, they are not subject to the criteria of self-support like EU-citizens who cannot claim any worker-related name. But unlike any other EU-citizen who is allowed to stay for more than 3 months, these job-seekers are not entitled to social assistance after the first 3 months. And unlike those who can claim the ‘status of worker’, they are excluded from the right to maintenance aid for studies or vocational training.²⁸⁶

So, the Residence Directive lays down serious restrictions on social rights for unemployed without a working history in the country of residence. It is worth noticing as well the difference between the formulations of the requirements laid down for the unemployed who have the ‘status of workers’ and those who do not: ‘registers as a job-seeker with the relevant employment office’ versus ‘can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged’. The second formulation sets stronger demands, but more importantly, it grants much more discretion to the relevant authorities. It is a quite interesting formulation. In stead of requiring particular actions or conditions, the provision requires a ‘genuine chance’; it substitutes a speculation on the likeliness of certain future events for a specified duty. Interpreted literally, it demands of the person without a working history the ability to control his or her future chances.

But what authority would be able to assess whether a person is in control of his or her future chances? What person would be in control of his or her future chances? The CJEU has solved the matter in a pragmatic manner. Jobseekers who do not have the ‘status of workers’ are given at least 6 months in another member state. But after this period, it shall again be assessed whether ‘they are continuing to seek employment and have a genuine chance of being engaged’.²⁸⁷ The pragmatic solution is, in other words, only a partial solution. There are, however, also more sophisticated (and ambiguous) ways in which to consider the matter, as we shall see in a little while.

The Social Security Coordination Regulation specifies the conditions under which unemployed without a working history in the state of residence may receive unemployment benefits. A ‘wholly unemployed’ person who is entitled to

²⁸⁵Art. 14(4)(b), Dir. 2004/38/EC

²⁸⁶ Art. 24(2), *ibid*

²⁸⁷ Case C-138/02, *Collins*, par.36-37.

unemployment benefits in one member state may bring these benefits to another member state in order to seek work there, provided that he or she registers with and adheres to the conditions of the employment services of this State. But if this person has not found work after 3 months, he or she must either return to the first state or lose all entitlement to benefits under the legislation of that state. In exceptional cases, the period can be extended to 6 months.²⁸⁸

This does not necessarily leave the person without unemployment benefit after the first 3 months. He or she can rely on the principle of equal treatment as the general principle of the Regulation and will consequently be able to receive benefits after the first 3 months *in case* the state of residence grants benefits to people who has never worked - and on the condition, of course, that the person has been allowed to stay beyond the 3 months limit in order to continue to seek work.²⁸⁹

As can be seen, unemployed with no working history in the state of residence are not left rightless by the Regulation, but their situation is extremely difficult. They depend entirely on national systems granting unemployment benefits to people who have never worked; and in most EU states such benefits are either very limited, or they are understood as social assistance, rather than social security. Since these people are excluded from both social assistance and maintenance aid for studies when moving to another state, they are most likely to lose rights as a result of their transnational endeavor. - Obviously, the situation of unemployed with no working history at all is even more difficult. Very often, they will not be entitled to any unemployment benefits in their original state of residence which can be transported to another member state.

These border areas of the name 'Worker' are both complex and ambiguous. The general pattern which can be derived from these areas is, nonetheless, fairly clear. In general, the more substantial the working history in some (or more) member states, the better the rights. Only a brief working history in the state of residence makes a difference. With just a minimum of past working activities, the 'status of worker' *may* be claimed. With a working history of a year or more, this status can certainly be claimed. And as a result thereof, the right to stay in the state will be secured, and the door to social assistance as well as maintenance aid for studies and vocational training will be open.

²⁸⁸ Art. 64(1)(b-c), 64(2), Reg. (EC) No 883/2004

²⁸⁹ Naturally, a number of different transnational situations are taken into account by the Regulation, f. inst. the situation of an unemployed person who used to reside in a different state than the state in which he or she completed his or her last periods of employment and who is now seeking work in the state of residence. For such persons, conditions are slightly more favorable, see art. 65, Reg. (EC) No 883/2004

We shall now revisit the Vatsouras and Koupatantze-judgment and analyze the second part of it. We shall see that the CJEU may - under certain circumstances - be able to secure unemployment benefits for unemployed without a working history in the state of residence. That is, also those who cannot claim the 'status of worker' and who are therefore not granted equal treatment rights in relation to social assistance, may be entitled to unemployment benefits, according to the CJEU. However, this will only be so in case the persons in question satisfy certain other criteria. The introduction of these other criteria potentially undermines the general pattern painted above.

Again, the CJEU makes use of Treaty articles as well as conceptual definitions. And again, the distinction between social security and social assistance proves to be crucial. As recalled, it was questioned whether Mr. Vatsouras and Mr Koupatantze, two Greek Citizens residing and looking for work in Germany, could be regarded as 'workers' within the meaning of the Treaty. If they could, then they would be also have the status of 'workers' within the meaning of the residence Directive and would be entitled to equal treatment in relation to social assistance. Accordingly, they could not be excluded from the benefit which they used to receive (categorized as social assistance), but which was terminated on the ground that '*foreign nationals whose right of residence arises solely out of the search for employment*' should no longer be entitled to it.²⁹⁰ The CJEU indicates that Mr. Vatsouras and Mr Koupatantze may very well be 'workers' within the meaning of the Treaty, but that it is for the national court to carry out the examination. However, the CJEU also considers the other scenario, that is, the possibility that Mr. Vatsouras and Mr Koupatantze cannot be regarded as 'workers' within the meaning of the Treaty because the work they had performed was not 'real and genuine'. In that case they would not have a working history in Germany, recognized as such, and not be entitled to social assistance. Firstly, the CJEU emphasizes that the Greek Citizens would still be covered by the fundamental right to seek work laid down in the Treaty, even if they would not be 'workers' within the meaning of the Treaty: '*Nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC [now article 45] and therefore enjoy the right to equal treatment laid down in paragraph 2 of that provision*'.²⁹¹ That is, a different kind of concept of 'worker' is hereby silently introduced, namely a job-seeker who does not have the status of 'worker', but who is none the less covered by the fundamental rights of workers.

²⁹⁰ Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, par. 30-32

²⁹¹ *ibid*, par. 36

Now, according to the mentioned article 39(2) (now art. 45(2)), workers should be granted equal treatment with respect to '*employment, remuneration and other conditions of work and employment*'. The CJEU finds that when seen in the light of the fundamental status of EU-Citizenship, the Treaty provision concerning the rights of workers must be understood as implying access to work as well: '*in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC [now article 45(2)] a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.*'²⁹²

In other words, the EU-citizenship means that job-seekers who do not have the 'status of workers' are entitled to financial help with respect to the possibility of becoming a 'worker'. It is not entirely clear whether such persons are entitled to such rights because they are 'EU-Citizens' or 'Workers'. Somehow, the two names are brought together, creating a border-name in between them, the name of a 'Potential Worker'. However, since the argumentation of the CJEU focuses on article 45(2) - which is seen '*in view of the establishment of citizenship of the Union*' - it would be reasonable to conclude that we are indeed confronted with a sub-name of worker. 'Potentially being a Worker' belongs to the name 'Worker' - and the rights of potential workers include rights intended to facilitate the transformation from potential to actual worker.

Such rights are not granted without conditions, though: '*It is, however, legitimate for a Member State to grant such an allowance only after it has been possible to establish a real link between the job-seeker and the labour market of that State.*'²⁹³ A 'real link' between the job-seeker and the labour market? What constitutes 'a real link'? '*The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question*'²⁹⁴, the court suggests. That is, a history of work seeking in the state will satisfy the condition of 'a real link' which in turn provides the basis for granting benefits intended to facilitate access to the labour market. We see again that history matters for the future opportunities given: If a person has already proved that he or she is 'linked' to the labour market through personal history, that person should be helped to gain access to the same. However, here 'history' only implies work seeking, not actual work activities.

²⁹² *ibid*, par. 37

²⁹³ *ibid*, par. 38

²⁹⁴ *ibid*, par. 39

The question then arises whether a contradiction exists between the Treaty provision and the Residence Directive? The national benefit in question was categorized as a benefit 'in favor of job-seekers', but also as social assistance. According to the Residence Directive, job-seekers who do not have the 'status of workers' are not entitled to social assistance. The CJEU solves the matter by simply stating that the national benefit in question cannot be regarded as social assistance - hereby neglecting the categorizations of German law: *'Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.'*²⁹⁵

We are witnessing, again, the power of the fundamental rights laid down in the Treaty vis-a-vis secondary legislation, the flexible interpretation of these rights (this time by way of seeing one fundamental right in the light of another) and the significance of conceptual definitions established at EU-level. - But apart from that, a new criterium has been introduced, a criterium on the basis of which job-seekers without a working history may still claim certain rights of 'workers': the 'real link' criterium. We learned that *'the existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question'*.

The 'real link' criterium has been considered in other judgments as well. From the Ioannidis-judgment, we learn that a 'real link' means a real link between the person concerned and the 'geographic employment market'. It is implied that being socially integrated in the state in general increases the chances of the existence of a 'real link'. Having one's parents in the state would for instance point to 'a real and effective degree of connection'. However, no single factor should be made into an absolute criterium, the CJEU underlines. A person may very well be able to establish a 'real link' with the labour market of a given state even if he does not have his parents in that state, have not grown up in that state or completed his education in that state. The court finds that Mr Ioannidis who has merely pursued higher education in the state in question might very well be in a position to establish a real link with the labour market of that state.²⁹⁶

In the Collins-judgment, the CJEU considered whether a residence requirement would be appropriate for the purpose of ensuring a 'real link' between Mr. Collins and the

²⁹⁵ *ibid*, par. 45

²⁹⁶ Case C-258/04, *Ioannidis*, par. 30-33

British labour market and found that it would as long as it did not 'go beyond what is necessary'. The period of residence required should not be any longer than would be necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work. Besides, the residence requirement should rest on clear criteria.²⁹⁷

As can be seen, in spite of these clarifications, the 'real link' criterium remains very open. In truth, we are rather confronted with indications than determinations. Residence *may* be considered a condition; social integration in general appears to be a condition, but no specific factors should be determined in this respect. Having '*for a reasonable period, in fact genuinely sought work in the Member State in question*', appears, however, to be an inescapable condition. But what is a '*reasonable period*' of work seeking? And not least, what does 'genuinely' mean? Yet again, we encounter this term '*genuine*'; this time, however, it neither concerns the 'normal labour market' nor the future chances of acquiring work, but merely the quality of the work-seeking'. - The only clear conclusion we can draw from these vague criteria is that the subjective attitude of the unemployed person is considered to be crucial. '*Genuinely seeking work*' indicates a strong subjective element, a sincerity. 'Being socially integrated in general' (where no specific factors can be pointed out) implies the diffuse existence of a certain subjective attitude as well.

It should be mentioned that it is not only in relation to unemployed without a working history that the subjective attitude is considered to be important. This element pervades the rights of unemployed workers in general. In order to have the 'status of worker', for instance, it is not enough to have a substantial working history in the state in question, it is also required that the unemployment is 'involuntary'.²⁹⁸ A student, for instance, who for a short period gives up working in order to focus on finishing her studies, will lose the 'status of worker' which she otherwise enjoyed, in spite of the fact that she may have a substantial working history in the state in question and is planning a working future in that state.²⁹⁹ In the view of the CJEU, being '*capable of working, willing to work and available for work*' constitutes a general condition for the right to receive unemployment benefits (that is, the presence or absence of this condition

²⁹⁷ Case C-138/02, *Collins*, par. 69-72

²⁹⁸ Art. 7(3)(b,c), Dir. 2004/38/EC

²⁹⁹ Case C-158/07, *Förster*. As a result of losing her status as worker, Ms Förster lost her right to study finance.

determines whether a given national benefit is to be categorized as an ‘unemployment benefit’ or not), except in very special cases.³⁰⁰

Naturally, the requirement of a particular subjective attitude also has a dark side. How can the existence of such an attitude be trusted? In general, therefore, regular registration with the relevant authorities is required. In case registration is not required, the CJEU underlines that ‘monitoring arrangements’ may be justified. The court points out that *‘the monitoring to be carried out as far as concerns unemployment allowances is of a specific nature which justifies the introduction of arrangements that are more restrictive than those imposed for monitoring in respect of other benefits’*.³⁰¹

Accordingly, an ‘unemployed’ is not simply a person who is presently not working. Being ‘unemployed’ implies the involuntariness of the present situation and the intention to change it whenever possible. The meaning of the sub-name ‘Unemployed without a working history’ centers almost exclusively on this feature. In contrast, the sub-name ‘Unemployed with a working history in the state in question’ carries with it the significance of past events as well.

Rights attributed to the extremely mobile

My second study of the border areas of the name ‘Worker’ concerns the extremely mobile.

This might be surprising. Are we not confronted with a range of rights the purpose of which is to make transnational mobility possible - including transnational situations involving mobility between many different states and current changes? We certainly are. However, we shall see that even though the coordination system goes far to prevent that any one should lose rights for the reasons of mobility, it still leaves some people in a very difficult situation - or even with no place and no name in the system. These are the extremely mobile people, those with unstable, discontinuous lives, whose working history is a result of numerous transnational combinations and shifts.

As described above, the bearing idea of the Social Security Coordination Regulation is that no one should lose social security rights for the reasons of transnational mobility. Not losing rights does not mean that a person might not improve or worsen his or her right’s situation by moving to or working in another state, due to differences between

³⁰⁰ Case C-228/07, *Petersen*, par. 32-33.

³⁰¹ Case C-406/04, *De Cuyper*, par. 45. In this case, the monitoring does not concern the sincerity of the work-seeking, but *‘the possible existence of sources of revenue which the claimant has not declared’*. None the less, it demonstrates that unemployed are regarded as persons who should be subjected to strict control.

the national systems. But a person shall not lose the fruits of past activities and is not suddenly left without the framework of a welfare state; another state shall take the place of the lost one. However, rights shall not be multiplied either. The coordination system between member states as laid down in the Regulation is highly complex for exactly this reason. In all possible transnational situations, it shall be possible to point to one state - no more, no less - responsible for calculating and granting the social rights in question, and simultaneously, previously earned rights shall not be lost.

Transnational mobility shall neither be punished, nor rewarded, only made possible, - this appears to be the overall intention of the Social Security Coordination Regulation. But let us take a closer look at both residence and social security rights, in order to see whether rewards or punishments are built into the system with respect to degrees of mobility.

The Residence Directive centers around the transnational situation of an EU-citizen moving to a member state of which he or she is not a national, with the intention of residing *and* working there (or seeking work). 'Frontier workers' are included, though, that is, persons working in one state and residing in another '*to which he returns as a rule daily or at least once a week*'³⁰². A 'frontier worker' may acquire the right of permanent residence in the state of residence before the usual 5 years, namely after three years of continuous employment and residence in the state in question.³⁰³ In other words, only a 'frontier worker' who was not always a 'frontier worker', but who for three years worked and resided in the same state, shall enjoy this privilege.

Furthermore, 'frontier workers' do not enjoy the 'status of worker' in the state in which they reside. Only those who pursue their working activities - or used to do so - in the state of residence can claim such status.³⁰⁴ Consequently, as regards residence rights, 'frontier workers' are subject to much harder conditions than other transnational workers, most notably the criterium of self-support.

So, what residence rights are concerned, high degrees of transnational mobility are in fact punished. 'Frontier workers' are subject to harder conditions of residence. The only privilege offered, the possibility of acquiring permanent residence after three years, is granted to those who for three years were not frontier workers. In addition, as previously unfolded, the Residence Directive rewards stability as far as all EU-citizens

³⁰² Defined in art. 1(f), Reg. (EC) No 883/2004. In Dir. 2004/58 (art. 17(1)(c)) we find the exact same definition, though without naming such a person a 'frontier worker'

³⁰³ Art. 17(1)(c), Dir. 2004/38/EC

³⁰⁴ Art. 7(1)(a) and 7(3), *ibid*

are concerned. A person who never resides in a state for more than a few years, but keeps on moving from state to state will never obtain the right of permanent residence in any state and consequently never enjoy equal treatment unrestrictedly. Not to mention the situation of someone who only stays for a few months in each state (such a person will never obtain the right to receive social assistance).

The Social Security Coordination Regulation is not characterized by such restrictions connected to periods of residence or work, but goes far to prevent the loss of rights due to transnational mobility. None the less, we detect in the Regulation a specific problem as regards the aggregation of periods of insurance, namely the problem of how to calculate rights based on a number of very short periods of insurance in different states. Most often, a certain period of insurance is required within a given national system before the insured person has actually acquired a right to benefits. This raises the question of what would be the situation of a person who has moved so much and so often that he or she has never acquired any rights within any national system, although he or she has in fact been insured for a long time, only in different states.

If we take pension rights as an example, we can see on the one hand that the Regulation goes far to secure the rights of the very mobile person, on the other that there are still border areas which the Regulation will not reach. A specific method of calculating pension rights is laid down so that, firstly, a pension can be composed of benefits from different national systems, secondly, the total period of insurance will be taken into account, although each national system will only pay its own part.³⁰⁵ In this way a person can move from state to state and still build up seniority. There is, however, a problem what short periods of insurance are concerned: *'[...] the institution of a Member State shall not be required to provide benefits in respect of periods completed under the legislation it applies [...], if the duration of the said periods is less than one year, and taking only these periods into account no right to benefit is acquired under that legislation.'*³⁰⁶ So, short periods of insurance may be lost. They will still count in terms of seniority, of calculating the total sum of insured periods³⁰⁷, but no state will pay 'the part' corresponding to these periods. Accordingly, many such periods in a personal insurance history will affect the ultimate pension to some degree. The Regulation does however take into consideration the possibility that all the states concerned would be

³⁰⁵ Art. 52, Reg. (EC) No 883/2004

³⁰⁶ Art. 57(1), *ibid*

³⁰⁷ Art. 57(2), *ibid*

relieved of their obligations. In that case, the last state whose conditions are satisfied shall provide the benefits as if all the periods of insurance had been completed in that State.³⁰⁸ That is, in the extreme case of a transnational worker who would be left without pension rights, an alternative rule will apply, so that he or she will receive benefits corresponding to all the periods of insurance. But this will not help the worker who is left with a limited pension due to several short periods of insurance in different national systems.

Taking unemployment rights as another example, we detect a similar problem with respect to short periods of insurance. What unemployment rights are concerned, only one state will grant the benefits, but it shall do so in accordance with the general logic of aggregation. This has the following implication, though: *'(...) the periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation.'*³⁰⁹ This is another example of short periods being lost because of mobility. Short periods that trigger rights in one state may not do it in another and will - as a result of the mentioned rule - not be calculated with at all. Or we could be dealing with short periods that would not trigger rights in any of the two states, but they would still be lost, not allowed to be part of the transnational building up of seniority.

Finally, it should be mentioned that as far as unemployment benefits are concerned, it is required that the most recently completed periods of insurance or work must be completed in accordance with the legislation under which the unemployment benefit is claimed. Otherwise, periods of insurance or work completed in other member states will not be taken into account at all.³¹⁰ Obviously, this rule (which is a special rule which only applies to unemployment benefits and which can be said to partly undermine the general principle of aggregation of periods of insurance) may have huge consequences for the transnationally mobile people in general, and in particular for the extremely mobile.

These important examples show that even though the Regulation does improve the social rights of the transnationally mobile person immensely, there are still limits to how mobile a person can be without losing rights, or, in extreme cases, be left without

³⁰⁸ Art. 57(3), *ibid*

³⁰⁹ Art. 61(1), *ibid*

³¹⁰ Art. 61(2), *ibid*. The rule is applied in Case C-175/00, *Verwayen-Boelen* and in Case C-372/02, *Adanez-Vega*

significant rights. We are of course dealing with border areas. Not many people move from state to state throughout their lives, staying only a year or less in each state. But such people do exist - whether for reasons of distress and necessity or desire and adventure.

Rights attributed to third country national workers

Finally, we need to readdress the situations of third country nationals. In principle, third country nationals are potential transnational workers just like EU-citizens. They have been included in the Social Security Coordination Regulation and are therefore granted the same social security rights as EU citizens. But they are neither included in the Treaty provisions concerning the fundamental rights of workers nor in the Residence Directive (unless they are family-members, as we shall see in the next chapter). Accordingly, third country nationals workers *as such* do not have any mobility, residence or working access rights on the basis of EU-law. Their possibilities of even entering the grayish field of the name 'Worker' within the context of EU-laws are therefore very restricted. More precisely, since they cannot use the name 'Third Country National' to gain such access, they will need other legal doors to the field of the name.

Some of these doors were dealt with in the last chapter in the shape of specific sub-names of 'Third Country National'. In this connection, we saw that mobility, residence and working access rights in a second member state are granted only on the conditions of previous stability and capabilities of self-support (in the case of 'Long Term Residents') and on the conditions of professional qualifications, previous work in a member state and relative stability (in the case of 'Blue Card Holders'). Likewise, we saw that mobility and residence rights do not in itself open the doors to the labour market as such; the member states may practically decide to what extent and on what conditions third country nationals should have access to national labour markets.

The sub-names of the border areas discussed above are hardly relevant to the third country nationals who gain access to the field of the name 'Worker' through the legal doors opened by the 'privileged' sub-names of 'Third Country National', due to the hard requirements characterizing these names. It would be unlikely for a 'Long Term Resident' and impossible for a 'Blue Card Holder' to be a jobseeker in a second member state without a working history in the EU. It would be impossible for both to

be extremely transnationally mobile and unlikely that they should not have completed periods of insurance long enough to count within the EU-coordination system.

But there are other legal doors to the name 'Worker'. A very important one will be dealt with in the following chapter, in the shape of the name 'Family Member'. But third country nationals could also be moving within the EU because of agreements between particular member states. It is therefore not at all impossible that third country nationals could be crossing borders as unemployed without a working history or as extremely mobile.

A final remark as regards third country national workers. We should not forget that some of the most transnationally mobile workers within the EU are to be found among the completely rightless workers, the illegal third country nationals. These people whose lives may be fragmented and mobile beyond common imagination are not covered by any of the legislative acts dealt with in this chapter. The same is of the course the case for illegal third country nationals workers who are stuck in one place over many years.

In conclusion: a highly differentiated name, powerful but flawed

The name 'Worker' is a very powerful and wide-reaching name. In combination with the name EU-citizen it gives access to all the rights mentioned under the previous names - rights concerning mobility, work access and working conditions, residence, family reunification, social security and social assistance rights. Yet, it is not without flaws. Most notably, a third country national worker is still subjected to hard conditions and limitations with respect to almost all of those rights. But we may also point to other kinds of social situations which are partly neglected. I identified in particular the following two: situations characterized by the lack of a working history and situations characterized by extreme transnational mobility.³¹¹

With these flaws in mind, we must be aware, though, how extremely differentiated the name 'Worker' is. It gives rise to an endless number of sub-names. This endless number arise on the basis of several different ways of differentiating within the field: temporal differentiations (presently working, having worked in the past for so and so long, intending to be working in the future, being in-between work etc); differentiations

³¹¹ Clearly, other sub-names of the border areas could have been analyzed, like for instance sub-names for those who never have worked and never will work (but who are still workers within the meaning of the Social Security Coordination Regulation, because they are insured). Specific problematics concern the transportation and translation of benefits in kind. See for instance Case C-208/07, *Chamier-Glisczinski*

related to the nature of the employment contract (part-time or full time worker, fixed term or permanent worker); differentiations related to the nature of the transnational situation (living and working in another member state, living in one state, working in another, working in several states, living or working in another state than the state in which the family is living, etc); and differentiations related to insurance (being insured with respect to old age, to unemployment, sickness etc). Apart from that it is crucial to remember the distinction between self-employed and employed workers.

In overall, we may differentiate between the stronger and the weaker sub-names according to the following drawing of the field:

In the core of the field we find the stronger sub-names. Those are the names which can be claimed by people who have a working present, past and future. Close to the core are the names for those who are not presently working, but have a working past and future. Further away are the names for those who only have a working past. And finally, the border areas are characterized by the weakest sub-names - the names for those who only have a working future, as well as the names which can be claimed by those who will never work.

We need to be aware, though, that this drawing does not reflect one core definition of 'Worker'. Several definitions are in play - and accordingly, several criteria on the basis of which we may differentiate between stronger and weaker sub-names. The remuneration and 'real and genuine' criteria - according to which a 'Worker' is someone who for a certain period of time receives remuneration in exchange for particular services under the direction of another person provided that this relationship relates to the labour market as a whole - is important, but far from exhaustive.

First of all, that definition does not apply to self-employed workers. Self-employed workers can be said to constitute a field of their own, parallel to the field of employed workers, but on the basis of a different definition: A self-employed worker is someone who has the double role of exercising his or her freedom of establishment and of constituting the other side of the employment relation, that is, directing and paying others in exchange for particular services.

Secondly, the remuneration-definition is supplemented by a completely different definition, according to which a 'worker' may also simply be someone who is insured (in relation to certain schemes). In principle, a person who has never worked and who never will work may none the less be a 'worker'. Such a person can certainly not be said to relate to the remuneration and 'real and genuine' criteria.

Thirdly, we encounter yet another definition which does, admittedly, relate to the remuneration and 'real and genuine' criteria, but which cannot be reduced to them. An unemployed person without a working history in the state in question must, in order to be a 'worker', have established a 'real link' between him- or herself and the labour market. Such 'real links' may be measured according to a range of not fully explicated criteria. Registration as a jobseeker with the relevant authorities would constitute one of them; general societal integration another. But more than anything, the attitude of the person is considered important, that he or she is not only 'capable' of working, but also 'willing to work and available for work'.

Finally, the remuneration and 'real and genuine' criteria are indifferent to how much and how long a person has worked or is working. Even a short period of minor work activities may suffice in order for a person to be a 'worker'. However, since social security equal treatment rights build on the idea of membership and contribution, it is clear that the working history of a person is immensely important, not to his or her access to social security equal treatment rights as such, but to his or her possibility of actually benefitting from them. The rights earned by part-time and fixed-term workers and by workers who have only worked for shorter periods will generally not be as good as those earned by full-time workers, permanent workers and workers who have worked continuously for many years.³¹²

The drawing above and the different core definitions of 'Worker' which it reflects is however not adequate in the case of third country national workers. Certainly, third country nationals who have a working present, past and future will generally be in a stronger situation with respect to EU rights than those who only have a working past or working future or neither of those. However, in order to be able to enter the field of the name 'Worker' at all, a third country national will need to satisfy other conditions than having a working present, past or future. This is due to the fact that third country

³¹² A principle of non-discrimination against part-time and fixed-term workers has been laid down in *Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work*, Clause 4, and in *Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP - Annex : Framework agreement on fixed-term work*, clause 4, covering working conditions, including social security rights linked to the employment relationship. But there is a limit to the power of these non-discrimination rights. They cannot change the fact that people who work less do not earn the same rights as those who work more, just like they cannot change the fact that hourly wages are often lower for 'Part-time Workers' and 'Fixed term Workers', as long as such differences are justified by claims as to the nature of the work required. See Joined Cases C-395/08 and C-396/08, *Bruno and Others*, C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-177/10, *Rosado Santana*, Joined Cases C-444/09 and C-456/09, *Gavieiro Gavieiro and Iglesias Torres*.

nationals as such do not have any transnational mobility or work access rights, like EU-citizens. Consequently, they will need to find particular legal doors to the name 'Worker', each representing different requirements. And even when one of those doors have been entered, the name 'Worker' will not give rise to the same rights as it does when claimed by an EU-citizen.

In this chapter, we have been able to discern the presence of a certain remarkable horizon dominating the interpretations of the CJEU. In the previous chapters, we have seen examples of the CJEU seeking to secure EU-rights against undermining - hereby engaging in highly flexible ways of interpretation, based on the establishment of conceptual criteria and on different kinds of fundamental rights. Also in this chapter, we have been witnessing the flexibility of the methods of interpretation of the CJEU. But the 'Worker'-related judgments did not only involve fundamental rights and conceptual definitions. They established a particular criterium, namely the 'real link' criterium.

A horizon dominated by the overall idea of 'national integration' is clearly in play in these judgments. The meaning of 'national integration' within this horizon is not entirely clear though. Integration in the labour market for the sake of integration in society as such? Or vice versa, integration in society for the sake of integration in the labour market? In any case, these two kinds of integration are intimately bound together, representing societal aims and means at the same time. In this conjunction, they depend on a particular subjective attitude, being '*capable of working, willing to work and available for work*'.

This horizon of integration reflects, moreover, the general picture we have discerned: in spite of the fact that the rights we have dealt with are meant to serve transnational mobility, relative stability is still being rewarded and extreme mobility is being punished.

We have seen that as far as the unemployed are concerned, a number of exceptions from the principle of non-discrimination are laid down, hereby limiting transnational mobility. Unemployed people are being bound to the national context within which they receive their benefits to a much higher degree than others. From the point of view of the ambiguous horizon characterized by the double-understanding of 'national integration', the unemployed constitute the problem kids.

Chapter 8

‘Family-member’

The right to found a family is a fundamental right of ‘Everyone’ provided by the Charter of Fundamental Rights.³¹³ In the Charter, family life is presented as equal to private life and in opposition to professional life: *‘Everyone has the right to respect for his or her private and family life [...]’*³¹⁴, whereas *‘To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity [...]’*³¹⁵. In general, the family shall enjoy *‘legal, economic and social protection’*.³¹⁶ Furthermore, as mentioned in chapter 4, within secondary legislation, family life is being connected to the concept of dignity.³¹⁷

In the previous chapters, we have seen that both EU-citizens and third country nationals are granted family reunification rights - although under different conditions. But we have not analyzed the residence rights, working access and social rights granted to family-members qua family-members. These rights are called ‘derivative rights’ in contrast to ‘independent’ rights because they are dependent on a persons family-relationship to another person. This other person, because of whom the rights are acquired, is called the sponsor. It is crucial to understand that without a sponsor, that is, a person who is entitled to EU-rights, the name ‘Family-member’ will be useless.

What is a family, and who is a family member? Varying definitions can be found within secondary legislation, all of them centering, though, on the idea of a ‘nuclear family’ and human relations which can be compared to or closely associated herewith.

But apart from these varying definitions of ‘family member’, another type of distinction turns out to be crucial to the field, namely the distinction between ‘EU-citizen’ and ‘third country national’. A family member may be both, but the sponsor of the family member may also be both. Accordingly, on the basis of this distinction we may distinguish between four sub-names of ‘Family-member’: ‘EU-citizen Family-member

³¹³ Art. 9, Charter of Fundamental Rights

³¹⁴ Art. 7, *ibid*

³¹⁵ Art. 33(2), *ibid*

³¹⁶ Charter of Fundamental Rights, art. 33(2)

³¹⁷ See f. inst. recital 5 and 15, Dir. 2004/58/EC

whose sponsors is an EU-Citizen; 'EU-citizen Family-member whose sponsors is a Third Country National'³¹⁸; 'Third Country National Family-member whose sponsor is an EU-citizen'; 'Third Country National Family member whose sponsor is a Third Country National'. Each of these four sub-names can then be combined with the different definitions of a 'family-member' which arise on the basis of and in relation to the perspective of the nuclear family.

In other words, these two aspects of the definition of a family-member - the relationship to the sponsor from the point of view of the concept of 'family', and from the point of view of the EU-citizen/third country national distinction - may cross each other in a number of ways so as to give rise to a range of sub-names. We shall see that this field of sub-names has its own characteristics. Whereas the field of the sub-names of 'Third Country National' is a muddy and extremely hollow field characterized by an almost useless overall name and only a few relatively strong sub-names, and the field of sub-names of 'Worker' is an extremely differentiated and grayish field revolving around two overall cores, we are now entering a more ordered field. 'A more ordered field' does not mean uncomplicated or easily overlooked, though. The sub-names of the field are certainly not few, but they are clearly distinguishable. The rights corresponding to the different sub-names are likewise multiple and constitute a clearly hierarchical field.

The sub-names of 'Family-member'

Due to these characteristics of the field described above, the analysis will be carried out in a very systematic way. More precisely, when examining the substance of the name 'Family-member' I shall begin with the sub-names designating an EU-citizen sponsor and proceed with the sub-names designating a third country national sponsor. When afterwards analyzing the attributes of the name, I shall do the same. As we shall see, as far as the sub-names of the name 'Family-member' is concerned, it is more important who the sponsor is than who the family-member is.

³¹⁸ This combination will in many cases not be relevant, since an EU-citizen will have better rights as an 'EU-citizen' than as a 'family-member' whose sponsor is a 'Third Country National'. This is clearly the case as regards residence rights. What social security rights are concerned, the combination could be relevant, though.

Sub-names designating an EU-citizen sponsor

The Residence Directive lays down rights for EU-citizens and their family-members. This means that within the context of that Directive, the sponsor is always an EU-citizen, whereas the family-member enjoying derivative rights may be both an EU-citizen and a third country national.

From the perspective of the concept of 'family', the Directive distinguishes between two kinds of family-members.

Firstly, a 'family-member' may be the spouse or registered partner, a direct descendant (child, grand child etc) of the sponsor or spouse under the age of 21. Furthermore, direct descendants of the sponsor or the spouse over the age of 21 are also included in so far as they are *dependent* on the sponsor. The same is the case for direct relatives in the ascending line (parents, grandparents etc) of the sponsor or the spouse.³¹⁹

Secondly, the Directive owes respect to the '*unity of the family in a broader sense*'. Persons who are '*dependants or members of the household of the Union citizen*', or who because of '*serious health grounds*' needs personal care-taking by the sponsor, and finally '*the partner with whom the Union citizen has a durable relationship, duly attested*' are all seen as belonging to the '*family in a broader sense*'.³²⁰

Whereas the before mentioned family-members - we may call them the family-members in a strict sense - are granted '*an automatic right of entry and residence*', the family members belonging to the '*family in a broader sense*' shall be subjected to '*an extensive examination of [their] personal circumstances*' by the state in question which may choose to deny them entry and residence. The Directive lays down that any denial shall be justified, but it does not specify any criteria in this respect.³²¹ In other words, huge discretion is granted to the member states as far as concerns the residence rights of the family-members in a broader sense.

It is clear that both with respect to the first and second definition of family-member, the notion of 'dependence' is crucial. According to the preamble, dependence could mean '*financial or physical dependence*', but the notion as such is kept open. As far as the overall assessment of '*personal circumstances*' is concerned, the preamble indicates that also

³¹⁹ Art. 2(2), Dir. 2004/38/EC

³²⁰ Art. 3(2) and recital 6, *ibid*

³²¹ Art. 3(2), last sentence, *ibid*

'other circumstances' than those relating to *'dependence'* may be considered, but does not provide any hint as to the nature of such *'other circumstances'*.³²²

The Residence Directive also distinguishes between EU-citizen and third country national family-members. With respect to initial rights of entry and residence it does not matter whether the family-member is an EU-citizen or a third country national. But it does matter with respect to other rights, as we shall see.

Accordingly, we are already confronted with a large number of sub-names. All the different definitions of *'family-member'* mentioned above may be combined with either *'EU-citizen'* or *'Third Country National'*. But common for all of them is that the sponsor is designated as an EU-citizen. In other words, the sub-names we are facing comprise three elements and are of the following kind: *'EU-Citizen Spouse whose sponsor is an EU-Citizen'*, *'Third Country National Spouse whose sponsor is an EU-Citizen'*, *'EU-Citizen Direct Descendant whose sponsor is an EU-Citizen'*, *'Third Country National Direct Descendant whose sponsor is an EU-Citizen'*, etc.

Sub-names designating a third country national sponsor

Now, if the sponsor is a third country national, different definitions of *'family member'* will apply. These definitions are primarily laid down in the Family Reunification Directive.

In the Family Reunification Directive, *'family members'* are defined in terms similar to those of the Residence Directive, but more restrictedly and by way of more specific formulations. Members of the nuclear family - spouse and the minor children - are right-holders. However, minor children of either the sponsor or the spouse are only included where the sponsor or spouse has custody and the children are dependent on him or her. Grown up children are not included as they are in the Residence Directive. The age criterium is also different, a *'minor child'* should be below the age of majority according to the law of the member state, - and not under 21 as in the Residence Directive. Furthermore, it is required that the child is not married. Registered partners are not automatically included; it is for the member states to decide, whether they are to be treated equally as spouses. It shall also be possible for the state to require the sponsor and his or her spouse to be of a minimum age, in order to prevent forced marriages. Lastly, the possibility of polygamy is taken into account. Only one spouse may be reunified with the sponsor.³²³

³²² Recital 6, *ibid*

³²³ Art. 4(1), 4(3), 4(4) and 4(5), Dir. 2003/86/EC

Apart from laying down stricter criteria regarding the definitions of family-members belonging to the nuclear family, the Directive does not grant an automatic right of entry and residence to dependent grown-up children, parents and grandparents.³²⁴ And family-members in a '*broader sense*' - that is, other family members dependent on the sponsor, one way or another - are not being considered by the Family Reunification Directive at all.³²⁵

As described in chapter 6, specific family reunification rights are laid down in the Long term resident Directive and the Blue Card Holder Directive. However, both of these Directives make use of the definition of family-member in the Family Reunification Directive, as analyzed above, with the exception that the Long Term Resident Directive opens for the possibility that the member states may choose to grant residence rights to 'other family members'.³²⁶ Accordingly, with respect to initial rights of entry and residence it matters only little whether the sponsor is a long term resident, a blue card holder or a third country national who satisfies the criteria laid down in the Family Reunification Directive. Definitions of 'family-member' are practically the same.³²⁷

We are again confronted with a large amount of sub-names which comprise three elements. They would read like this: 'Third Country National Spouse whose sponsor is a Long Term Resident', 'Third Country National Spouse whose sponsor is a Blue Card Holder', 'Third Country National Spouse whose sponsor is a Third Country National who satisfies the criteria of the Family Reunification Directive', 'Third Country National Child of the sponsor and his or her spouse and whose sponsor is a Long Term Resident', etc.

Definitions provided in the Social Security Coordination Regulation, applying to family members whose sponsor is an EU-citizen or a third country national

It should be mentioned as well that a special definition of 'family member' is laid down in the Social Security Coordination Regulation, which applies to both EU-citizens and Third Country Nationals.

The Regulation provides a double definition of 'family-member', in correspondence with the general intricate relationship between national concepts and EU-concepts

³²⁴ Art. 4(2), *ibid.* The member states may - or may not - grant residence rights to such persons.

³²⁵ Only with respect to refugees, it is stated that member states may - or may not - take into account other dependent family members. Art. 10(2), *ibid.*

³²⁶ Art. 2(e), 16(1) and (2), recital 20, Dir. 2003/109/EC; art. 2(f), 15(1), Dir. 2009/50/EC

³²⁷ However, the criteria which the sponsor must satisfy in order to be granted family reunification are of course not the same, as analyzed in chapter 6

characterizing the Regulation. A ‘family-member’ is primarily defined as someone defined as a ‘family member’ within the applicable national legislation. But in case the national legislation does not make a distinction between ‘family-members’ and other persons, an EU-definition shall prevail instead. The EU-definition reads: ‘*the spouse, minor children, and dependent children who have reached the age of majority*’.³²⁸ This definition is more comprehensive than the definition given in the Family Reunification Directive in that it includes grown-up dependent children and does not require that minor children of either the sponsor or the spouse should be under the custody of and dependent on him or her. On the other hand, it is quite narrow compared to the definition given in the Residence Directive. This means that in case the sponsor is an EU-Citizen, not all family members who are granted residence rights are necessarily granted social security rights. In contrast, in case the sponsor is a third country national, residence rights may be harder to obtain than social security rights.

The Regulation also takes into account the various possible transnational situations of the ‘family’. In case the national legislation requires family members to live in the same household, this national requirement shall be replaced by an EU-requirement, namely that family-members who do not live in the same household as the sponsor must be ‘mainly dependent’ on him or her in order to be regarded as a family-member.³²⁹ In other words, the possibility of transnational mobility figures within the very core of the definition of the family. Family-members may live in a different state than the sponsor and still be granted derivative rights as family-members.

The derivative rights of family-members

We shall now proceed with the attributes of the name, according to the same overall structure.

The rights of Family-members whose sponsor is an EU-citizen

The rights of family-members whose sponsor is an EU-citizen are fairly simple as *long as family ties are upheld*. Regardless of who the family-member is, residence rights, working access rights and social rights are basically the same as those enjoyed by their

³²⁸ Art. 1(i)(1-2), Reg. (EC) No 883/2004

³²⁹ Art. 1(i)(3), *ibid*. In the Regulation, the sponsor is merely called ‘the insured person’

sponsor. They can stay as long as their sponsor satisfies the conditions for residence.³³⁰ After 5 years of consecutive residence in the state in question, family members shall acquire the right of permanent residence, just like their sponsor.³³¹ If the sponsor acquires permanent residence earlier than that, the family-member will likewise.³³² Family-members shall be entitled to take up employment or self-employment - just like their sponsor.³³³ And they shall enjoy equal treatment rights - with the same limitations or lack of limitations that apply to their sponsor as regards social assistance and maintenance aid for studies.³³⁴

The rights of family members only become complicated in the event of the death or departure of the sponsor. Family-members may in that case still claim derivative rights, due to their previous family relation. The content of these rights will however vary quite significantly, depending on the situation of the family-member.

For the family-members who have acquired permanent residence, the matter presents no difficulties: they can claim this status on a personal basis, and will not need to claim derivative rights.

Those who have not acquired permanent residence at the time of the death of the sponsor will have the possibility of acquiring this status, but only if the sponsor used to have the 'status of worker'. In addition, the sponsor must, at the time of death, have resided in the state for at least two years, or he or she must have died because of an accident at work or an occupational disease.³³⁵ Family-members who are either children enrolled at an educational establishment in the state, or the parent of these children, will retain their right of residence until the completion of the studies.³³⁶

But for those family members who cannot meet the above mentioned criteria, residence rights are more uncertain. If they are EU-citizens, they will retain their rights of residence. But they will be subjected to the same conditions as all other EU-citizens.

³³⁰ Art. 6(1), art. 7(1)(d), art. 7(2), Dir. 2004/38/EC. Administrative formalities differ somewhat (EU-citizens will only need a registration certificate after 3 months, whereas third country nationals must apply for a residence card), but the criteria for acquiring the necessary documents are identical, see art. 8(5) and art. 10(2)

³³¹ Art. 18, Dir. 2004/38/EC

³³² Art. 17(3), *ibid*

³³³ Art. 23, *ibid*

³³⁴ Art. 24, Dir. 2004/38/EC; art. 2(1) and art. 4, Reg.(EC) No 883/04

³³⁵ Art. 17(4), Dir. 2004/38/EC. One further possibility, but more unusual; the surviving spouse must have lost the nationality of that state as a result of marriage

³³⁶ Art. 12(3), *ibid*

That is, they will need to have the status of workers, or be capable of self-support.³³⁷ If they are third country nationals, conditions are harder. Only if they have resided as family members in the state for at least a year, they will retain their right of residence. Further, they will need to be a 'worker' (in the sense of presently working) or be capable of self-support before acquiring permanent residence. In contrast to EU-citizens, the 'status of worker' on the basis of previous working activities in the state will not be available to them.³³⁸

The Residence Directive does not only take into account the possibility of the death of the sponsor, but also the possibility of divorce. In the event of divorce, EU-Citizen family members must, again, meet the same conditions as all other EU-citizens, in order to stay. And third country national family-members will need to be 'workers' or be capable of self-support.³³⁹ But in addition, a number of other conditions are laid down in the case of third country nationals: The marriage or partnership must have lasted at least three years, including one year in the state in question; or the divorced family-member must have custody of the former sponsors children or have the right of access to a minor child in the state in question. Or, as the final possibility, the third country national family-member must have been '*a victim of domestic violence*' during the marriage.³⁴⁰

As far as working access and social rights are concerned, nothing is specified, neither in the case of divorce or death. But EU-citizens will, due to the fact they are EU-citizens, be able to claim the principle of non-discrimination with respect to both. Third country nationals are not guaranteed equal treatment rights with respect to work access or social rights on the basis of the Residence Directive or the Treaty. However, the Social Security Coordination Regulation will apply - but only if the state in question is the second member state of those former family-members or if they are survivors.³⁴¹

³³⁷ Art. 12(1), in conjunction with art. 7(1) and 7(3), *ibid.* EU-citizens will also have these rights in the event of the departure of the sponsor from the member state in question.

³³⁸ Art. 12(2) (compared to art. 12(1), in conjunction with art. 7(1) and 7(3)), *ibid.*

³³⁹ Art. 13(1) and 13(2), second paragraph, *ibid.*

³⁴⁰ Art. 13(2), first paragraph, *ibid.*

³⁴¹ However, family benefits granted because of a child may still be covered by the Regulation, also in the case of a divorce. See Case C-363/08, *Slanina*, par. 30: '*The Court has already held that although Regulation No 1408/71 does not expressly cover family situations following a divorce there is nothing to justify the exclusion of such situations from the scope of Regulation No 1408/71.*'

The rights of family-members whose sponsor is a third country national

Now, if the sponsor is a third country national we detect a similar pattern as far as residence rights are concerned. As long as family ties is upheld, the family-member will basically enjoy the same rights as those enjoyed by the sponsor.³⁴² As a condition for granting these rights, though, member states may require sponsor as well as family-members to '*comply with integration measures, in accordance with national law*'.³⁴³

We also find a parallel to the acquirement of permanent residence on a personal basis after 5 years. However, only an 'autonomous residence permit', and not permanent residence, is granted to the spouse or partner and children who have reached the age of majority, after 5 years; that is, these family-members are given independent and not only derivative rights after 5 years, but the content of these rights are not qualified.³⁴⁴

In the case of death of or divorce from the sponsor, family-members are left without any secured rights: '*In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification.*'³⁴⁵ In other words, it is for the member states to decide whether family-members should retain their rights of residence, and under what conditions.

Neither the Long Term Resident Directive nor the Blue Card Holder Directive grant any particular rights to family-members in the event of death of or divorce from the sponsor.³⁴⁶ As far as the autonomous residence permit is concerned, however, family-members of Blue Card Holders are allowed transnational mobility without the consequence of losing rights; they may cumulate periods of residence in different member states for the purpose of acquiring such an autonomous residence permit after 5 years³⁴⁷.

³⁴² Art. 13, Dir. 2003/86/EC; art. 16(1-2), art. 19(3), Dir. 2003/109/EC; art. 15, Dir. 2009/50/EC. In the case of family members covered by the Family-reunification Directive, a renewable residence permit of at least one year's duration shall be issued, and in case the sponsor cannot continue to satisfy the conditions for family reunification, the member states may refuse to renew the family member's residence permit (art. 13(2), 16(1)(a), Dir. 2003/86/EC)

³⁴³ Art. 7(2), Dir. 2003/86/EC; art. 15(3), Dir. 2003/109/EC; art. 15(3), Dir. 2009/50/EC

³⁴⁴ Art. 15(1), first subparagraph, Dir. 2003/86/EC. The Directive makes clear that the '*conditions relating to the granting and duration of the autonomous residence permit are established by national law*'. (art. 15(4))

³⁴⁵ Art. 15(3), *ibid*

³⁴⁶ None of those Directives specifies any rights in that respect which means that the Family Reunification Directive, Dir. 2003/86/EC, will apply (which in turn does not grant any rights, see above).

³⁴⁷ Art. 15(7), Dir. 2009/50/EC

Family-members whose sponsor is a third country national are granted access to education, training and work, but very restrictedly. They are not granted equal treatment rights; the member states may decide what kind of education, training and work should be available to these family-members. In addition, they may have to wait 1 year before being allowed to work: *'[...] These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorizing family members to exercise an employed or self-employed activity.'*³⁴⁸ Parents, grand parents and adult children may be denied access to the labour market entirely.³⁴⁹

As far as social rights are concerned, the Social Security Coordination Regulation will apply in case the sponsor is a Blue Card holder or have crossed borders within the EU. Otherwise, no social rights are granted to family members of third country nationals. However, since long term residents are granted equal treatment rights within a number of areas, including social security and social assistance, family members may have access to social security and social assistance rights as *national derivative rights*. Severe restrictions apply to the social equal treatment rights of long term residents, though (as unfolded in chapter 6).

In the case of death of or divorce from the sponsor, nothing is specified as to social rights and working access rights. Survivors of a sponsor covered by the Social Security Coordination Regulation will be able to rely on that Regulation, though.

Family reunification rights of third country nationals seen in the light of the fundamental right to family life

After this systematic (and somewhat schematic) analysis of the substance and attributes of the name 'Family-member - displaying a complex, but rather ordered and clearly hierarchized field - we shall discuss a judgment, the Parliament versus Council judgment from 2006.

The judgment concerns the following restriction laid down in the Family Reunification Directive: *'where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing*

³⁴⁸ Art. 14(1-2), Dir. 2003/86/EC; the same rights in art. 21(3), Dir. 2003/109/EC, and in art. 15(6) and art. 19(5), Dir. 2009/50/EC

³⁴⁹ Art. 14(3), Dir. 2003/86/EC

legislation'³⁵⁰. In other words, children as young as 12 years old may be denied the possibility of staying with the sponsor - who in this case will be the father or mother³⁵¹ - because they arrive alone from somewhere else where they used to stay. The explanation given in the preamble is the following: *'The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.'*³⁵² It is the capacity for integration which makes out the focal point of the explanation; a 12 year old child is considered to be too old for integration.

The European Parliament found that this provision of the Family Reunification Directive did not respect fundamental rights, including the right to family life, as guaranteed by the European Convention on Human Rights. Accordingly, a potential conflict between a provision of EU law and a human right (a right of 'Everyone') is at stake. Strictly speaking, the case does not concern what the Directive regulates, but what it *does not* regulate. Should the member states be allowed this kind of discretion, should they be allowed to deny entry and residence to a 12 year old child whose father or mother resides in the state, on the basis of an assessment of the child's capacity for integration according to national criteria?

The CJEU found that the member states should indeed be allowed this kind of discretion. From our point of view, the judgment is interesting for two reasons. Firstly, we are confronted with an EU-law provision which clearly lays down very hard conditions for third country nationals, compared to EU-citizens. In chapter 6, we saw that the CJEU would sometimes seek to secure or even strengthen the rights of third country nationals by way of flexible interpretation. Fundamental rights (rights of 'Everyone') would play important roles in this connection. In the Parliament versus Council judgment, in contrast, we are witnessing a potential conflict between a human right and an EU-law-provision concerning the rights of third country nationals. Since the CJEU concludes that the right to family life has not been violated, we may say that this time, the rights of third country nationals are not being strengthened due to the fact that they are being interpreted in the light of human rights; on the contrary, their weaknesses have been confirmed. Secondly, the judgment is interesting because it

³⁵⁰ Art 4(1), last paragraph, *ibid*. This does not apply to refugees (art. 10(1))

³⁵¹ Since neither grandchildren nor 'other family-members' are included in the definition of 'family-member' in the Family Reunification Directive

³⁵² Recital 12, Dir. 2003/86/EC

concerns the issue of integration - an issue which we found, in the last chapter, to be crucial to the name 'Worker'.

The discussion of the CJEU consists of two different parts which are based on two different kinds of criteria. The first part of the discussion is based - primarily but not exclusively - on criteria derived from the case-law of the ECtHR. The CJEU derives criteria as to the meaning of the fundamental rights in question from the case-law of the ECtHR supplemented by The Convention on the Rights of the Child and the Charter of Fundamental Rights of the EU. (The Charter is only mentioned briefly; in 2006, the Charter was not yet legally binding). According to the criteria derived from the case-law of the ECtHR, the right to respect for family life does not impose on a State a general obligation to authorize family reunion in its territory. When seen in the light thereof, the contested EU-law provision merely preserves a limited margin of appreciation for the Member States, under certain circumstances related to the entry of children aged over 12³⁵³. Secondly, according to the derived criteria, states are obliged to take into account the particular circumstances of the persons involved in the light of the general interest and to consider, especially, the child's interests, including the importance to a child of a family life. The CJEU finds that the Family Reunification Directive contains a number of provisions which correspond to these obligations.³⁵⁴

The second part of the discussion concerns the fact that 'capacity for integration' appears as a condition for the right to family reunification. In the first part of the discussion, it has been established that the discretion granted to the member states is not problematic as such when seen in light of the right to family life and the rights of the child. But would such discretion be problematic when based on a particular line of reasoning, namely a 'capacity for integration'-reasoning? In this part of the discussion, the European Convention and the case-law of the ECtHR only play a minor role. Rather, the discussion focuses on the fact that the general objective of the 'Family Reunification Directive' is '*the integration of third country nationals in Member States by making family life possible through reunification*'³⁵⁵. In view of the overall purpose of Directive, the CJEU finds that it is meaningful to require a 'capacity for integration' as a condition for granting a right to family reunification.

³⁵³ Case C-540/03, *Parliament versus Council*, par. 53-62

³⁵⁴ *Ibid*, par. 64-65

³⁵⁵ *Ibid*, par. 69 (see par. 66-69)

In other words, in the second part of the discussion, it is an EU-law-purpose, namely the purpose of integrating third country nationals (and not the right to family life) which functions as the crucial criterium. From this we may derive two points. Firstly: in the second part of the discussion, the right to family life has been reduced to a *mean* serving an EU-law-purpose (just as the right to take collective action was reduced to a mean in the Laval and Viking judgments). Secondly, 'integration' appears to constitute an overarching purpose within the context of EU social rights.

In conclusion:

A highly hierarchized name - in spite of the fundamental rights attributed to it

The name 'Family-member' is a strong name. But also this name has multiple sub-names due to different ways of differentiating within the field: differentiations between members of the nuclear family and other family-members who may in turn be regarded as closer to or more distant from the nuclear family; differentiations between EU-citizens and third country nationals, including sub-names; differentiations between workers and non-workers according to various criteria. And the respective strength of these sub-names vary a lot.

The name 'Family-member' is always a double name, in all its variations. It is a double name because the rights attributed to the name are derivative rights. A 'Family-member' can claim rights due to somebody else, called the 'sponsor'. Any sub-name of 'Family-member' will imply this doubleness; a sub-name could for instance be 'A Third Country National whose sponsor is an EU citizen Worker and in relation to whom she is the spouse'. We have seen that the rights of 'Family members' depend on both elements; they both depend on who the 'Family-member' is, and on who the sponsor is.

In overall the pattern is the following: As long as family ties are upheld, rights of family-members depend on who the sponsor is. First and foremost, they depend on whether the sponsor is an EU-citizen or a Third country national. This is far more important than whether the family-member is an EU-citizen or a third country national. But when family ties break down, it becomes important who the former 'Family-member' is, because then the former 'Family-member' will need to acquire rights on a personal basis.

If the sponsor is an EU-citizen, all family members, regardless of nationality, have equally good rights. More precisely, they have practically the same rights as the EU-

citizen sponsor: they can move around within the EU together with their sponsor, they can stay in a given member state for as long as the sponsor may stay there, they have working access rights and equal treatment rights with respect to social security and social assistance to the extent that the sponsor has such rights. Moreover, after 5 years (at the latest) they shall acquire the right of permanent residence on a personal basis. But if family ties are broken down, due to death or divorce, differences in rights will appear. In particular situations - where the sponsor was a 'worker' or where children or students are involved - family-members will be granted permanent residence. Otherwise, family-members will now need to satisfy certain conditions on their own in order to be allowed to stay in the state in question. EU-citizens must satisfy the same conditions as all other EU-citizens. Third country nationals must satisfy harder conditions. As for working access and social assistance equal treatment rights, such rights are not specified in the case of former family-members who are third country nationals - but in many cases, they will be able to claim social security equal treatment rights.

In comparison, the power of the name 'Family-member' is severely reduced if the sponsor is a third country national, but not to the extent of making it insignificant: it still generates rights of entry and residence which the persons in question would be unlikely to acquire by any other means. As long as family ties are upheld, the family member will have practically the same residence rights as the sponsor, but waiting periods of up to 2-3 years must be taken into account. And no right of permanent residence on a personal basis is granted after 5 years, only an 'autonomous residence permit'. Working access rights are extremely restricted, and no social security and social assistance equal treatment rights are granted in general. However, if the sponsor has been subjected to the legislation of more than one member state, then equal treatment rights with respect to social security can be claimed

If family ties are broken down, due to death or divorce, the situation of a person whose former sponsor is a third country national is extremely insecure. EU law grants no residence rights, no mobility and no work access rights. Only social security equal treatment rights may apply - but again, only on the condition that the former family member and/or the sponsor has been subjected to the legislation of more than one member state.

The analysis of the Parliament versus Council judgment exhibited in a very striking manner how differentiated and hierarchized the name 'Family-member' is. The family

is being connected to the concept of 'dignity' and is supposed to enjoy fundamental protection. The right to family life is a fundamental right of 'Everyone'. And yet, it is clear that this fundamental right does not apply to everyone in the same manner. Third country national families are only protected under certain circumstances and in any case not to the same extent as families which can rely on an EU-citizen sponsor. A 12 year old child may be denied the right to live with one (or both) of his or her parents. In this case, the fundamental right to family life is of no help. In stead, it is the child's capacity for integration which is considered to be crucial.

PART I.2: NON-NAMES

Whereas names correspond to categorizations of people, non-names correspond to *unfinished* categorizations of people - that is, categorizations which are not laid down in advance, but only arise in connection with the *particular applications* of the law.

Non-names are names which are both presumed and not presumed. They are names which are presumed in the sense that 'non-discrimination' does not merely constitute a principle of law, it constitutes a foundation of *rights* within EU-law. And we shall see that this is true in practice. When ever the principle of non-discrimination is applied, particular right-holders are being identified. More precisely, a comparison between two categories of people is being established, the former representing the potential victims of discrimination, the latter representing everybody else who are seen as being in a *comparable situation*, except for the aspect which relates to the discrimination ground.

But non-names are also names which are not presumed in the sense that they are neither declared nor defined as names *in general*. They rely on designations of particular discrimination grounds, not of a particular groups of people. Accordingly, non-names can be seen as *unfinished names* which arise and die in each new application of the law. As such, they can also be seen as highly dynamical and flexible names.

Non-names are characterized by another crucial feature as well: They are basically *unwanted* in the sense that the potential differences they point to are meant to be insignificant. Simultaneously, however, the non-name is necessarily transformed, in each new case, into a particular name which is indisputably significant, not only to the particular case, but also to any comparable case. This gives the non-name its basic paradoxical nature.

The characteristics of non-names - that they are unfinished and unwanted names - spring from what I shall call the non-significance-logic. The non-significance-logic simply implies that a given aspect (like 'racial or ethnic origin') shall be insignificant within a given area of rights. It is a particular manifestation of the principle of non-discrimination logic.

We shall see that the non-significance-logic gives rise to recurrent confusions in the caselaw as well as in the non-discrimination Directives themselves in relation to *the status of the particular names* which can be formulated on the basis of the discrimination grounds. In the caselaw, in particular, we can detect a considerable confusion as far as

the relationship between *discrimination ground* and *category of person* is concerned. Often, the argumentation of the CJEU is based on the explicit or implicit presumption that the discrimination grounds ('racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief') are in fact just synonyms for particular categories of person. But there are also judgments in which it is explicitly argued that the discrimination ground in question should not be understood as a 'category of person'. Besides, the case-law displays huge flexibility; it testifies to the fact that many different names could arise on the basis of the same discrimination ground.

Also the analysis of non-names will follow the overall structure of substances and attributes. However, the nature of the analysis will be somewhat different. First of all, none of the five discrimination grounds which make out the basis of the five non-names are defined in legislation. Secondly, it is, in principle, one and the same right which is attributed to all of them, namely the right to non-discrimination.

In relation to the *substance* of the non-name we shall consider the nature of the non-name in the light of the tension between fixation and flexibility. Does the CJEU provide us with a conceptual definition of the corresponding discrimination ground or not, explicitly or implicitly? To the extent that a conceptual understanding can be derived, is it broad or narrow, precise or vague, consistent or non-consistent? On the basis of such considerations, the respective strengths of the five non-names can be evaluated. An evaluation of that kind must be carefully carried out, though - and it cannot follow any too rigid criteria. Flexibility in contrast to fixation will often be a strength - but not if the flexibility is due to a complete openness which will endanger the efficiency of the law. Conceptual precision will generally be a strength, - but not if it ruins any potential development of the law.

In relation to the *attributes* of the non-name, we shall consider the role of exceptions and limitations of material scope, as well as justification of discrimination. Again, the evaluation of strengths and weaknesses must be carried out in a careful manner. If justification of discrimination plays a huge role in relation to a particular non-name, I shall generally consider it a weakness, - but it will certainly be important to consider on what grounds discrimination may be justified, and the arguments provided by the CJEU in this respect. Are the situations of the right-holder being considered or ignored? What characterizes the horizons within which justification of discrimination are considered meaningful at all?

Chapter 9

Similarly structured Directives

Before entering the fields of the five non-names - 'racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief' - it will be sinful to introduce the relevant Directives, *Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, generally referred to as the Race Equality Directive, and *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, generally referred to as the General Framework Directive.

Whereas the field of names implied a number of different Directives or Regulations, each of them involving a number of detailed and specific provisions, the field of non-names are based on only two Directives. In addition, these two Directives which are short and formulated in broad and open terms are similarly structured and identical to a high degree. The former deals with the discrimination ground 'racial or ethnic origin', and the latter deals with the other four discrimination grounds.

I shall begin the analysis of non-names by introducing the common structure of the two Directives as well as the elements which are identical - or at least similar to a large degree. Most importantly, the principle of non-discrimination is defined in an identical manner in both Directives. But also the general idea of justification of discrimination appears in both. Finally, certain procedural elements as well as policy related elements are entailed in both Directives. All of these common elements are obviously significant to all five non-names - for which reason it will be meaningful to introduce them before we embark on the analyses of the respective non-names.

It should be mentioned that also the non-discrimination Directives concerning the discrimination ground 'sex' follow the same overall pattern. Or more precisely, the Race Equality Directive and the General Framework Directive follow the pattern of those Directives concerning 'sex'. EU-non-discrimination law in relation to sex was adopted already in the late 1970's. Now, this area constitutes a highly developed area of law. In contrast, the Race Equality Directive and the General Framework Directive are fairly new Directives, both from 2000.

Definitions of discrimination and justification of discrimination

The Race Equality Directive and the General Framework Directive are both based on article 19 of the Treaty according to which the Council may adopt secondary legislation with the purpose of combatting discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Non-discrimination with respect to these grounds is made into a general principle of EU-law: *'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'*³⁵⁶

In accordance herewith, both Directives declare that their overall purpose is *'to lay down a framework for combating discrimination [...], with a view to putting into effect in the Member States the principle of equal treatment'*³⁵⁷ More precisely, *'[for] the purposes of this Directive the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever'*³⁵⁸.

This is a very striking example of the principle of equal treatment and the principle of non-discrimination appearing together, if as synonymous. However, it is the term non-discrimination which plays the crucial role: it is 'discrimination' which is being carefully defined.

'Discrimination' includes direct and indirect discrimination and harassment.

We learn that *'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of [...].'*³⁵⁹ *'On grounds of...'* - no right-holders are being designated; the definition is an expression of the non-significance logic. It is worth noticing the hypothetical element. Determining whether a person is being treated in a discriminating way means taking into account whether another person *would have been* treated more favorably. The notion of 'comparable situation' obviously constitutes a key notion - and simultaneously a highly tricky element. When are two situations comparable? No definition, or even indication, is provided which could guide the application of the notion of 'comparable situation'.

Indirect discrimination, on the other hand *'shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular [religion or belief,*

³⁵⁶Art 10, TFEU (and art. 19)

³⁵⁷ Art. 1 of Dir. 2000/43/EC and of Dir. 2000/78/EC

³⁵⁸ Art. 2 of Dir. 2000/43/EC and of Dir. 2000/78/EC

³⁵⁹ Art. 2(2)(a) of Dir. 2000/43/EC and of Dir. 2000/78/EC

*f.inst.] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*³⁶⁰ This complex definition gives rise to several remarks.

First, in contrast to the definition of direct discrimination, the definition of indirect discrimination is not a pure example of the non-significance logic. This definition translates the discrimination ground into a category of person (*persons having a particular [religion or belief, f.inst.]...*). It is not a fixated, but an open category, though. For this reason, we shall say that this formulation of the principle of non-discrimination reflects an *indeterminately reduced non-significance logic*.

Furthermore, in contrast to the definition of direct discrimination, the definition of indirect discrimination does not refer to the notion of 'comparable situations'; it indicates that what should be compared would be the 'particular advantages/disadvantages' of persons. In other words, the definition of indirect discrimination focuses on the (actual or potential) *consequences* of discrimination; it seeks to grasp the inequality which may arise from apparently non-discriminating laws and practices. Obviously, the concept of 'indirect discrimination' opens for endless possibilities with respect to determining the existence of discrimination; hardly any law does not have different effects on different people. These endless possibilities are limited only through the principle of proportionality: the requirement of the existence of a legitimate aim and appropriate and necessary means.

The fact that definition of indirect discrimination does not refer to 'comparable situations', but to advantages and disadvantages makes sense because indirect discrimination concerns different situations which are treated formally equal. However, comparisons of situations - and therefore the need for the establishment of situations as 'comparable' - cannot be avoided. If two different kinds of situations are not seen as comparable in the first instance, the suspicion of discrimination could not be raised at all.

The establishment of the existence of indirect discrimination therefore corresponds to a complicated, multilayered process: indirect discrimination presupposes that '*basically comparable situations*', f.inst. different people applying for the same kind of job, are treated formally equal as far as f.inst. ethnic origin is concerned, but in a way which means that persons having a particular ethnic origin will be less likely to satisfy the

³⁶⁰ Art. 2(2)(b) of Dir. 2000/43/EC and of Dir. 2000/78/EC

requirements laid down for the job in question. So, the disadvantages of some people is being compared to the advantages of others with respect to a comparable situation. That is, a double comparison is at stake: first, the establishment of a comparable situation, secondly, the establishment that a relevant difference is hidden underneath the apparently neutral provision. Finally, in case the existence of indirect discrimination can be confirmed according to these criteria, it must be tested whether it is objectively justifiable, necessary and appropriate.

When that is said: The basic elements involved in the establishment of direct and indirect discrimination are the same: '*comparable situation*', '*relevant formal differences*' (because of which the existence of discrimination can be established at all), '*relevant consequences*' and '*justification of discrimination*'. Although the latter two elements play a more visible role in connection with indirect discrimination, they are also at play in connection with direct discrimination. Direct discrimination is not necessarily obvious, but may be hidden behind non-transparent laws and practices. Without an assumption that a particular discriminating law or praxis might have discriminating *effects* on the lives of people, it would hardly be noticed as an act of direct discrimination (although in principle constituting such an act). To strengthen the point further: the formulation '*treated less favourably than another [person]*' (in the definition of direct discrimination) would make little sense if it did not imply an evaluation of the actual or possible consequences of a law or praxis. As regards the element of *justification*, we shall see in a short moment that direct discrimination is being regarded as acceptable for a number of reasons. Direct discrimination can be justified, just like indirect discrimination, and according to similar patterns of justification. - Obviously, both direct and indirect discrimination depend on the establishment of relevant differences and samenesses - formally as well as with respect to the consequences of laws and practices - and on particular understandings of constitutes a legitimate aim.

Finally, the definition of discrimination includes harassment: '*Harassment shall be deemed to be a form of discrimination [...], when an unwanted conduct related to [religion or belief, f.inst.] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*'³⁶¹ Whereas the focal point of 'direct discrimination' is formal discrimination with the actual or possible effect of putting some people in a less favorable situation than others, and the focal

³⁶¹ Art. 2(3) of Dir. 2000/43/EC and of Dir. 2000/78/EC

point of 'indirect discrimination' lies in the discriminating effects of laws and practices, the definition of 'harassment' introduces the element of *purpose*, that is *intentional* discrimination. 'Harassment' implies subjective elements in a twofold sense, the subjective experience of the victim as well as the intention of the perpetrator. As concerns the latter, although the definition keeps open the possibility that the violation was not deliberate ('*purpose or effect*');

it would be difficult to give meaning to the words '*intimidating, hostile, degrading, humiliating or offensive*' without presupposing some kind of intentionality.

It should be noted that this definition of discrimination does not reflect the non-significance-logic or a variation thereof. We are confronted with a simple prohibition against certain actions. No logic of comparison is complied. Strictly speaking, the prohibition of harassment is not an expression of a logic of non-discrimination at all. However, it does imply non-names in the sense that it relies on discrimination grounds rather than particular categories of person (*an unwanted conduct related to ...*).

Finally, it is emphasized that also an '*instruction to discriminate [...] shall be deemed to be discrimination*'.³⁶²

It should be mentioned that both Directives open for the possibility of positive discrimination: '*With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to [...]..*'³⁶³ In the case-law we shall be dealing with in the following five chapters, positive discrimination does not play any role at all. However, in Part I.3 which concerns the discrimination ground 'sex', positive discrimination will prove to be important. Accordingly, we shall examine this particular version of non-discrimination in Part I.3. Already now, it should be noted, though, that positive discrimination constitutes a complete reversal of the non-significance-logic.

As mentioned above, not only indirect discrimination may be justified. Both Directives specify that discrimination shall be acceptable under certain circumstances: *[...] a difference of treatment which is based on a characteristic related to [the discrimination ground(s) in question] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that*

³⁶² Art. 2(4) of Dir. 2000/43/EC and of Dir. 2000/78/EC

³⁶³ Art. 5 of Dir. 2000/43/EC; art. 7, Dir. 2000/78/EC

*the objective is legitimate and the requirement is proportionate.*³⁶⁴ The latter part of the sentence echoes the latter part of the definition of indirect discrimination; again it is the principle of proportionality which provides the structure for a justification-argumentation.

We shall refer to this justification possibility as the occupational-requirement-argument. As we shall see, it plays an important role. But also other possibilities of justification are laid down in the two Directives. But since they relate specifically to some of the discrimination grounds, we shall deal with them in connection with the particular non-names.

Procedural elements

Common to both Directives is also the dominant presence of certain procedural elements the purpose of which is to ensure the efficiency of the implementation of the Directives. In overall, we may talk about two kinds of procedural elements, the first relating to effective judicial protection of the individual victim of discrimination, the second focusing on the role of organizations and dialogue. The two kinds of elements are placed together in the two Directives, under the same heading '*Remedies and enforcement*', indicating a close connection between them.³⁶⁵

The first kind of procedural elements, those relating to judicial protection, encompass the following: a general statement concerning the availability of judicial or administrative procedures, rules regarding the burden of proof and protection against victimization.³⁶⁶

As far as the burden of proof is concerned, both Directives lay down that it shall be for the respondent, that is, the person or organization accused of discrimination, to prove that there has not been any discrimination. It is required, though, that the person who claims to be a victim of discrimination has been able to establish '*before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect*

³⁶⁴ Art. 4, Dir. 2000/43/EC; art. 4(1), Dir. 2000/78/EC

³⁶⁵ Chapter II in both Directives

³⁶⁶ The general statement reads: '*Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures [...] are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.* Art. 7(1), Dir. 2000/43/EC, art. 9(1), Dir. 2000/78/EC

discrimination'.³⁶⁷ Or, in the words of the preamble: there must be '*a prima facie case of discrimination*'³⁶⁸

This is obviously controversial: a reversion of the principle of '*presumption of innocence until the contrary is proved*', generally regarded as a fundamental principle of criminal law and as a human right.³⁶⁹ Also the Charter states: '*Everyone who has been charged shall be presumed innocent until proved guilty according to law.*'³⁷⁰

The Directives escape breaching this fundamental principle of criminal law by assuming that the kinds of discrimination falling under the scope of the Directives do not in general belong to the field of criminal law, - and if they do, the rule regarding the burden of proof shall not be applied.³⁷¹ Also, member States need not apply this rule in proceedings in which the person who claims to be a victim of discrimination is not required to prove the facts, because it is for the court or competent body to investigate the facts of the case.³⁷² If it is applied, however, it is clear that at least two crucial issues of interpretation are open for dispute. First, what is '*a prima facie case of discrimination*'? And secondly, how may it be '*proved*' that there has not been discrimination?

Secondly, the CJEU has developed the instrument '*protection against victimization*': '*Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint [...]*'.³⁷³ In other words, a victim of discrimination should not be punished for bringing the matter to a court or other body for adjudication, after the formal process has ended.

Clearly, both elements bear witness to the presence of an underlying presumption according to which victims of discrimination are very weak - or in weak positions - not only during, but also after the discriminatory events have taken place. In addition, the rules on the burden of proof indicate that intransparency is presumed to be a general feature of discrimination.

³⁶⁷ Art. 8(1), Dir. 2000/43/EC; art. 10(1), Dir. 2000/78/EC

³⁶⁸ Recital 21, Dir. 2000/43/EC; recital 31, Dir. 2000/78/EC

³⁶⁹ Art. 6(2) of the European Convention on Human Rights reads: '*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*' Art. 11 of the Universal Declaration of Human Rights states: '*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defence.*'

³⁷⁰ Art. 48(1), Charter of Fundamental Rights.

³⁷¹ Art. 8(3), Dir. 2000/43/EC; art. 10(3), Dir. 2000/78/EC

³⁷² Art. 8(5), recital 22, Dir. 2000/43/EC; art. 10(5), recital 32, Dir. 2000/78/EC

³⁷³ Art. 9, Dir. 2000/43/EC; art. 11, Dir. 2000/78/EC

The second kind of procedural elements focus on the role of organizations and dialogue.

Firstly, it should be noticed that the general statement concerning the availability of judicial or administrative procedures is followed, in both Directives, by a statement about the possible role of organizations within these procedures: *'Member States shall ensure that associations, organisations or other legal entities, which have [...] a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure [...].'*³⁷⁴

Apart from that, four elements appear, presented under the following headings: 'Dissemination of information', 'Social dialogue', 'Dialogue with non-governmental organizations', and 'Bodies for the promotion of equal treatment.'

Member states are required to inform *'the persons concerned'* about the national provisions implementing the Directives, as well as other national provisions already in force.³⁷⁵ They shall *'promote the social dialogue between the two sides of industry'* and encourage them to conclude agreements laying down anti-discrimination rules. Apart from such agreements, the following measures should be taken into use: *'monitoring of workplace practices, [...] codes of conduct, research or exchange of experiences and good practices.'*³⁷⁶ Dialogue with *'appropriate non-governmental organizations'* shall be sought as well.³⁷⁷ And finally, member states shall actively create new organizations the purpose of which includes *'providing independent assistance to victims of discrimination in pursuing their complaints', 'conducting independent surveys' and 'publishing independent reports and making recommendations'*.³⁷⁸

We see, accordingly, that non-discrimination rights in themselves are not considered to be sufficient. Not even when supported by judicial procedural elements. Policy-related instruments must be involved as well. Organizations shall not only assist individuals in processing their claims, they are also given the roles of knowledge providers and disseminators (research, monitoring, reports) and advisors as to conduct and practices. Instruments of this kind are of course not unique for the Directives we are investigating. *'Monitoring', 'codes of conduct', 'surveys', 'exchange of best practices'* - all

³⁷⁴ Art. 7(2), Dir. 2000/43/EC; art. 9(2), Dir. 2000/78/EC

³⁷⁵ Art. 10, Dir. 2000/43/EC; art. 12, Dir. 2000/78/EC

³⁷⁶ Art. 11(1-2), Dir. 2000/43/EC; art. 13, Dir. 2000/78/EC

³⁷⁷ Art. 12, Dir. 2000/43/EC; art. 14, Dir. 2000/78/EC

³⁷⁸ Art. 13(1-2), Dir. 2000/43/EC - this last element only appears in the Race Equality Directive

these elements certainly correspond to influential ideas of our time. But it is interesting that they are inscribed as binding measures within legislation - after the specification of rights.

‘The persons concerned’ - a symptom of the tension between flexibility and fixation

I shall end this chapter with a reflexion on the expression ‘the persons concerned’ appearing in the provision regarding dissemination of information: *‘Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.’*³⁷⁹

Now, who are the ‘the persons concerned’? Is what is meant the potential victims of discrimination, or rather the potential perpetrators, like employers, authorities, private and public organizations? Let us presume that what is meant is both, but that the potential victims are also included in ‘the persons concerned’. When seen in the light of the general strengthening of the position of the potential victims of discrimination, implied in the elements presented above, it would not be meaningful to assume that the potential victims should not be given information so that they would be able to pursue their rights.

So, when seen from the side of the potential victims of discrimination, who are ‘the persons concerned’? The two Directives apply to ‘all persons, as regards both the public and private sectors’ in relation to certain areas of rights³⁸⁰. As unfolded above, no particular groups of people are designated (like ‘Muslims’, ‘old people’, or ‘homosexuals’), only discrimination grounds are provided. In principle, everyone could potentially be victims of discrimination on the grounds in question, everyone could be ‘the persons concerned’.

One might say: ‘the persons concerned’ are certain minority groups hinted at through the discrimination grounds. From time to time, and from country to country, it will vary who these groups are. The persons discriminated against on grounds of ‘racial or ethnic origin’ could be Roma people in some countries, and Arabs in others; the persons discriminated against on grounds of ‘religion or belief’ could be Muslims in some countries, and Jews or Catholics in others. Only on the basis of particular historical and

³⁷⁹ Art. 10, Dir. 2000/43/EC; art. 12, Dir. 2000/78/EC (*‘for example at the workplace’* only appears in the latter Directive, otherwise the formulations are identical)

³⁸⁰ Art. 3(1) of Dir. 2000/43/EC and of Dir. 2000/78/EC

contemporary knowledge and sensibility, it will be possible to say who '*the persons concerned*' might be. This viewpoint is meaningful. But it presupposes the existence of stable and knowable patterns of discrimination - that politicians, administrators, researchers, practitioners and others will be able to possess a comprehensive insight into the dominating patterns of discrimination.

Against this it could be argued, that even if such stability exists, the Directives are supposed to secure the rights of everyone falling under their scope. A person who adheres to a religion which dominates in the area in which he or she lives, for instance, should be able to claim non-discrimination rights as well. And this person should be informed about his or her rights, like anyone else. In this sense, a radical flexibility is at stake.

The Directives are characterized by an underlying tension in this respect. On the one hand, the non-significance logic implies that patterns of discrimination could be highly flexible, even uncapturable and unfixable. The broad personal scope support this possibility. On the other hand, the particular discrimination grounds picked out indicate that the Directives were drafted with particular discriminated groups of people in mind. But only because we understand these discrimination grounds within a certain historical horizon, of course, that is, on the basis of a general historical knowledge as to dominating patterns of discrimination. The dubious expression '*the persons concerned*' can be seen as a symptom of this underlying tension.

All the policy-related elements introduced in the Directives are based on the presumption that it is possible, through research and experience, to know who '*the persons concerned*' might be. Accordingly, these elements can be said to work against radical flexibility and unfixability; their function is to examine who the discriminated persons are most likely to be, how discriminating patterns are most likely to take place, how practices could be installed which could reduce the risks of discrimination, or alternatively, bring risks and actual incidences to the surface. This does not necessarily mean establishing fixated patterns; the elements in question may very well be implemented highly dynamically, with the aim of continuously grasping changing patterns and unknown aspects. But even if implemented dynamically, with a view to the never fully graspable nature of discrimination, these elements would be obsolete were they not directed against the *likely victims and forms of discrimination*. In other words, they will serve the continuous, dynamic development of horizons within which discrimination may be understood at all. These horizons will shiver in the tension

between fixation of general patterns and awareness to differentiations and exceptions. But even so, they will be in risk of undermining the radical flexibility which is the logical implication of the principle of non-discrimination laid down in the two Directives.

With this tension between radical flexibility and fixation in mind, we shall now enter the ambiguous realm of non-names.

Chapter 10

Racial or Ethnic Origin

A special Directive is dedicated to the discrimination ground ‘racial or ethnic origin’, the Race Equality Directive. Almost all important elements have been described in chapter 9; they are elements which are also entailed in the General Framework Directive. Apart from the discrimination ground itself, only the delineations of material scope are specific.

The preamble makes clear that the Directive is intended to cover a wide range of areas. Combatting discrimination in the labour market constitutes a crucial objective³⁸¹, but this is not enough: *‘To ensure the development of democratic and tolerant societies [...] specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and health-care, social advantages and access to and supply of goods and services.’*³⁸²

Accordingly, the Directive covers the public as well as private sector, with respect to a range of work-related rights, such as *‘conditions for access to employment, to self-employment and to occupation [...]’, ‘access to all types and to all levels of vocational guidance, vocational training [...]’, ‘employment and working conditions, including dismissals and pay’, and ‘membership of and involvement in an organization of workers or employers [...]’*. But it also covers social rights which go beyond the field of employment, such as *‘social*

³⁸¹ Recital 8 and 9, Dir. 2000/43/EC

³⁸² Recital 12, *ibid*

*protection, including social security and healthcare', 'social advantages', 'education', 'access to and supply of goods and services which are available to the public, including housing'*³⁸³.

We shall now examine the non-name 'Racial or Ethnic Origin' according to its substance and attributes. We shall begin with the substance: what does 'racial or ethnic origin' mean, according to the Directive and according to the case-law? Afterwards, we shall examine how the non-discrimination right attributed to this non-name is manifested in the case-law.

Reflections as to the meaning of the discrimination ground on the basis of the Directive

The discrimination-ground 'racial or ethnic origin' is not defined. But the Directive encompasses a provision which serves to qualify the discrimination ground in a negative way: *'This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.'*³⁸⁴

The provision does not mean that third country nationals are not covered by the Directive; the preamble emphasises that third country nationals may be right-holders as well.³⁸⁵ But as such, they are not protected by the principle of non-discrimination with respect to any issues related to their nationality or legal status. Only discrimination which concerns something else, namely their racial or ethnic origin, is prohibited.

But what is this 'something else', then? What does '*racial or ethnic origin*' mean if we are to understand this discrimination ground as concerning something which is completely separated from issues of nationality and legal status?

Another negative qualification of the meaning of the discrimination ground is introduced. As far as 'racial origin' is concerned, the preamble introduces a reservation which only enhances unclarity, - in truth mystifies the matter: *'The European Union rejects theories which attempt to determine the existence of separate human races. The use of the*

³⁸³ Art 3(1)(a-h), *ibid*. '*Social advantages*' covers a wide range of public rules, arrangements and offers, including social assistance.

³⁸⁴ Art. 3(2), *ibid*

³⁸⁵ Recital 13, *ibid*

term 'racial origin' in this Directive does not imply an acceptance of such theories.'³⁸⁶ This reservation - however reasonable in itself - is on the edge of rendering the notions of 'race' and 'racial' meaningless within the context of the Directive. Of course, what is explicitly rejected is not the meaningfulness of these notions, but racial theories. But implicitly, the Directive rejects as well that there could be such a thing as separate human races.

But if human races do not exist, how is it possible that people could be victims of discrimination on the grounds of race? 'Race' would then not mean anything? It is only possible in the sense that the perpetrators of discrimination *believe* in the existence of different human races and acts discriminating in accordance herewith. But this means that indications and proofs of discrimination can only be based on disclosing the discriminating *intentions* of the perpetrators. Only an explicit racist law or statement - or an otherwise disclosed racist intention - can be deemed discrimination. Racial discrimination will consist in the manifestation of false views or theories and is strictly speaking unrelated to any characteristics of the people who are the victims of racial discrimination. The notion of race corresponds to a cultural idea, nothing more.

This means that we are confronted with a non-name the *unwantedness* of which is particularly strong. Not only does it correspond to differences which are meant to be rendered insignificant by virtue of the law. And not only are no particular groups of right-holders designated in general. The first part of the discrimination ground itself is deprived of any meaning. Racial differences are unwanted to the extent that they are denied existence. Yet, they are claimed to be a ground of discrimination. Consequently, the potential right-holders are granted a highly shaky ground of existence. They are potential right-holders because they are the potential victims of discrimination on the grounds of race, yet, they cannot in any way be characterized in relation to race, since races do not exist. They are the victims of discrimination because of a characteristic which does not exist, other than as a false idea influencing the attitudes and actions of certain people.

If this understanding of 'racial origin' is taken seriously, the concept of '*indirect discrimination*' will be unusable. Any procedure relying on effects of discrimination will be impossible. If separate human races do not exist, then no comparison of the respective situations of different races can be carried out (like for instance a comparison of the average salary of different races employed in the same company). But also as far

³⁸⁶ Recital 6, *ibid*

as direct discrimination is concerned, detecting it in the first place will be more difficult if we do not presume the existence of different races.

In view of the historical experiences of the 20th Century, the statement of the preamble is completely understandable. But it has the effect of rendering the concept 'racial' meaningless. Another term could have been used in stead, such as 'skin color'. This has not been chosen. For this reason, we are confronted with an extremely ambiguous non-name.

Does the other part of the discrimination ground, '*ethnic origin*', establish a less shaky conceptual ground for the non-name? We are given no qualifications as to the meaning of '*ethnic*', negative or positive, except for the specification that 'nationality' in the sense of legal status does not form part of the discrimination ground, as mentioned above.

The meaning of '*ethnic*' is far from straightforward. Etymologically, the word relates to 'ethnos', that is 'the people' of a particular nation. From an etymological and historical perspective, '*ethnic*' is intimately related to issues of nationality. Since the middle of the 20th century, the notion of 'ethnicity' has been used in relation to groups of people which can be defined by a common cultural or political heritage. The question of what defines an ethnic group is in itself controversial, scientifically as well as politically. Notwithstanding these controversies, the notion of '*ethnic origin*' is still often related to nationality issues, at least as far as the political language is concerned. Only rarely would political-ideological groups or subcultures (a particular left-wing group or the punk-movement f. instance), be referred to as 'ethnic groups', although such groups share both norms, ideas, concepts, life-forms and rituals. A long common history relating to nationality issues is generally presupposed - living together in the same area, having fought for national rights or recognition; or originating from the same area, but later destined to lives in exile. Clearly, the people belonging to a particular 'ethnic group' may both have the same nationality and different nationalities; and they may both have the nationality of the state in which they reside and another nationality. But I will argue that issues of nationality are intrinsic to the notion of '*ethnic origin*' as it is to the notion of 'ethnic groups'.

Stripping the notion of '*ethnic*' completely of issues of nationality would be difficult. It is possible to follow the restriction of the Directive with respect to 'legal status' and understand '*ethnic origin*' as referring to a common cultural or political heritage (which most likely relates to past or present nationality issues), but in abstraction from the present status of citizenship. Possible, but also somewhat contrived. Not that present

legal status and cultural heritage is the same thing, as indicated above. But present legal status constitutes, at least, an important element when dealing with questions of cultural and political belonging and not belonging. Excluding this element impoverishes, in any event, the notion of 'ethnic origin'.

Neither 'racial origin' nor 'ethnic origin' is positively defined, and the negative qualifications only serve to complicate the meaning of those notions. None of them are developed into concepts, they remain fluctuating notions. As a whole, this non-name is haunted by an ambiguity which makes it almost mythological; it is there and not there, real and unreal, everything and nothing.

We shall now see how the existing case-law deals with the complexities connected to the notions of '*racial origin*' and '*ethnic origin*'.

'Racial or ethnic origin' means 'foreignness as such'

The Race Equality Directive has so far not been interpreted in many CJEU-judgments. But a few judgments exist on the basis of which we may draw a partial and preliminary pattern.

The Feryn-judgment from 2008 gives an interpretation of the Directive with respect to several elements of it. The judgment is highly interesting as regards the interpretation of the discrimination ground '*racial or ethnic origin*' - and therefore the logical complexities which springs from this particular non-name. It also offers noteworthy perspectives with respect to some of the procedural elements of the Race Equality Directive, namely the rules on the burden of proof as well as the role of organizations.

The Feryn-case concerns a Belgian company, Feryn, which specializes in the sale and installation of doors. The director of Feryn stated publicly that the company could not employ 'immigrants' because the customers were reluctant to give them access to their private residences. He explained himself in the following way: '*I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!*'³⁸⁷ A Belgian Equality Body, Centre for Equal

³⁸⁷ Case C-54/07, *Feryn*, Par. 18(1)

Opportunities and Opposition to Racism³⁸⁸, applied to the Belgian labour courts for a finding that Feryn applied a discriminatory recruitment policy. The Belgian Courts referred a number of questions to the CJEU for a preliminary ruling.

Our first concern is the definition of the discrimination ground '*racial or ethnic origin*'. How does the CJEU interpret the notions implied in order to assess whether the Race Equality Directive is at all relevant for the case in question? The court does not interpret these notions; it simply assumes that the Feryn-case concerns discrimination on the grounds of '*racial or ethnic origin*'. What we see instead of an explicit argument is a quiet replacement of notions.

In the English version of the judgment, the director of Feryn uses the word '*immigrants*'. Immigrants are people originating from other countries than their present country of residence. The original word used by the director of Feryn was the Dutch word '*allochtonen*'³⁸⁹, literally meaning 'originating from another country'. In the questions referred, the word used by the Director - '*immigrant*' or '*allochtonen*' - is silently replaced with '*ethnic origin*' or '*ethnic minorities*'³⁹⁰, and in the answers given by the CJEU, it is replaced with '*a certain ethnic or racial origin*'³⁹¹. In the questions referred we also encounter the expression '*actually a bit racist*'³⁹². These replacements of words are not problematized in the least; we must assume, then, that all these expressions are regarded as synonymous. '*Originating from another country*' is regarded as equal to (or at least as an example of) '*having a certain ethnic or racial origin*'.

As it appears, this equalization of words is not in line with what we inferred from the Directive with respect to the meaning of the discrimination ground. Distinguishing between immigrants and indigenous people is not exactly the same as assuming certain false ideas about the existence of different races. Neither does such a distinction correspond to a classification of people with respect to '*ethnic groups*' in the sense of sharing a particular cultural or political heritage.

³⁸⁸ The judgment refers to the Dutch name '*Centrum voor gelijkheid van kansen en voor racismebestrijding*', *ibid*, par. 15

³⁸⁹ See the Dutch version of Case C-54/07, *Feryn*, par. 2

³⁹⁰ *Ibid*, par. 17, 18(4)(d) and 18(5)

³⁹¹ *Ibid*, par. 25, 28, 31 and 34

³⁹² '[...] he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist [...]' *ibid*, par. 18(4)(b)

On the other hand, we see that the CJEU pushes the meaning of '*racial or ethnic origin*' in the direction of nationality issues - contrary to the intention of the Directive. Clearly, immigrants either have or used to have (or their family had) a different nationality.

However, on the basis of a closer reflection on the particularities of the case, the equalization becomes intelligible. The director of Feryn feared that his customers would not want 'immigrants' in their private homes. But how could a particular customer know whether a fitter originated from a different country, when confronted with him or her on the doorstep? The customer could not know, of course, but only judge by the appearance of the fitter. We cannot say what would matter to the customer in that situation. Skin-color, clothes, language, body-language? Or something else, which could hardly be put into words? Certainly, racist ideas could be in play, as well as some kind of sensations of 'a different culture', whether true or not.

This reflection creates a horizon within which the equalization of '*originating from a different country*' and '*racial or ethnic origin*' becomes understandable. What is at stake in the Feryn-case is 'foreignness' as such. Not a particular race or particular racial ideas, not a particular culture, not a particular nationality. Foreignness in the sense of 'unfamiliar', 'strange', 'from somewhere else'. Race, culture and nationality could all represent ways in which to experience or express this foreignness, and thereby be grounds of discrimination. But what the Feryn-director is hinting at is an immediate feeling of foreignness, and he chooses the word '*immigrants*' to describe it.

I suggest that the equalization of the notions of 'immigrants' and 'racial or ethnic origin' by the CJEU is based on the same kind of intuition: A confusing mix of factors, perhaps never fully definable, gives rise to discriminatory reactions. But the court also immediately accepts the word 'immigrants' as an expression of this, and thereby it pushes the meaning of the discrimination ground 'racial or ethnic origin' towards nationality issues.

It should be mentioned that two other judgments regard the interpretation of '*racial or ethnic origin*', although only negatively, by exclusion.

The case '*Agafiței and Others*' was not admitted by the CJEU for exactly the reason that the discrimination ground brought forward was considered not to be covered by the Race Equality Directive. The case concerned salary rights of Rumanian judges and introduced '*socio-professional category or place of work*', corresponding to '*social class*' in

the Rumanian legislation in question, as a discrimination ground ³⁹³. The CJEU found that '*racial or ethnic origin*' and '*socio-professional category*' are two entirely different things. This finding emphasizes that an '*ethnic group*' is not constituted by shared norms, practices, rituals and traditions alone.

The second judgment concerns an Albanian citizen, Mr. Kamberaj, living in Bolzano, who was denied housing assistance in 2009 on the ground that the resources allocated to third country nationals for the year 2009 were depleted. The CJEU makes completely clear that that Directive does not apply: the difference of treatment was due to the fact that Servet Kamberaj is a third-country-national, it was based on his citizenship.³⁹⁴ In his case, the CJEU upholds a strict demarcation line between '*racial or ethnic origin*' and '*nationality*' in this case.

We see that the existing case-law contributes very little to the conceptual construction of the notions of '*racial origin*' and '*ethnic origin*'. The two negative definitions found in the *Agafitei*-judgment and the *Kamberaj*-judgment mainly confirm what we already derived from the Directive.

The equalization of the notions of '*immigrants*' and '*racial or ethnic origin*' in the *Feryn*-judgment, on the other hand, is highly interesting. Far from defining or clarifying '*racial or ethnic origin*', it enhances the confusion by pushing these notions towards nationality issues. '*Racial*' and '*ethnic*' are still left completely in a void, undeveloped, hardly concepts at all. What happens instead is the coming into being of a silent concept, the concept of '*foreignness as such*'. This silent concept is what lies behind the unquestioned equalizations of the other notions, what renders them meaningful.

Potential right-holders - represented by an organization

As far as the nature of the right-holders is concerned, the *Feryn*-judgment clarifies that we may also think of right-holders as potential right-holders.

As mentioned already, it was an organization, Centre for Equal Opportunities and Opposition to Racism, which filed the discrimination charges against *Feryn*. This organization is an equality body designated by the Belgian government, in accordance with the requirements of the Race Equality Directive. No individual victims of

³⁹³ Case C-310/10, *Agafitei and Others*. See in particular par. 17, 18, 32, 33 and 48

³⁹⁴ Case C-571/10, *Kamberaj*, par. 48-50. Instead, the CJEU made use of the Long Term Resident Directive. The judgment was analyzed in chapter 6

discrimination was involved in the process; the claim was that Feryn applied a discriminatory recruitment policy in general. The answers by the CJEU to the first and second questions referred focuses exactly on this issue: Can there be discrimination within the meaning of the Directive without an identifiable complainant who contends to have been the victim of discrimination? The court answers yes, *'the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.'*³⁹⁵ In other words, the CJEU answers by claiming the existence of a range of *potential* victims of discrimination. It is not the statement in itself, in abstracto, but the fact that it is likely to hinder certain people in their access to the labour market which justifies the use of the concept of 'discrimination'. In this way, the court indirectly confirms that what is at stake is non-discrimination-rights attributed to people, while adding another potentiality-dimension to the principle of discrimination.³⁹⁶

Accordingly, the judgment tells us that organizations are truly granted an important procedural role, and that they may even process discrimination claims where there is no identifiable victim.³⁹⁷ But the substantial question of whether discrimination is at issue in a particular case relies ultimately on the existence of actual or potential victims of discrimination.

The powerlessness of non-discrimination rights - the burden of proof

In the Feryn-judgment, the CJEU also considers the application of the rules on the burden of proof in the particular case. It finds that the public statement of the Feryn-director is *'sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory'*. This public statement counts in other words as 'facts' from which it may be presumed that there has been discrimination, established by the plaintiff. Accordingly, the court states that *'it is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual*

³⁹⁵ Case C-54/07, *Feryn*, par. 28. See par. 21-28 for the whole argument

³⁹⁶ The potentiality-dimension analyzed above (in chapter 9, in connection with the definitions of discrimination) relied on an assumption of how another person would have been treated, compared to the victim of discrimination. The Feryn-case introduces the idea of potential victims.

³⁹⁷ This possibility depends, however, on whether national legislation allows it. Case C-54/07, *Feryn*, par. 27

*recruitment practice does not correspond to those statements.*³⁹⁸ The burden of proof lies on Feryn.

We notice an interesting shift in the identification of the act of discrimination. As quoted above, the CJEU finds that the public statement *'constitutes direct discrimination in respect of recruitment'*, since it is *'likely strongly to dissuade certain candidates from submitting their candidature'*. But later, in connection with the procedural questions, the public statement only has the role of prima facie evidence of a discriminatory recruitment practice, and Feryn is given the possibility of proving that *'the actual recruitment practice'* is not discriminatory. Two different discriminatory acts are at stake, the first one - the statement - playing the double role of constituting in itself an act of discrimination and being an indication of another. Although in principle comprehensible, the distinction between the two acts appears artificial. How could the *'actual recruitment practice'* not be discriminatory if immigrants have already been dissuaded from applying for the vacant jobs? It is as if the potentiality-dimension is delicately taken back. As regards the *'actual recruitment practice'*, the range of potential victims serve merely as an indication of the existence of real victims.

In another judgment, we are also faced with the issue of prima facie evidence - but this time the plaintiff has difficulties with respect to obtaining such evidence. The case concerns a Russian woman living in Germany, Ms Meister. She holds a Russian degree in systems engineering, recognized in Germany. She applied to an advertisement of the company Speech Design Carrier Systems GmbH, which was looking for a software developer, and was rejected without interview. Not long afterwards, the company published an advertisement with the same content; she applied again, but was rejected once more without being called for an interview. Ms Meister believed she had been the victim of discrimination on the grounds of her sex, age or ethnic origin and brought proceeding for the national courts. They held that she had not submitted sufficient evidence. But Ms Meister had not been able to do so; she been denied information from the company with respect to the outcome and criteria of the recruitment process.

At the instigation of the referring court, the CJEU considers whether the race Equality Directive (as well as other relevant Directives) implies that Ms Meister would have a right to such information, and finds that it does not. She is the one who must *'initially establish the facts from which it may be presumed that there has been direct or indirect*

³⁹⁸ Ibid, par. 34

*discrimination*³⁹⁹. However, the CJEU underlines that Union objectives, including those pursued by the relevant Directives, must not be undermined. The court finds that it is not *‘inconceivable that a refusal of disclosure by the defendant, in the context of establishing such facts, is liable to compromise the achievement of the objective pursued by that directive and, in particular to deprive that provision of its effectiveness’*.⁴⁰⁰ The national court must ensure that all relevant facts have been established. In this connection, the fact that the employer in question has refused Ms Meister any access to the information that she seeks could in itself be regarded as a fact of relevance to the case - along with the fact that the employer has not disputed Ms Meister’s level of expertise.⁴⁰¹

When comparing the two judgments, we learn a crucial lesson about the rules on the burden of proof. If the evidence provided by the plaintiff is very substantial (in the Feryn-case it is so substantial that it constitutes a case of direct discrimination in itself), then the burden of proof shifts to the respondent. But if we are only faced with a suspicious sequence of events, then the burden of proof falls on the victim. And acquiring information which the person or company accused of discrimination is reluctant to give does not form part of the non-discrimination right of the victim.

The Meister-judgment strongly demonstrates the complexities of non-discrimination law. Indisputably, much discrimination will resemble the discrimination Ms Meister is (possibly) the victim of. Hidden, possibly indirect, maybe even partly subconscious. In any case, very difficult to grasp and prove. The rules on the burden of proof was introduced in order to meet such difficulties. If these rules can, however, not be utilized without the existence of very strong prima facie evidence, then they will be powerless in many situations. What is introduced instead - to counterbalance this powerlessness - is the idea of a broad contextualized assessment which takes all circumstances of the particular case into account, including the ‘evil will’ of the respondent.

Reflections as to the nature of interpretational horizons

When determining, in the Feryn-judgment, that direct discrimination has indeed taken place, in spite of the fact that no actual victim of discrimination has been identified, the CJEU does not only rely on the definition of direct discrimination. The court also relies on the aim of the Directive: *‘The aim of that directive, as stated in recital 8 of its preamble, is*

³⁹⁹ Case C-415/10, Meister, par. 36, 46

⁴⁰⁰ Ibid, par. 39 (and par. 40-41)

⁴⁰¹ Ibid, par. 42-45

*'to foster conditions for a socially inclusive labour market'*⁴⁰². And on the basis thereof, the court argues that the statement of the director is directly discriminatory, since it is *'likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market'*.⁴⁰³

The judgment refers to recital 8 of the preamble regarding the aim of the directive. However, recital 8 does not lay down *'the aim of the directive'*. Rather, recital 8 mentions one aim, or more accurately, one reason (among others) for drafting the Directive: *'The Employment Guidelines 2000 [...] stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.'*⁴⁰⁴ The difference between this formulation and the formulation in the judgment is not huge; we may say that the court presents us with an interpretation of the Directive with respect to its overall aim, on the basis of recital 8. But this interpretation and the argumentative use of it in the judgment is still saying. It implies that the idea of *'fostering conditions for a socially inclusive labour market'* is to be understood as constituting *the* crucial idea underpinning the Directive - which means that other ideas presented in the preamble - not least the idea that *'to ensure the development of democratic and tolerant societies'* non-discrimination law should go beyond issues of employment⁴⁰⁵ - are neglected.

As concerns the Feryn-judgment, there can be no doubt as to the interpretational horizon established. *'A socially inclusive labour market'* - this idea creates the horizon within which relevant differences and similarities are to be distinguished. The possibility of justifying the discrimination at issue is not even being considered (the argument provided by the Director, that his discriminatory behaviour is meant to serve his customers and his business, is not taken into account).

In the Meister-judgment, it is not discussed whether discrimination has taken place, only the procedural questions regarding hidden information and burden of proof are considered. But also in this case, the discussion clearly depends on the idea of *'an inclusive labour market'*. But in contrast to the Feryn-judgment, the Meister-judgment bears witness to an irreconcilable conflict - from the point of view of this horizon. In

⁴⁰² Case C-54/07, *Feryn*, par. 23

⁴⁰³ *Ibid*, par. 28

⁴⁰⁴ Recital 8, Dir. 2000/43/EC

⁴⁰⁵ *'To ensure the development of democratic and tolerant societies [...] specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities [...]'* (recital 12, *ibid*)

other words: the horizon is the same, but in the Meister-judgment, it vibrates differently, conflictuously.

In conclusion: A non-name haunted by deep conceptual ambiguity

The non-name 'Racial or Ethnic origin' is characterized by huge difficulties.

It is implied in the Race Equality Directive that the notion of 'race' refers to a false idea, not to the real existence of different races. This means that this concept cannot give rise to any particular names which depend on racial categorization. Only particular names such as 'a person who is *regarded by someone as* belonging to the black race' will be possible. The strength of this understanding is of course that the Directive avoids any confirmation of racial ideas. The weakness is, however, that the meaningfulness of non-discrimination rights in relation to 'race' is in risk of being undermined.

The other part of the discrimination ground, 'ethnic origin', constitutes a conceptually complex foundation as well. The meaning of the term 'ethnic origin' is controversial in itself. Today, 'ethnicity' would generally refer to a political and cultural heritage shared by a group of people. But would any political and cultural heritage shared by a group of people constitute a particular 'ethnic origin'? In addition, due to its etymological and historical sources, the concept of 'ethnicity' is closely related to issues of nationality. But nationality issues are explicitly excluded from the discrimination ground.

So far, the CJEU has not discussed these complexities. No conceptual considerations are carried out with respect to the discrimination ground. The two notions are not even being separated. The court simply assumes - in one case - that '*immigrants*' are characterized by '*a certain racial or ethnic origin*', and - in other cases - that '*third country nationals*' and '*socio-professional categories*' are not. Hereby, the court does in fact establish a position with respect to some of the conceptual dilemmas outlined above - only without discussing them. The court makes clear that not any political and cultural heritage shared by a group of people constitutes a particular 'racial or ethnic origin'. Also, nationality in the strict sense of 'present legal status' is excluded from the discrimination ground. But nationality issues in a broader and more diffuse sense are not excluded from the discrimination ground.

We concluded that 'racial or ethnic origin' designates the idea of 'strangeness', 'unfamiliarity' or 'foreignness' as such. Anyone who could give rise to such an idea - whether because of culture, political history or appearance, or because of a confusing

mix of factors, perhaps never fully definable - could be a potential victim of discrimination.

This *ideological* application of the discrimination ground may not be without advantages from the point of view of the potential right-holders. The attention is being directed towards the discrimination which occurs in relation to 'the ideological strangers', that is, the people who are already marginalized and generally met with suspicion and alienation. Possibly, it would be difficult to capture discrimination against those people on the basis of more precise criteria. Possibly, neither cultural nor historical nor physical criteria would do - simply because 'the ideological stranger' cannot necessarily be characterized on the basis of clear criteria, but only on the basis of a not fully definable mix of different factors.

But when that is said, the ideological application is also problematic. The efficiency of the Directive becomes dependent on the sensitivities of courts and others who interpret it with respect to contemporary patterns of marginalization and alienation. Not to mention that the CJEU does not itself formulate the idea of 'the ideological stranger'; this idea merely underpins the judgments in question - according to our analysis.

As far as the attributes of the non-name are concerned, the Race Equality Directive covers not only issues of employment, but also a wide range of social rights, including social security, health care, education, goods and services available to the public as well as 'social advantages'. 'Justification of discrimination' does not play a huge role, - not in the Directive and so far also not in the case-law. In the Feryn-case, the court found that non-discrimination-rights of 'immigrants' are far more important than the business interest of a company (with respect to adapting to the fears of the customers).

We concluded that the idea of 'a socially inclusive labour market' constituted the overall interpretational horizon - both in relation to the Feryn- and the Meister-judgment. Vis-a-vis this idea, other ideas mentioned in the Directive such as '*the development of democratic and tolerant societies*' were being neglected. The overall horizon was potentially torn, though. The Meister-judgment made clear that there are limitations as to the obligations of employers with respect to serving the idea of 'a socially inclusive labour market'.

Chapter 11

‘Age’

The four remaining discrimination grounds we shall be dealing with in Part I.2 are all covered by a single Directive, the General Framework Directive.

Compared to the Race Equality Directive, the General Framework Directive has a far narrower material scope. It covers only employment related issues ⁴⁰⁶, not social protection and social advantages (including social security and social assistance), education and access to public goods and services. More precisely, it is underlined that social rights the financial source of which is the state are meant to be excluded, whereas social rights and workers rights linked to the employment relationship are meant to be included. The demarcation is - even if clear according to its overall idea - far from uncontroversial. It relies on the possibility of differentiating clearly between ‘*payment by the State*’ and ‘pay’ linked to the employment relationship.⁴⁰⁷

In addition, the General Framework Directive is characterized by more reservations and exceptions than is the Race Equality Directive. Most notably, it opens for a number of different ways in which to justify discrimination, some of them relating to all of the discrimination grounds, others relating specifically to one of them. In general, we may say that it is a more careful or even anxious Directive; it anticipates a number of situations in which non-discrimination law could be troublesome for the member states. This testifies clearly to the fact these grounds - or at least some of them - touches upon substantial issues as regards the structuring of the welfare systems in the member states, to a much higher degree than does the discrimination ground ‘racial or ethnic

⁴⁰⁶ ‘Conditions for access to employment, to self-employment and to occupation [...], ‘access to all types and to all levels of vocational guidance, vocational training [...], ‘employment and working conditions [...], ‘membership of and involvement in an organization of workers or employers [...] Art. 3(1), Dir. 2000/78/EC

⁴⁰⁷ ‘This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes ‘ art. 3(3), *ibid*; [...] nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.’ Recital 13, *ibid*

origin'. The discrimination ground 'age' certainly belongs to those trouble-some grounds.⁴⁰⁸ The Directive as well as the case-law bears witness to that.

'Age' is obviously the least complex discrimination ground as concerns its meaning. It does not give rise to conceptual problems like 'racial or ethnic origin' (since we live in times where the meaning and measurement of 'age' is not a matter of conceptual dispute). However, this discrimination ground gives rise to a number of other problematics, predominantly problematics related to 'justification of discrimination'.

We shall briefly go through the possibilities of justification laid down in the Directive. And then we shall examine the case-law with a view to the interpretation of these possibilities.

Five ways of justifying discrimination on grounds of age

In addition to two general provisions - one containing the occupational-requirement-argument (mentioned in chapter 9) and another focusing on public security, order and health⁴⁰⁹ - the Directive provides the member states with three overall ways of justifying discrimination on the grounds of age.

First, the member states may decide that the Directive *'in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.'*⁴¹⁰ The preamble elaborates on this point by emphasizing that the armed forces and the police, prison or emergency services are not required to recruit anyone *'who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services'*⁴¹¹. In principle, these concerns should be covered by the general occupational-requirement-provision. However, the special provision regarding the armed forces is formulated in a stronger way in that it allows the exclusion of an entire occupational field from the scope of the Directive.

⁴⁰⁸ The EU Commission has drafted a proposal for a new Directive meant to complement the General Framework Directive in that it covers the areas which have been left out by that Directive (social protection, social advantages, education, access to and supply of goods and services which are available to the public, including housing): *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM(2008) 426 final. The future of the proposal is still unknown (even though more than 5 years have passed).

⁴⁰⁹ Art. 4(1) and 2(5), Directive 2000/78/EC

⁴¹⁰ Art. 3(4), Dir. 2000/78/EC

⁴¹¹ Recital 18, *ibid*

Secondly, *'differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'*⁴¹² An elaborate listing of different kinds of age discrimination which would be justified on the basis of employment and labour market objectives is provided, but the listing is not meant to be exhaustive. Clearly, a wide field of possibilities of justifications is hereby established. Possibilities which play a huge role in the caselaw, as we shall see.

Lastly, *'the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits'* shall not constitute discrimination⁴¹³. The corresponding recital of the preamble, however, utilizes a much broader formulation: *'This Directive shall be without prejudice to national provisions laying down retirement ages.'*⁴¹⁴ This provision is interpreted flexibly by the CJEU, as we shall see.

Now, well armed with these different paths of argumentation made possible by the Directive with respect to justification of age discrimination, we shall examine the caselaw. Since it is extensive, I shall not examine it case by case, but analyze it as a whole from the perspective of certain overall themes of controversy, all centering on justification of discrimination.

Most of the analysis will concern the possibility of justification related to labour market aims. So far, this constitutes the most dominant and problematic justification path. However, we shall also briefly touch upon the justification paths related to public security, order and health, to occupational requirements and to the emergency services.

Legitimate aims and appropriate and necessary means in the light of the labour market

A large number of judgment focus on the question of obligatory retirement. Is national legislation permitting the automatic termination of an employment relationship once the employed worker in question has reached the official retirement age consistent with the General Framework Directive?

As mentioned above, the Directive does not interfere with the establishment of national retirement ages as such. But this does not mean that retirement ages, as far as their

⁴¹² Art. 6(1), *ibid*

⁴¹³ Art. 6(2), *ibid*

⁴¹⁴ Recital 14, *ibid*

consequences for employment relationships are concerned, might not constitute an issue which falls within the scope of the Directive. At least, this is the opinion of the CJEU which has admitted at least 9 cases⁴¹⁵ on the matter of obligatory retirement of workers once they have reached the official retirement age. In this respect, the court states: *'It is true that, according to recital 14 in its preamble, Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages. However, that recital merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached', since such national measures 'affects the duration of the employment relationship between the parties and, more generally, the engagement of the worker concerned in an occupation, by preventing his future participation in the labour force.'*⁴¹⁶

The 7 judgments in question (4 of the 9 cases are joined together two and two, resulting in 7 judgments) can be reconstructed according to the same overall argumentative structure. First, the CJEU considers whether the matter of dispute falls within the scope of the Directive (and finds that it does, in all 9 cases), and secondly, the court seeks to determine whether the national rules in question constitute direct discrimination on grounds of age (and finds that direct discrimination is indeed, in principle, at stake in all 9 cases).

The establishment of relevant samenesses and differences with respect to the latter point is promptly executed in all 7 judgments: a worker forced to retire solely on the ground that he or she has reached a certain age has been treated less favorably than others *'in a comparable situation'*. In case the national rule under dispute concerns all employers and employees of the state, others *'in a comparable situation'* would be *'all other persons in the labour force'*.⁴¹⁷ In case the rule under dispute only concerns a particular profession, then others *'in a comparable situation'* would be *'other persons practising the same profession'*⁴¹⁸. In short, the *'comparable situation'* is being established

⁴¹⁵ Case C-411/05, *Palacios de la Villa*; Case C-388/07, *Age Concern England*; Case C-341/08, *Petersen*; Case C-45/09, *Rosenbladt*; Case C-447/09, *Prigge and Others*; Joined Cases C-250/09 and C-268/09, *Georgiev*; Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler*.

⁴¹⁶ Case C-411/05, *Palacios de la Villa*, par 44-45. And par. 46 concludes: *'Consequently, legislation of that kind must be regarded as establishing rules relating to 'employment and working conditions, including dismissals and pay' within the meaning of Article 3(1)(c) of Directive 2000/78'*

⁴¹⁷ Like for instance in Case C-411/05, *Palacios de la Villa*, see par. 51

⁴¹⁸ Like in Case C-341/08, *Petersen*, par. 35, and in Joined Cases C-250/09 and C-268/09, *Georgiev*, par. 32.

on the basis of the broadest possible consideration; it is made dependent on the personal scope of the rule under dispute.

The more elaborate parts of the judgments concern the question of justification of discrimination, and those parts can be reconstructed according to two main lines of questioning, relating to the aims and the means of the national measures, respectively. In accordance with the wording of the relevant provision of the Directive, it needs to be established whether the aims of the national measures are 'legitimate' and whether the measures are 'appropriate and necessary'⁴¹⁹. The two lines of questioning are kept separate which means that the court may very well find that a national measure has a legitimate aim, but that it is not appropriate and necessary.

We shall now analyze the 7 judgments with respect to this pattern of argumentation - an expression, of course, of the principle of proportionality.

First, what is regarded as a 'legitimate aim' by the CJEU in relation to article 6(1)? The court lays down that only objectives related to '*employment policy, labour market and vocational training objectives*' may be considered under the scope of that article, but also clarifies that such objectives are to be understood as '*social policy objectives*'.⁴²⁰ The majority of the judgments concerning obligatory retirement refers to labour market objectives. More specifically, we find the following examples of 'legitimate aims' in these judgments:

It is legitimate for the member states to aim at '*regulating the national labour market, in particular, for the purposes of checking unemployment*'. In this connection, '*encouraging the recruitment and promotion of young people*' constitutes in particular a legitimate aim.⁴²¹

A general phrase occurring in the judgments in connection with the discussions of aims is '*establishing a balance between the generations*'. A double legitimate aim springs from this: the aim of '*sharing employment between the generations*', but also the aim of '*the*

⁴¹⁹ Art. 6(1), Directive 2000/78/EC

⁴²⁰ As quoted above, the wording of art. 6(1) is '[...] justified by a legitimate aim [...] including legitimate employment policy, labour market and vocational training objectives [...]' - which does not exclude the possibility that other objectives could be considered. But the CJEU finds that it does: '*it must be noted that, while the list is not exhaustive, the legitimate aims set out in that provision are related to employment policy, labour market and vocational training. The Court has also held that aims that may be considered 'legitimate' within the meaning of the first paragraph of Article 6(1) of the Directive [...] are social policy objectives, such as those related to employment policy, the labour market or vocational training.* C-447/09, *Prigge and Others*, par. 80-81.

⁴²¹ '*Improving opportunities for entering the labour market for certain categories of workers*' is an alternative formulation ('certain categories of workers' being young workers). Case C-411/05, *Palacios de la Villa*, par. 62-65; Case C-341/08, *Petersen*, par. 65, 68; Case C-45/09, *Rosenbladt*, par. 43, 60, 62; Joined Cases C-250/09 and C-268/09, *Georgiev*, par. 45; Joined Cases C-159/10 and C-160/10, *Fuchs, and Köhler*, par. 47

creation of a 'favourable age structure' within a profession so that 'an exchange of experiences and innovation' will be promoted.⁴²²

Also the more general aim of assuring the employers' possibilities of 'efficient planning of the departure and recruitment of staff'⁴²³ is regarded to be legitimate by the CJEU. And a few times the court mentions the aim of 'avoiding disputes relating to employees' ability to perform their duties' - disputes 'which may be humiliating for those who have reached an advanced age'.⁴²⁴

Finally, the CJEU formulates an overall and historically contextualized aim: 'It must be observed that the automatic termination of the employment contracts of employees [...] has, for a long time, been a feature of employment law in many Member States [...]. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement.'⁴²⁵

It is striking how similar the formulations of legitimate aims are throughout the judgments in question. Most of the phrases quoted above appear in all or most of these judgments; in addition, the different aims are clearly connected, if not overlapping. We may, however, establish a few distinctions. Some of the aims relate to the interests of the employers ('efficient planning' as well as 'avoiding disputes'), whereas others relate to the interests of employees (avoiding 'humiliation' of older workers, and improving employment opportunities for younger workers). But most of the aims are formulated as aims which serve the labour market *as such*. We notice, however, that the labour market does not appear as an abstract notion; it represents a 'balance', we are told, a complex balance to be struck between a range of different interests and considerations.

We shall now continue with the second line of questioning integral to the argumentative pattern of the court when considering particular ways of justifying compulsory retirement. Under what conditions are the above-mentioned 'legitimate aims' pursued in ways which are 'appropriate and necessary'⁴²⁶?

⁴²² Case C-45/09, *Rosenbladt* par. 43, 62; Joined Cases C-250/09 and C-268/09, *Georgiev*, par. 45-46; Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 47-48

⁴²³ Case C-45/09, *Rosenbladt* par. 59-60; Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 47

⁴²⁴ Case C-45/09, *Rosenbladt* par. 43; Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 47

⁴²⁵ C-45/09, *Rosenbladt* par. 44

⁴²⁶ 'Appropriate' and 'necessary' are discussed together in these judgments and mostly used without clear separation. To the extent that they are being separated, it will be made clear in the discussion.

The CJEU emphasizes strongly the importance of the fact that *'the persons concerned are entitled to financial compensation by way of a retirement pension' the level of which 'cannot be regarded as unreasonable'*.⁴²⁷

Also, the court highlights that the persons concerned are not precluded from *'remaining in the labour market and enjoying protection from discrimination on grounds of age'*⁴²⁸. In other words, the national legislation in question may allow employers the use of the compulsory retirement mechanism in particular employment contracts; but older workers who have passed the official retirement age should not be excluded from the labour market as such. Older workers enjoy *'the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union'*, the court says while adding - and interpreting⁴²⁹ - a number of overall objectives of the General Framework Directive, according to its preamble, such as *'[paying] particular attention to the participation of older workers in the labour force and thus in economic, cultural and social life'*, and *'contribut[ing] to the realising of their potential and to the quality of life of the workers'*. Obviously, the compulsory retirement mechanism runs counter to such aims, and for that reason the *'right balance between the different interests'* needs to be found⁴³⁰. A balance which apparently consists in allowing the compulsory retirement mechanism in particular contracts, but not excluding older workers from the labour market as such.

Further, the CJEU requires that national legislation allowing the compulsory retirement mechanism may also be appropriate and necessary in the sense that it is in fact difficult for younger workers to gain access to the occupational occupational field in question, either because the number of posts are limited⁴³¹, or because there is already an *'excessive number'* of professionals within that field⁴³².

Finally, a line of argument which plays a significant role within some of the judgments, focuses on whether the compulsory retirement mechanism has its basis in an

⁴²⁷ Case C-411/05, *Palacios de la Villa*, par. 73; C-45/09, *Rosenbladt* par. 48; Joined Cases C-250/09 and C-268/09, *Georgiev*, par. 54; Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 66

⁴²⁸ C-45/09, *Rosenbladt* par. 74-75; Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 66

⁴²⁹ The CJEU picks out formulations from recital 8,9,11 and 25 of Directive 2000/78/EC and brings them together in a way which is definitely in line with the spirit of these recitals, but which also strengthens the connection between 'labour force' and 'life'. See my discussion hereof in a few pages.

⁴³⁰ Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 62-65

⁴³¹ Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 58, Joined Cases C-250/09 and C-268/09, *Georgiev*, par. 52

⁴³² Case C-341/08, *Petersen* par. 73

agreement: *'That allows not only employees and employers, by means of individual agreements, but also the social partners, by means of collective agreements, – and therefore with considerable flexibility – to opt for application of that mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question.'*⁴³³ In this quote, the element of 'agreement' serves 'flexibility'; 'agreement' means that the social partners, as well as employer and employee, are able to adjust to the labour market situation. But later in the same judgment 'agreement' is emphasized in the light of 'striking a balance' between different interests: the fact that the clause on automatic termination of employment contracts has its basis in an agreement means that it is *'the reflection of a balance between diverging but legitimate interests against a complex background of employment relationships closely linked to political choices in the area of retirement and employment'*⁴³⁴. In this connection it is also underlined that the right to bargain constitutes a fundamental right. But also the 'balance' (the result of the unfolding of a fundamental right) is being connected directly to 'flexibility', appears to serve 'flexibility': *'The fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement.'*⁴³⁵

In other words, if the compulsory retirement mechanism has its basis in an agreement, it will be appropriate because an agreement is the reflection of a 'balance' which, in turn, serves 'flexibility'. The three concepts 'agreement', 'balance' and 'flexibility' are being connected so closely to one another so that it is hard to say which one is more fundamental. Clearly, the three elements are presumed to serve each other mutually.

The Rosenbladt-judgment is particularly interesting in this respect because it involves a disagreement between the CJEU and the referring court with respect to the question of whether the national measure should be considered 'appropriate and necessary'. The case concerns a cleaner, Mrs. Rosenbladt, who had worked 39 year in a barracks in Germany when her employment contract terminated automatically because she had reached retirement age. Afterwards, she was entitled to a statutory old-age pension of EUR 253.19 per month.

⁴³³ Case C-45/09, *Rosenbladt* par. 49. Almost identical wording in Case C-411/05, *Palacios de la Villa*, par. 74

⁴³⁴ Case C-45/09, *Rosenbladt* par. 68

⁴³⁵ *Ibid*, par. 67

The referring court holds that the national legislation in question is not ‘appropriate’ because it is inefficient with respect to the aims pursued. The referring court states that the compulsory retirement mechanism has no documented effect on the level of employment and that there is no risk of an aging workforce in the cleaning sector.⁴³⁶ The CJEU does not respond to these objections raised by the referring court, but simply states that the compulsory retirement mechanism is ‘appropriate’ by referring to ‘agreement’, ‘flexibility’, ‘balance’ and the connection between them.

The referring court also argues that the compulsory retirement mechanism is not ‘necessary’, since it *‘causes significant financial hardship to workers in the commercial cleaning sector [...] the statutory old-age pension is not sufficient to meet the basic needs of workers.’* And as concerns the planning of departure and recruitment of staff, the referring court finds that employers *‘need only ask their employees’* when they plan to retire.⁴³⁷ Here, the CJEU merely responds that the mechanism does not prevent Mrs. Rosenbladt and others from continuing to work beyond retirement age and consequently that *‘it does not go beyond what is necessary’*.⁴³⁸

As it appears, we are confronted with a rather confusing mix of arguments. In overall, there are four different kinds of conditions in play, focusing on pension, difficult employment situations for young workers, the right to continue working and the agreement-flexibility-balance-triad, respectively. Not only do these conditions point in different directions; the former two are being undermined by the latter two in the Rosenbladt-judgment. The referring court’s objection, that the compulsory retirement mechanism has no documented effect on the employment situation of young workers, is treated as irrelevant by the CJEU in the light of the agreement-flexibility-balance-condition. Likewise, the CJEU does not at all discuss the fact that Mrs. Rosenbladt’s pension of EUR 253.19 per month is regarded as *‘not sufficient to meet the basic needs of workers’* by the referring court. In contrast, what is crucial to the CJEU is the fact that Mrs. Rosenbladt has the right to sign a new employment contract (if one is offered to her) and remain in the labour market.

The right of older workers to remain in the labour market and the agreement-flexibility-balance-triad are the crucial conditions which must be satisfied if a national measure permitting employers the use of the compulsory retirement mechanism

⁴³⁶ Ibid, par. 64-66

⁴³⁷ Ibid, *Rosenbladt* par. 71-72

⁴³⁸ Ibid, par. 74-76

should be ‘appropriate and necessary’, if we are to believe the Rosenblatt-judgment. So crucial indeed that they have the power to nullify other conditions emphasized in other judgments (and in the Rosenblatt-judgment as well).

**The crucial factors :
the agreement-flexibility-balance-triad and the naked right to work**

In the Joined Cases *Fuchs and Köhler*, the CJEU emphasizes that ‘*particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life*’ and that keeping older workers in the labour force ‘*contributes to the realising of their potential and to the quality of life of the workers*’.⁴³⁹ I have presented these quotes already, but it is worthwhile looking at them again. A strong causal connection between ‘participation in the labour force’ and ‘participation in life’ is implied. This connection is clearly present in the Directive, but the court strengthens it severely by bringing disparate expressions of the preamble together in a concentrated formulation and in particular by adding the little word ‘thus’: ‘[...] *the participation of older workers in the labour force and thus in economic, cultural and social life*’. The right to remain in the labour force is a right to remain in life in the sense of economic, cultural and social life and in the sense of realizing one’s potential. These formulations do not exclude the possibility of a socially and individually qualified life after retirement. But they do state that the right to work should be seen as a right to participate not only in economic, but also in cultural and social life, and to develop personally. Also in the case of older workers who have already worked for many years.

However, this right to remain in the labour force should be balanced, as we recall, by other interests, which means that the compulsory retirement mechanism should not be seen as inappropriate or unnecessary as long as it only relates to particular employment contracts. Older workers, consequently, have a right to remain in the labour force - and thus life - beyond retirement age, but on harder conditions than younger workers. They have to regain access to the labour market in the sense of proving once again their suitability for it. But it is their right never to be forced out of it, entirely.

Regarding the triad of agreement-flexibility-balance, two interrelated issues spring to mind. First, it is remarkable that ‘balance’ plays a significant role both with respect to the discussion of the legitimacy of the aims pursued and the appropriateness and

⁴³⁹ Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 63

necessity of the ways in which these aims are pursued. 'Balance' plays a double-role: The aims shall reflect a balance, and the means as well. The aims shall reflect a balance in the sense of reflecting the purpose of striking a balance between the divergent interests of the labour market. The means shall reflect a balance by being themselves an expression of such a balance. The agreement-flexibility-balance-triad is the expression of such a mean; it specifies one way in which to pursue a balance while expressing it simultaneously.

Secondly, when taking a closer look on how the connections between 'agreement', 'flexibility' and 'balance' appear in the argumentations of the CJEU, it becomes clear that these three concepts form a closely tied constellation within which no separate meaning can be assigned to each concept. Not in the sense of an equalization of these concepts; they do not mean the same, they are not entirely interchangeable. Rather, they color each other mutually and hereby form a common horizon of meaning. 'Agreement' means the enhancement of flexibility; it means that adjustments to the situation of the labour market can be made continuously. But 'agreement' also means balancing between divergent interests. Likewise, 'flexibility' means continuous sensibility to the complexities of striking 'the balance' and thereby a system of agreements within which the social partners may opt for the application of certain mechanisms. Finally, 'balance' means both of the others as well: it means continuous adjustments while being aware of the existence of divergent interests, or awareness of divergent interests by way of continuous adjustments. And so forth. The three concepts form a circle, and one can begin anywhere and move in any direction within this circle - and gain similar meanings.

Is it a problem? Is something being lost in the circle? What is lost is the possibility that these three elements might not serve each other. What if agreement meant a lack of flexibility, because no compromise could be found between the divergent interests, and negotiations would freeze? What if agreement meant lack of balance because one part was always stronger than the other? What if flexibility, in the sense of continuous adjustments, served one part more than the other (or others)? What if 'balance' ultimately meant something which could only be pursued, never possessed, - and only claimed, never known?

'Balance' plays a double part in the argumentations of the CJEU; it is the legitimate aim to pursue and the process through which to pursue the aim. In both roles it means the same; it means regulating the labour market in the sense of continuously adjusting to

what appears to be the needs of it in a given situation when considering its divergent interests. It means a subtle, continuous process of adjustments on the basis of the acknowledgment of complexities, of different aspects and different interests.

That is, 'balance' plays the double role of 'aim' and 'mean', but in both roles it means a process. Consequently 'balance' does not represent an aim in the true sense of the word, unless a process can be an aim in itself. It is not an aim in the sense of an ideal of a just state of society, a state towards which we should aspire. Moreover, as a process identified with flexible continuous adjustments on the basis of agreements between divergent interests, 'balance' becomes something which can be possessed and known. 'Balance' means in fact nothing more than flexible adjustments on the basis of the existent power relations and their view on what appears to be needed.

Fundamental rights are inscribed within the triad of agreement-flexibility-balance. The right to bargain is recognized as a fundamental right by the CJEU⁴⁴⁰. In our present context, this right is not being balanced against other rights or concerns, but *serves* the idea of balance as such, while simultaneously acquiring the color of flexibility. The fundamental right to non-discrimination on the grounds of age, in its turn, may be balanced against a variety of labour market aims, as we have seen.

The only fundamental right which stands untouched is the right to work. This right should be seen as a right to a substantial life, socially and individually. Untouched only in the sense of the naked right to work, though, not in the sense of particular conditions of work.

A tautological circle of aims and means

In order to conclude this analysis of how the compulsory retirement mechanism may be justified because of labour market objectives, I shall bring the attention to some general remarks made by the CJEU with respect to 'legitimate aims' and 'appropriate and necessary' means.

'Legitimate aims' are public aims: *'It is apparent from Article 6(1) of Directive 2000/78 that the aims which may be considered 'legitimate' within the meaning of that provision, [...] are social policy objectives [...] By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation [...]'*⁴⁴¹.

⁴⁴⁰ Case C-45/09, *Rosenbladt*, par. 67, and Case C-271/08, *Commission v Germany*, par. 37

⁴⁴¹ Case C-388/07, *Age Concern England*, par. 46. Same wording in Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 52

Furthermore, the court makes clear that ‘the aims’ of a national law or measure are to be established through broad contextual interpretation and awareness of the changing nature of law-society-relations. It is not a problem, if a national law does not specify its purpose⁴⁴², it is not a problem if it specifies a purpose which is no longer relevant⁴⁴³, it is not a problem either, if there are multiple aims⁴⁴⁴. It is for the national court - guided by the CJEU - to identify the aims of a particular national law or measure by considering the wider context of the law or measure in question, including its history, other laws, political declarations and discussions, collective agreements and finally the past and present labour market situation.⁴⁴⁵ Not only the judgment of whether particular aims are legitimate or not, but also the identification of aims, is a matter for the courts. And this identification of aims calls for a broad contextual interpretation of the national political, legal and labor market situation.

On the basis of these remarks, it is clear that ‘balance’ constitutes a *public aim*; although made up of particular interests, it shall itself be distinguishable from such interests. Further, the courts are given a significant role. They are to identify and evaluate aims on the basis of broad legal and political interpretation, and finally decide on their public interest nature.

With respect to the ‘appropriateness and necessity’ of means, the CJEU emphasizes that *‘Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough [...] and do not constitute*

⁴⁴² ‘It cannot be inferred from Article 6(1) of Directive 2000/78 that the lack of precision in the national legislation at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision. In the absence of such precision, it is important, however, that other elements, taken from the general context of the measure concerned, enable the underlying aim of that law to be identified for the purposes of judicial review of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary’. Case C-411/05, *Palacios de la Villa*, par. 56-57. See for similar formulations Case C-341/08, *Petersen*, par. 40; Case C-388/07, *Age Concern England*, par. 45; Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 39; Case C-45/09, *Rosenblatt*, par. 58

⁴⁴³ ‘It must be concluded, in that regard, that a change in the context of a law leading to an alteration of the aim of that law does not, by itself, preclude that law from pursuing a legitimate aim within the meaning of Article 6(1) of Directive 2000/78. Circumstances can change and the law may nevertheless be preserved for other reasons.’ Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 41-42

⁴⁴⁴ ‘As regards reliance on several aims at the same time, it may be seen from the case-law that the coexistence of a number of aims does not preclude the existence of a legitimate aim.’ Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 44. See also Joined Cases C-250/09 and C-268/09, *Georgiev*, par. 45, 46 and 68 (where the different aims are linked together), and C-341/08 *Petersen*, par. 41 and 65 (where the different aims are hierarchized)

⁴⁴⁵ Case C-411/05, *Palacios de la Villa*, par. 58-63

*evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim.*⁴⁴⁶

Seen in light of the *Rosenbladt*-judgment, this statement is confusing and disturbing. The referring court's accentuation of the lack of an evident connection between aims and means was ignored by the CJEU. Instead, the CJEU emphasized the agreement-flexibility-balance-triad and the fundamental right to work.

But we may turn the perspective around and notice that the elements which appear to be crucial for the CJEU was not disputed in the *Rosenbladt*-judgment or in any of the other judgments concerning the compulsory retirement mechanism. In fact, it is hard to imagine that they would ever be disputed in any judgment. How could the agreement-flexibility-balance-triad not be efficient with respect to pursuing labour market aims, if the overall labour market aim is defined as that triad itself - a process of flexible continuous adjustments on the basis of agreements between divergent interests? There could never be any inconsistency between the two. The agreement-flexibility-balance-triad is a priori suited for its purpose; no reality could ever come between the two.

As concerns the right to work, it certainly can be argued that this naked right in itself is insufficient for securing the balance between non-discrimination of older workers and other labour market concerns. However, even if not sufficient in itself, the suitability of the right to work as a mean for serving labour market objectives - that is, the continuous process of balancing interests - could scarcely be disputed, as long as the right to work is to be understood as a right to life. As long as the connection between participation in the labour force and participation in life stands unquestioned, it would be almost impossible to deny that the right to work constitutes a both suitable and necessary minimum requirement with respect to balancing the divergent interests of the labour market.

So this is the brutal conclusion: We are faced with a tautological circle of aims and means, consisting in a continuous process of flexible adjustments on the basis of the existent power relations of the labour market. It is required that this process should be of a public nature, and it should be formulated and legitimated through broad contextual analysis. Once this circle is established, it can only confirm itself. No criteria as to the results of the process are laid down; and no minimum conditions are specified, except for the naked right to work. All other concerns - including fundamental rights - are elements within the circle, within the 'balance'.

⁴⁴⁶ Case C-388/07, *Age Concern England*, par. 51

The right to work in a more substantial version

It is also important to mention that a number of judgments deal with the issue of discrimination on the grounds of age in relation to older workers where the declared aim of the legislation in question is *integration of older workers in the labour market*. In these cases, a different interpretation of the fundamental right to work can be detected. The Mangold-judgment from 2005 has been the subject of much discussion. Mr. Mangold concluded, at the age of 56, a fixed-term-employment-contract with his employer. The contract was based on a national (German) provision intended to make it easier to conclude fixed-term contracts with workers who had reached the age of 52. The purpose of that provision was *'the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work'*.⁴⁴⁷ The CJEU found that such a purpose doubtlessly constitutes a legitimate aim in that it constitutes a labour market objective. But the national provision was not 'appropriate and necessary' and consequently not justifiable. The national provision applied to all older workers who have reached the age of 52, also those who are *not* unemployed. *'This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment'*, the CJEU stated. More precisely, the problem was, according to the CJEU, that the national legislation did not consider *'the structure of the labour market in question or the personal situation of the person concerned'*.⁴⁴⁸

The same could be said in the Rosenbladt-case: the national legislation did neither consider the personal situation of old part-time-workers in the cleaning sector, nor the structure of the labour market, in general or with respect to the cleaning sector. But in the Rosenbladt-case, the CJEU did not find these omissions important. Are we faced with inconsistencies of a coincidental nature? Possibly. However, it is worthwhile noticing the differences between the two cases. First, the national provision at issue in the Mangold-case is not the subject of an agreement between the social partners and does not constitute an instance of the agreement-flexibility-balance-triad, like the provision in the Rosenbladt-case. Secondly, the Mangold-case concerns national legislation the purpose of which is the integration in the labour market of older workers, who still have *'a substantial part of their working life'* in front of them, whereas

⁴⁴⁷ Case C-144/04, *Mangold*, par. 59

⁴⁴⁸ *Ibid*, par. 64-65

the Rosenbladt-case concerns the opposite: national legislation making it possible for employers to get rid of older workers for the sake of younger workers.

The Mangold judgment was particularly controversial because it was delivered before the period prescribed for the national implementation of the General Framework Directive had expired. In that respect, the CJEU stated that *'the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law'*, and that the source of that principle lies not in the directive, but *'in various international instruments and in the constitutional traditions common to the Member States'*.⁴⁴⁹ Still, the question of justification was discussed in relation to the specific provisions of the directive, as described above. I shall not go deeper into this issue⁴⁵⁰, but only notice that non-discrimination on the grounds of age obviously constitutes a high priority of the court when the aim at issue is the integration of older workers in the labour market.

Also the Andersen-case reflects the significance of the distinction between different kinds of aims. Mr. Andersen was dismissed by his employer after 27 years of service. On the basis of these many years of service, he was entitled to a severance allowance, but was denied it on the grounds that he had reached the age of 63 and was eligible for a pension. According to the national court, the purpose of the relevant national legislation was to facilitate the move to new employment for older employees. The national court explained that workers eligible for a pension was excluded from the right to the severance allowance for the reason that *'those who are eligible for an old-age pension generally decide to leave the labour market'*.⁴⁵¹

When considering whether this instance of discrimination on the grounds of age could be justified, the CJEU found that the aim of the national legislation (to help older workers finding new employment) is legitimate and the means not inappropriate⁴⁵². However, the national law falls on the criterium of necessity. The law excludes not only those workers who will *in fact* receive a pension by the end of their employment relationship, but also those who are eligible for a pension, yet wish to continue with their career. *'The measure at issue actually deprives workers who have been made redundant*

⁴⁴⁹ Ibid, par. 74-75

⁴⁵⁰ Compare in particular with Case C-427/06, *Bartsch*, par. 24. The CJEU states that crucial for the Mangold-judgment was the fact that *'the national rules in question were a measure implementing a Community directive, namely, Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work [...], by means of which those rules were thus brought within the scope of Community law.'*

⁴⁵¹ Case C-499/08, *Ingeniørforeningen i Danmark (on behalf of Ole Andersen)*, par. 27

⁴⁵² Ibid, par. 29-31 and par. 34-35

*and who wish to remain in the labour market of entitlement to the severance allowance [...] and 'makes it more difficult for workers who are eligible for an old-age pension subsequently to exercise their right to work'*⁴⁵³. Consequently, this national law was not justifiable, according to the CJEU.

In other words, the CJEU emphasizes the need to take into account the existence of differences of personal situations and wishes. *Even though* the older workers in question have reached the age of retirement and are entitled to a pension. Here, the fundamental right to work is given priority - and not only in the sense of a naked right to work, but in the sense of a right to be helped financially to find new work.

On the basis of these judgments, we detect the following pattern: if the denounced aim of a national measure is the integration of older workers within the labour market, the CJEU requires that measure to be a *precise tool* with respect to its aim, taking into account the differences of personal wishes and needs. If on the other hand the aim of a national measure is regulating the labour market as such (by making it possible for employers to get rid of their older employees), the CJEU does not require that kind of differentiation and attention to the personal situation of workers, but leaves it largely to the member states to define and weigh the different concerns of the labour market, as long as the naked right to work is upheld. Within this pattern, the 'pension-argument' comes and goes. It is used when it suites the direction of the judgment; it is regarded as irrelevant, if it does not.

This confirms - from another angle - that the right to work and the agreement-flexibility-balance-triad are the two crucial criteria. But it also shows that the relationship between them is not entirely clear. At times the right to work is reduced to the naked right to work, for the sake of an overall balance. At times the national discretion with respect to 'balancing' must yield to a more substantially developed right to work.

Discrimination against young people

To complete the picture, we also need to analyze the judgments dealing with discrimination against young people, discrimination on the grounds of not being old enough for certain rights.⁴⁵⁴ The number of such judgments is, so far, not as large as the

⁴⁵³ Ibid, par. 44-45

⁴⁵⁴ Case C-555/07, *Küçükdeveci* (on calculation of notice period for dismissal), Case C-88/08, *Hütter* (on calculation of pay), Joined Cases C-297/10 and C-298/10, *Hennings and Land Berlin* (on calculation of pay)

number of judgments dealing with discrimination on the grounds of being too old for certain rights.

In the judgments we find two sorts of aims discussed. First, aims related to the regulation of the labour market with respect to the young workers: enhancing general flexibility for the sake of employers as well as young workers, and regulating relations between education, vocational training and the possibilities of entering the labour market.⁴⁵⁵ Secondly, aims related to working experience and history: rewarding experience and loyalty.⁴⁵⁶

As regards the first kind of aims, the CJEU requires the establishment of clear relations between aims and means, and means which are sensitive towards the differences of personal situations, - just like what we see in connection with the aim of integrating older workers in the labour market. A national measure which affects everyone who have worked before a certain age (f.inst. 18 or 25), in that it provides that periods of employment completed before that age are not to be taken into account in calculating the notice period, or in calculating pay, cannot be regarded as appropriate and necessary, according to the CJEU. Such national measures are not precise enough, according to the CJEU: they affect both young and old workers, and certain groups of workers particularly hard; it would have been better to focus on other criteria instead of age.⁴⁵⁷

As regards the second kind of aims, the CJEU, likewise, finds that differentiation and precision is missing in the national measures in question. The court makes explicitly clear that another criterium should have been chosen, in stead of age, namely a criterium reflecting the working history of a person. *'Rewarding experience that enables the worker to perform his duties better is, as a general rule, acknowledged to be a legitimate aim.'*

⁴⁵⁵ Case C-555/07, *Küçükdeveci*, par. 35-36, 39; Case C-88/08, *Hütter*, par. 40, 42. In *Hütter*, a range of more specified aims, pointing in different directions, are defined by the referring court. The CJEU argues that these aims are inconsistent (which they clearly are) (par. 46), and addresses them separately when later discussing the questions of 'appropriate and necessary'. Since these inconsistencies are not in themselves relevant for my discussion above, I have chosen to simplify the matter by referring to the general aim of 'regulating relations between education, vocational training and the possibilities of entering the labour market'.

⁴⁵⁶ Joined Cases C-297/10 and C-298/10, *Hennings and Land Berlin*, par. 69. This aim is also discussed by the CJEU in the *Hütter*-judgment, even though it is not an aim claimed by the referring court. The CJEU finds that *'the national legislation at issue in the main proceedings relies on the criterion of previous professional experience'* Case C-88/08, *Hütter*, par. 47

⁴⁵⁷ Case C-555/07, *Küçükdeveci*, par. 40-42; Case C-88/08, *Hütter*, par. 48-49

*That is why the employer is free to reward such experience [by means of pay]*⁴⁵⁸, states the court. However, there is not a necessary connection between the age of an employee and his or her professional experience, argues the court. Among the employees of the same age in a particular workplace, some will have had many years of experience, others only few,⁴⁵⁹ the court carefully explains, in alignment with the presumption that *'length of service goes hand in hand with professional experience'*⁴⁶⁰. And concludes that *'a criterion also based on length of service or professional experience but without resorting to age would, from the point of view of Directive 2000/78, appear better adapted to achieving the legitimate aim mentioned above'*.⁴⁶¹

In other words: it is acceptable to discriminate on the basis of professional experience, but not on the basis of age, as far as wages policy is concerned. In this respect, *'professional experience'* and *'length of service'* may be equalized.

Other paths of justification

Finally it should be mentioned that there are other argumentative paths which may be followed in order to justify discrimination.

As regards the possibility of justifying discrimination for reasons of public security, order and health; the CJEU finds that aims such as *'the health of patients'*, in connection with compulsory retirement of dentists, and *'air traffic safety'*, in connection with the retirement age of pilots, constitute legitimate aims.⁴⁶² But in both cases, the justification argument as a whole falls as a result of the second line of questioning, that of the *'necessity'* of the means with respect to their aims. The CJEU finds that the aims in question are not pursued consistently: Only some dentists (and not all in that country), and only some pilots (and not all in that country) are subjected to the compulsory retirement mechanism.⁴⁶³

Similarly, the attempt to justify an early retirement age of pilots by referring to *'occupational requirements'* falls as a result of inconsistency. *'It is essential'*, says the

⁴⁵⁸ Case C-88/08, *Hütter*, par. 47; almost similar formulation in Joined Cases C-297/10 and C-298/10, *Hennings and Land Berlin*, par. 72

⁴⁵⁹ Joined Cases C-297/10 and C-298/10, *Hennings and Land Berlin*, par. 76

⁴⁶⁰ Joined Cases C-297/10 and C-298/10, *Hennings and Land Berlin*, par. 74; the same argument is made, although less elaborately, in Case C-88/08, *Hütter*, par. 47

⁴⁶¹ Joined Cases C-297/10 and C-298/10, *Hennings and Land Berlin*, par. 77;

⁴⁶² Case C-341/08, *Petersen*, par. 45, 49, 50; Case C-447/09, *Prigge and Others*, par. 58

⁴⁶³ Case C-341/08, *Petersen*, par. 61-62; Case C-447/09, *Prigge and Others*, par. 63-64

CJEU ‘that [pilots] possess, *inter alia*, particular physical capabilities in so far as physical defects in that profession may have significant consequences. It is also undeniable that those capabilities diminish with age [...]’ Consequently, physical capabilities may be considered as a ‘genuine and determining occupational requirement’.⁴⁶⁴ But since the compulsory retirement mechanism applies to only some pilots and not all, the aim is pursued inconsistently, and the mechanism cannot be regarded as necessary.⁴⁶⁵

As it appears, the CJEU adheres to a strict interpretation of these justification possibilities, in contrast to what we have just seen in connection with labour market objectives. Precision is required in the sense that the national rule under dispute must not be inconsistent when seen in the light of the aim it is meant to pursue.

Finally, the Wolf-judgment concerns the possibility of justifying discrimination within the fire services. In this case, however, ‘the rational organization of the professional fire service’ - that is, the financial and organizational interests of the employer weigh heavier than individual non-discrimination rights with respect to access to the labour market. An age limit of 30 years was considered to constitute an ‘appropriate and necessary mean’ in the light of the legitimate aim of ‘ensuring the operational capacity and proper functioning of the professional fire service’ - in spite of the fact that the physically demanding duties in question can be carried out until the age of 45 or 50, according to informations provided by the fire service itself.⁴⁶⁶

In conclusion: A non-name marked by multiple escape-routes

In contrast to the non-name ‘Racial or Ethnic Origin’, the non-name ‘Age’ is unproblematic as concerns its substance. ‘Age’ simply means the official age of a person. The caselaw shows us that both old and young ages may be relevant. In connection with particular cases, the discrimination ground could be transformed into particular names such as ‘Older than 65’, ‘Older than 30’ or ‘Younger than 25’.

Accordingly, this is a flexible non-name. It should be noted, though, that this flexibility is determined by the general age-structures of the labour market - first and foremost the ‘pensionable ages’ in the different member states, but also ages at which a person is normally expected to enter the labour market or to have made a career choice. This is no wonder since the General Framework Directive only covers employment issues. But

⁴⁶⁴ Case C-447/09, *Prigge and Others*, par. 67

⁴⁶⁵ Case C-447/09, *Prigge and Others*, par. 75-76

⁴⁶⁶ Case C-229/08, *Wolf*, par. 37-44

it means that the non-name is colored by the meaning of age in a labour market perspective, rather than the meaning of age in a broader life-perspective.

The complexities of the non-name 'Age' arise in connection with its attributes. Apart from the fact that the material scope of the General Framework Directive is limited, an important exception is laid down regarding the determination of pensionable ages. In addition, the Directive opens for several possibilities with respect to justification of discrimination. Multiple escape-routes exist as far as non-discrimination on grounds of age is concerned.

Seen in the light of the case-law, the justification path which concerns policy aims related to the labour market is by far the most important. Practically any national policy aim related to the functioning of the labour market as such is seen as legitimate by the CJEU - no matter whether the aim in question only concerns the integration of particular groups in the labour market, or it concerns the creation of a 'balanced age structure'. In connection with the discussions of 'appropriate and necessary' means in different cases, we were witnessing a confusing and inconsistent mix of arguments. Criteria which were established in some cases were neglected in others. On the basis of a comparative analysis of a large number of cases, we detected the following pattern:

If the aim suggested by the national authorities in question only concerned the integration of particular groups in the labour market, then the CJEU would make its judgment on the basis of rather strict criteria. The CJEU would require the national legislation to take into account the specific features of the national labour market and the personal situation of the person concerned. If, on the other hand, the aim suggested by the national authorities in question concerned the creation of 'a balanced age structure' in the labour market in the sense of making more space for younger workers at the expense of older workers, then the CJEU did not require that kind of differentiation and attention to the personal situation of workers, but was largely accepting the ways in which the member states had chosen to define and weigh the divergent interests of their labour markets. A range of criteria were established, but used inconsistently. We found that ultimately, the conceptual triad 'agreement-flexibility-balance' made out the crucial criterium together with the naked right to work: The non-discrimination right of a worker could be set aside by any national provision which was the outcome of an agreement between the parties of the labour market as long as that worker was not excluded from the labour market as a whole. An 'agreement' between the parties of the labour market was seen as the expression of 'a

balance' as well as of 'flexibility' - the three concepts forming a closely tied constellation of meaning.

According to our analyses, the conceptual triad 'agreement-flexibility-balance' is the manifestation of a tautological circle of aims and means. 'Balance' plays the double role of aim and mean, and in both roles, it means the same: a process of continuous flexible adjustments on the basis of the existing power relations between the parties of the labour market. Once this circle is established, it can only confirm itself. No criteria as to the results of the process are laid down; and no minimum conditions are specified, except for the naked right to work. All other concerns - including non-discrimination rights - are elements within the circle, within the 'balance'.

There are other ways in which to justify discrimination on grounds of age, apart from the justification path which concerns labour market objectives. Aims related to 'public security, order or health' and 'occupational requirements' may constitute legitimate aims as well. In relation to these aims, we saw the CJEU displaying a strict approach. It was required that the discriminatory measures in question should pursue their aims in precise and consistent ways. Only with respect to the fire services, the court acted less strictly.

We are facing a scratched interpretational horizon. It is split between the idea of everybody's right to inclusion in the labour market and the idea of the labour market as a natural balance. The latter idea appears to be the stronger one, capable of undermining the former whenever a conflict arises. It should be recalled, though, that the idea of everybody's right to work is upheld in the case of a conflict, but in a reduced version, as the naked right to work. Besides, the idea of everybody's right to work appears as a powerful substantial idea whenever other concerns are in play. It is therefore reasonable to say that the interpretational horizon is split between two ideas which are fighting over which one should be *the* crucial idea with the power to determine the other.

However scratched, it is meaningful to talk about one horizon and not two. The two ideas do not only tear and disturb each other, they also interweave. What they share is the identification of work with life. This is why the idea of the labour market as a balance is confronted with a last absolute, a last barrier - the naked right to work.

Chapter 12

‘Disability’

The non-name of ‘Disability’ is particularly interesting for two reasons. Firstly, ‘disability’ is the only discrimination ground among the five we are investigating which have been conceptually defined by the CJEU. Secondly, and crucially, the relationship between the discrimination ground, on the one hand, and the definition of the right-holder (or, in our terminology, the nature of the signifier) has been discussed in connection with this discrimination ground. The question of who *‘the persons concerned’* might be has been raised explicitly by the CJEU.

Before entering the case-law with a view to examining the conceptual criteria and considerations provided by the CJEU, we shall briefly go through the provisions of the General Framework Directive relating specifically to this discrimination ground.

‘Reasonable accommodation’, ‘disproportionate burden’ and issues of ‘competence’

Predominantly, the provisions of the Directive which specifically concern ‘disability’ center on the establishment of special conditions for disabled people in connection with work. The main article with respect to this matter - article 5 - lays down that *‘employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training [...]’*.⁴⁶⁷ The preamble specifies what such measures might consist in: *‘[...] effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.’*⁴⁶⁸

The obligation to establish such measures is not only stated separately, but also added to the definition of indirect discrimination.⁴⁶⁹ By this addition, it is implied that indirect discrimination is especially likely to happen on grounds of disability, and that employers should actively and positively seek to counteract disability discrimination.

⁴⁶⁷ Art. 5, Dir. 2000/78

⁴⁶⁸ Recital 20, *ibid*

⁴⁶⁹ *‘[...] as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice’*. Art. 2(2)(b)(ii), *ibid*

There is another side to this obligation, however, namely its costs. How far is an employer obliged to go in order to accommodate people with disabilities? The Directive underlines that the measures in question should not *'impose a disproportionate burden on the employer'*. But when is a burden disproportionate? *'This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned'*⁴⁷⁰, article 5 reads, while the preamble establishes a complementary perspective: *'To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance'*.⁴⁷¹ In other words, to the extent that public funding or assistance is available within the member state in question, the employer is obliged to accommodate the needs of disabled people on the basis of such resources. Apart from that, an employer is obliged to accommodate such needs in accordance with the financial resources of the organization. But the Directive does not lay down an obligation on behalf of the member states with respect to making public funding or other support available to employers.

Accordingly, a tension between the obligation to accommodate the needs of disabled on the one hand, and the reservation manifested in the expression of 'disproportionate burden' on the other, is established in the Directive. But it is not the only one. Indirectly and subtly the preamble establishes a tension between this obligation and the issue of 'competence': *'This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.'*⁴⁷² Directly, the recital states that the two issues should be kept apart. But indirectly, they are brought in relation to each other: reasonable accommodation shall only be provided to the extent that the disabled person in question is considered to be competent with respect to the 'essential functions' of the post.

Finally, a reservation is laid down with respect to the armed forces, a reservation which we have already encountered in the last chapter: *'Member States may provide that this*

⁴⁷⁰ Art. 5, *ibid*

⁴⁷¹ Recital 21, *ibid*

⁴⁷² Recital 17, *ibid*

*Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.'*⁴⁷³

**Definitions of 'disability':
relations between 'disability', 'sickness' and 'professional life'**

The question of the relationship between the concepts of 'sickness' and 'disability' was raised in the Chacón Navas judgment from 2006. Ms. Chacón Navas was dismissed after having been absent from her employment for 8 months because of sickness. Apparently, she had been dismissed solely on the grounds of her absence because of sickness.

The Spanish referring court suggested that the concepts of sickness and disability cannot be strictly separated. With reference to the International Classification of Functioning, Disability and Health drawn up by the WHO, the referring court laid forward the following understanding of the relationship between the two concepts: *"disability" is a generic term which includes defects, limitation of activity and restriction of participation in social life. Sickness is capable of causing defects which disable individuals.'* Due to the causal links between sickness and disability, the referring court found that *'workers must be protected in a timely manner under the prohibition of discrimination on grounds of disability. Otherwise, the protection intended by the legislature would, in large measure, be nullified [...]*'⁴⁷⁴ On the basis of these considerations, the referring court asked whether the General Framework Directive also covers discrimination on the grounds of sickness?

The CJEU answered no and provided the following definition of 'disability': *'the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. However, by using the concept of 'disability' in Article 1 of that directive, the legislature deliberately chose a term which differs from 'sickness'. The two concepts cannot therefore simply be treated as being the same.'*⁴⁷⁵ One more characteristic was added: *'[The legislature] envisaged situations in which participation in professional life is hindered over*

⁴⁷³ Art. 3(4), *ibid.* See also recital 19

⁴⁷⁴ Case C-13/05, *Chacón Navas*, par. 22-23

⁴⁷⁵ *ibid.*, par. 43-44

*a long period of time. In order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time.'*⁴⁷⁶

We see that the CJEU defines 'disability' negatively as something different from sickness, and positively as something that will last for a long time. Finally, 'disability' is defined as a limitation of a physical, mental or psychological nature which hinders the participation of a person in professional life.

The first two parts of the definition are fairly helpless, separately as well as taken together. Is sickness something which only lasts for a short time, then? When does a period of time constitute 'a long time'? The third part of the definition does not provide any help with respect to these questions. Instead, it adds a tautological aspect to them.

First, we notice that the concept of 'disability' is made dependent on the concept of 'professional life': disability is something which hinders the participation of a person in professional life. This in itself is peculiar, - would disability not exist in a world without work (or in a life, or state of life, which did not relate to work)? In contrast, the definition suggested by the Spanish court, uses the expressions '*limitation of activity*' and '*restriction of participation in social life*'.

But secondly, we realize that this definition is in fact tautological within the context of the Directive. The purpose of the Directive is the prohibition of discrimination so that the participation in work life will not be hindered for certain people. Apart from the very vague parts of its definition ('*not sickness*' and '*lasting for a long time*'), the meaning of 'disability' relies on the very condition which the Directive is meant to abolish, that is, 'being hindered in professional life'. The fulfilment of the purpose of the Directive would mean that the concept of 'disability' became meaningless. No-one could be identified as disabled, no special needs could be accommodated.

This constitutes yet another strong variant of the feature of *unwantedness* characterizing non-names, but different from the strong variant we saw in connection with the non-name 'Racial or Ethnic Origin'. Whereas the concepts of 'racial' and 'ethnic' were denied any precise or definable meaning, but were given an associational and ideological meaning instead, the concept of 'disability' is denied any substantial meaning what so ever.

In other words, a circular connection between work life and disability is established which is interesting for our purposes in that it provides us with yet another particular qualification of the paradoxical logic of non-names, while simultaneously feeding the

⁴⁷⁶ *ibid*, par. 45

idea of *'a socially inclusive labour market'* - which has constituted our overall horizon so far - from yet another angle. It is the first time we have found one of the non-names to be directly conceptually dependent on this idea. 'Disability' drowns - as a concept, as a discrimination ground and as a non-name - completely in the purpose established by the Directive, defined by work.

As regards the first two parts of the definition, they are too vague to lead us out of the circle. They provide us with no clear criteria for distinguishing between disability and sickness, or between disability and reduced work capacity in general; stating that 'disability' is something which *'lasts for a long time'* will hardly prove to be sufficient.

At least, it proved not to be sufficient for a Danish court which a few years later referred a number of questions to the CJEU in connection with two cases, focusing on how to distinguish between disability, sickness and reduced work capacity. The answers provided by the CJEU largely confirm the definitions provided in the Chacón Navas judgment, but also clarifies certain aspects. The dependence of the concept of disability on the concept of 'professional life' is upheld: *'the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life'*. Interestingly, the CJEU refers in this respect to the UN Convention according to which disability concerns *'physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder full and effective participation in society on an equal basis with others'*.⁴⁷⁷ That is, 'society' is silently replaced by 'professional life' in the CJEU-definition. On the other hand, the little word 'may' has been introduced in the CJEU-definition (*'may hinder'*). This modifies the circular connection between 'disability' and 'professional life' implied in the definition of the Chacón Navas judgment which simply says *'a limitation which hinders'*.

As concerns the relationship between sickness and disability, the CJEU clarifies that the distinction between the two cannot be drawn too strictly. Not only *'disabilities that are congenital or result from accidents'* are covered by the concept 'disability', also limitations caused by curable or incurable illness may be covered - as long as they are 'long term' and as long as they may hinder the participation in professional life.⁴⁷⁸ This clarification gives rise to new questions, though. Does it imply that, ultimately, 'disability' cannot be

⁴⁷⁷ Joined Cases 335/11 and 337/11, *HK Danmark*, par. 37-38

⁴⁷⁸ *Ibid*, par. 40-41

separated from 'sickness' (in contrast to what was stated in the Chacón Navas judgment)? Are we left only with the criterium 'long term'? How long is 'long term'?

The fact that the concept of disability is made dependent on the concept of 'professional life' is problematic for two reasons. Firstly, the definition is too broad in the sense that in principle, any limitation which hinders a person in professional life may be called disability. This broadness could undermine the efficiency of the Directive. But from another point of view, the definition is too narrow. It implies that only to the extent that *we are aware of someone being hindered in professional life*, this person can be acknowledged as disabled. Difficulties or sufferings which are not visible from a work perspective, but which may still be damaging to a person, are not acknowledged.

These conceptual problems bear witness to the presence of an almost all-encompassing horizon characterized by the idea of a socially inclusive labour market. As concerns the non-name 'Disability', this horizon manifests itself so strongly that the concept of 'disability' itself is determined by it. This means that the potential right-holders, those wholly or partly excluded from the labour market, can only be identified within this horizon, from the perspective of the included. From the perspective of the included, almost any irregularity or reduction in individual work capabilities may constitute an instance of disability, while the difficulties which are not visible from the point of view of work performances, cannot be seen at all, but are left in darkness at the borders of the horizon.

Discrimination ground or 'particular category of person'?

The Coleman-judgment from 2008 touches upon the question of who the right-holders might be from another and yet related angle. Ms Coleman worked as a legal secretary when she gave birth to a son who suffered from serious illnesses and needed specialized and particular care. When her son was three years old, Ms Coleman accepted voluntary redundancy. Afterwards, she brought a claim against her former employer. She claimed that, during these three years, she had been treated less favorably than other employees because of her disabled child in a number of respects. The British referring court asked whether Ms Coleman could be seen as a victim of discrimination on grounds of disability, even though it was her son and not herself who was disabled?

The CJEU answers - against the contention of four member states⁴⁷⁹ - that Ms Coleman may indeed be seen as a victim of discrimination on the ground of disability. The word 'ground' is in fact crucial. '*The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1*'⁴⁸⁰, the CJEU states. And the discrimination ground at issue in the present case is clearly disability: '*Although[...] the person who is subject to direct discrimination on grounds of disability is not herself disabled, the fact remains that it is the disability which, according to Ms Coleman, is the ground for the less favourable treatment which she claims to have suffered.*'⁴⁸¹ If the application of the Directive was limited to people who were themselves disabled, it would '*deprive that directive of an important element of its effectiveness*'⁴⁸², the court finds.

The CJEU stresses that there are provisions in the Directive which relate specifically to disabled people, most notably the before-mentioned article 5. But this does not mean that the prohibition of discrimination inscribed in the Directive (including all the kinds of discrimination defined in the Directive, direct and indirect discrimination and harassment) relates exclusively to disabled people.⁴⁸³

This clarification given in the Coleman-judgment is highly interesting seen from our perspective. The victim of discrimination is not necessarily characterizable by way of the ground of discrimination at issue. In this case, it was the child of the victim of discrimination who could be characterized as disabled. But it is important to stress that it was not crucial in itself that it was the *child* of Ms Coleman who was disabled. The non-discrimination-right in question do not apply to '*a particular category of person*', the CJEU says. It is not so that they apply to 'parents of a disabled child' in addition to applying to 'disabled people'. Particular categories of persons are not relevant at all. It is the discrimination *ground* which is relevant.

There is another feature of the answer of the CJEU which is noteworthy as well. If 'disability' may refer to the disability of a three year old child, the work-based definition of disability provided in the Chacón Navas and the HK Danmark judgments will turn out to be not only useless, but absurd. The definition cannot be saved by restricting its relevance to cases in which the victim of discrimination is in fact disabled.

⁴⁷⁹ The United Kingdom, Greek, Italian and Netherlands Governments. Case C-303/06, *Coleman*, par. 41

⁴⁸⁰ C-303/06, *Coleman*, par. 38

⁴⁸¹ *Ibid*, par. 50

⁴⁸² *Ibid*, par. 51

⁴⁸³ *Ibid*, par. 39, 42, 43. Harassment is dealt with specifically in par. 57-63

In those judgments, the CJEU is interpreting the concept of disability for the purpose of the Directive as such⁴⁸⁴.

We are witnessing how two judgments are answering the question of who '*the persons concerned*' might be from entirely different perspectives. The Chacón Navas and the HK Danmark judgments clearly presuppose that the potential right-holders are definable, that they belong to a 'particular category of person', that they are 'disabled people'. On the basis hereof, these two judgments define the potential right-holders on the basis of the work-oriented purpose of the Directive. The Coleman-judgment, on the other hand pursues the formula of non-discrimination, as laid down in the Directive (as also in the Race Equality Directive) in a completely consequent manner. In other words, the Coleman-judgment is a clear and consequent expression of the *non-significance-logic* implied in this formula and accordingly a clear expression of the fact that we are dealing with a non-name and not merely a hidden name, a hidden 'category of person'. As far as the concept of 'disability' is concerned, the Coleman-judgment does not seem to require any particular definition. It is simply accepted, as a medical fact, that the three year old child (suffering from apnoeic attacks, congenital laryngomalacia and bronchomalacia) is disabled.⁴⁸⁵

Taking into account the special difficulties of disabled people

After these considerations as to the substance of the non-name, we shall now turn to the rights attributed to it. So far, the case-law is limited, but two issues of interest can be derived from it. Firstly, the HK Danmark judgment entails a consideration as to the tensional relationship between 'reasonable accommodation' and 'disproportionate burden'. Secondly, this judgment as well as the Odar-judgment, discuss the possibility of justifying indirect discrimination.

In the HK Danmark judgment, the CJEU considers whether a reduction in working hours may constitute one of the accommodation measures referred to in article 5 of the Directive? The CJEU finds that it may. The concept of 'reasonable accommodation' must be broadly understood, the court emphasizes, referring to the UN Convention. It

⁴⁸⁴ This is made perfectly clear in Case C-13/05, *Chacón Navas*, par. 42: '*[...] the concept of 'disability' for the purpose of Directive 2000/78 must, [...] be given an autonomous and uniform interpretation*'.

⁴⁸⁵ C-303/06, *Coleman*, par. 20. Also in Case C-152/11, *Odar* (which we shall deal with below), the disability in question is simply accepted as a fact: '*He is recognised as being severely disabled, with his degree of disability being 50%*' (par. 16).

covers the elimination of ‘various barriers’ the nature of which may be both ‘material’ and ‘organizational’.⁴⁸⁶

It is for the national court to assess whether a reduction in working hours, seen as an accommodation measure, represents a ‘disproportionate burden’ on the employer. However, the CJEU strongly indicates that on the basis of the particular facts of the case, a reduction in working hours would not have burdened the employer ‘disproportionately’. Firstly, immediately after the dismissal of the disabled worker, the company hired a new person to work part-time in a position which could have been occupied by the disabled worker. Secondly, Danish law makes it possible to grant public assistance to undertakings for accommodation measures concerning disabled employees.⁴⁸⁷

These considerations do not really solve the problem of how to weigh ‘reasonable accommodation’ and ‘burden on the employer’ against one another. On the basis of the known facts of the case, it must be presumed that there would hardly have been a burden on the employer at all. But the considerations of the CJEU demonstrate that art. 5 is not useless. Employers are indeed obliged to consider the needs of their disabled employees, also as far as working hours are concerned - at least as long as it does not ‘burden’ them.

The HK Danmark judgment also discusses the possibility of justifying discrimination on grounds of disability. The same does the Odar-judgment. Since the two judgments resemble each other as far as this issue is concerned, we shall analyze them together.

Both judgments concern indirect discrimination. Regarding one of the HK Danmark cases, Ms Ring was dismissed due to a national rule laying down that an employer can terminate the employment contract with a reduced period of notice if the employee has been absent because of illness for 120 days during the previous 12 months. Since the rule applied in the same way to disabled and non-disabled workers, it did not constitute direct discrimination on grounds of disability. However, the CJEU found that a worker with a disability would be more exposed to the risk of accumulating days of absence on grounds of illness. Accordingly, the 120-day rule was ‘*liable to place disabled*

⁴⁸⁶ Joined Cases 335/11 and 337/11, *HK Danmark*, par. 53-56

⁴⁸⁷ *Ibid*, par. 59, 62-63

workers at a disadvantage’ - for which reason indirect discrimination on grounds of disability was at stake.⁴⁸⁸

The Odar-judgment concerned a disabled worker who had been made redundant on operational grounds and who was entitled to a compensation calculated on the basis of the earliest possible date on which his pension would begin. However, because of his disability, Mr. Odar were to receive an early retirement pension at the age of 60, whereas non-disabled workers were eligible for a pension at 63. Consequently, Mr. Odar’s compensation would be lower than the compensation given to non-disabled workers. Again, since the national rule did not differentiate between disabled and non-disabled workers, but only applied ‘date on which the pension will begin’ as a criterium, it did not constitute direct discrimination. But since it was likely to place disabled workers at a disadvantage, indirect discrimination was at stake.⁴⁸⁹

Indirect discrimination may be justified if it can be established that it serves a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In both cases, the national courts explained that the rules under dispute served labour market aims: *‘to encourage employers to recruit and maintain in their employment workers who are particularly likely to have repeated absences because of illness, by allowing them subsequently to dismiss them with a shortened period of notice, if the absences tend to be for very long periods. As a counterpart, those workers can retain their employment during the period of illness’*⁴⁹⁰ (in the HK Danmark cases); and *‘granting compensation for the future, protecting younger workers and facilitating their reintegration into employment, whilst taking account of the need to achieve a fair distribution of limited financial resources in a social plan’*⁴⁹¹ (in the Odar-case). Those aims were regarded as legitimate aims by the CJEU. Also the criterium of ‘appropriateness’ was satisfied in both cases.⁴⁹² However, according to the CJEU, the national rules in question went *‘beyond what is necessary’*. The formulations are very similar in the two judgments. The national rules failed to take into account *‘the*

⁴⁸⁸ Ibid, par. 72-76. It should be noticed that this argumentation does in fact presuppose a difference between ‘disability’ and ‘sickness’. In this case, the ‘long term’ versus ‘short term’ distinction will hardly be sufficient.

⁴⁸⁹ Case C-152/11, *Odar*, par. 56-69. In fact, the conclusion of the CJEU could be disputed. It could be argued that the rule gives rise to direct (but hidden) discrimination. That would be the case if the rule in question was not only *likely* to, but would *necessarily* place disabled workers at a disadvantage (it is indicated that it would - since all severely disabled workers would be eligible for an early retirement pension).

⁴⁹⁰ Joined Cases 335/11 and 337/11, *HK Danmark*, par. 78-79

⁴⁹¹ Case C-152/11, *Odar*, par. 42, 64

⁴⁹² Joined Cases 335/11 and 337/11, *HK Danmark*, par. 87; Case C-152/11, *Odar*, par. 64

risks faced by severely disabled people, who generally face greater difficulties in finding new employment'. But also in general, disabled people have '*specific needs in connection with the protection their condition requires*' which should not be overlooked.⁴⁹³

Accordingly, discrimination on grounds of disability is not easily justified. Even when the existence of a legitimate aim and appropriate means has been established, the CJEU is still reluctant to accept discrimination. Disabled people are presumed to be people who are facing special risks and who have special needs - for which reason their rights should be given high priority, also in the light of legitimate labour market purposes.

In conclusion: A non-name torn between functional and substantial understandings

The only time we have seen the CJEU explicitly consider the relationship between 'discrimination ground' and 'category of person' is in a judgment concerning the discrimination ground 'disability'. In this judgment (the Coleman-judgment) the CJEU clarified that the victim of discrimination would not need to be disabled herself in order to be seen as a victim of discrimination on grounds of disability. She was being discriminated against for the reason that she had a 3-year old son who was disabled - and accordingly, she was being discriminated against *on grounds of* disability. Clearly, we should not understand this clarification as relevant only to the discrimination ground 'disability'; it concerns all the discrimination grounds dealt with in the General Framework Directive.

But the non-name 'Disability' is exceptional in another way as well. The discrimination ground 'disability' is the only one among the five we are investigating in Part I.2 which have been conceptually defined by the CJEU. The definition contains three elements. 'Disability' is defined negatively as something different from sickness, and positively as something that will last for a long time. Finally, 'disability' is defined as a limitation of a physical, mental or psychological nature which hinders the participation of a person in professional life.

The first two parts of the definition are obviously fairly helpless and will hardly prove to be sufficient. However, it is the third part of the definition which is the most problematic. The concept of 'disability' is made dependent on the concept of 'professional life'. This in itself is peculiar; it implies that disability would not exist in a world without work. But moreover, the definition is tautological within the context of

⁴⁹³ Joined Cases 335/11 and 337/11, *HK Danmark*, par. 91; Case C-152/11, *Odar*, par. 68-69. In the *HK Danmark* judgment, the CJEU states that it is for the national court to make the decision, but strongly indicates that the provision 'goes beyond what is necessary'.

the General Framework Directive: it relies on the very condition which the Directive is meant to abolish. This constitutes yet another strong variant of the feature of *unwantedness* characterizing non-names. The concept which constitute the non-name, 'disability', is denied any substantial meaning what so ever. Disabled people are not distinguishable at all, apart from the fact that they are hindered in professional life.

This purely functional definition is problematic for two reasons. It is too broad in the sense that in principle, any limitation which hinders a person in professional life may be called disability. But it is also too narrow. It implies that only to the extent that *we are aware of someone being hindered in professional life*, that person may be acknowledged as disabled.

It turns out, however, that the functional definition is set aside by the CJEU itself. In the Coleman-case, it is a 3 year old boy who is disabled. In its judgment, the court does not in any way dispute that the little boy is disabled. Obviously, to apply the work-dependent definition of disability in the case of a little boy would be absurd. But also in another case (the Odar-case), the disability in question is simply accepted as a medical fact.

So, two different understandings are in play, a functional work-dependent definition of disability and another broader understanding which is not defined or discussed, but which depends on what is commonly recognized as disability. As long as the CJEU will be capable of operating with both understandings, this non-name will uphold a certain flexibility. But clearly, both understandings are fragile and may easily be undermined - not to mention that they both have blind spots.

As far as concerns the attributes of the non-name 'Disability', it unfolds within the same limited material scope as 'Age': only working conditions are covered by the General Framework Directive. With respect to possibilities of justifying discrimination, the Directive does not open for any specific paths of justification. In the existing case-law, justification of discrimination has been discussed in two cases. In both cases, the CJEU emphasized that the specific difficulties faced by disabled, both with respect to employment and in general should not be neglected. As it appears, non-discrimination-rights on grounds of disability are weighed heavily by the CJEU.

The weaknesses lie elsewhere. They are indicated by the Directive in the provisions concerning 'reasonable accommodation'. Employers are required to take 'appropriate measures' in order to accommodate disabled employees. This tells us that in the case of the discrimination ground 'disability', non-discrimination rights are not enough. They

must be supported by substantial rights concerning accommodation. However, the Directive only grants such rights on the condition that the employer would not be 'disproportionately' burdened. No criteria as to the meaning of 'disproportionate' is laid down, neither in the Directive, nor in the case-law. Nor is it required of the member states that they should make public funding available to employers.

All in all, the non-name 'Disability' appears to be relatively strong. It is not dominated by multiple and easy escape-routes from the principle of non-discrimination as is the non-name 'Age'. And in spite of its, so far, rather helpless as well as problematic conceptual definition, it is not impotent. Particular names are formed on the basis of this non-name, only not in concordance with the conceptual definitions provided.

The conceptual tension underpinning this non-name is remarkable - the tension between a functional understanding related to the labour market and a more substantial understanding according to which 'disability' is something which concerns a person's life as a whole. This tension is not only visible in the explicit and implicit definitions of 'disability'. The functional understanding is also contrasted by the justification-considerations in the HK Danmark and the Odar judgment, and by the provisions of the Directive concerning 'reasonable accommodation'. Disabled people are - more or less explicitly - understood to be 'a special kind of people', people who face special difficulties and who will, throughout their life, require special care and help.

Chapter 13

'Sexual Orientation'

The discrimination ground 'sexual orientation' is the least visible discrimination ground in the General Framework Directive. No special provisions are dedicated to it. No special declaration emphasizes its importance or points to particular issues following in its wake.

However, the preamble contains a provision which is especially relevant to non-discrimination-issues on the grounds of sexual orientation. *'This Directive is without prejudice to national laws on marital status and the benefits dependent thereon'*⁴⁹⁴, recital 22

⁴⁹⁴ Recital 22, Dir. 2000/78/EC.

reads. The interpretation of recital 22 is critical to national implementations of the Directive for the reason that same-sex-marriages are still prohibited in a large number of EU-countries.

We shall go straight to the case-law, then. It is not huge; presently, only two judgments are directly relevant to the non-name 'Sexual orientation' within the context of the General Framework Directive, namely the *Maruko* and the *Römer* judgments⁴⁹⁵. A couple of cases are in process, though.⁴⁹⁶ The *Maruko* and the *Römer* judgments exhibit parallel features to a high degree and will therefore be analyzed together.

But before examining these two judgments, some older judgments deserve mentioning. These judgments clarify the distinction between the discrimination grounds of 'sexual orientation' and 'sex' and hereby provide us with crucial material for an analysis of the conceptual characteristics of the non-name 'Sexual orientation'.

'Sex' versus 'sexual orientation': The establishment of a double distinction

Two judgments from the 1990's regard the relationship between the discrimination grounds 'sex' and 'sexual orientation' - one explicitly, the other implicitly. That was before the adoption of the General Framework Directive, and therefore before the establishment of the discrimination ground 'sexual orientation' within EU-law. At that time EU non-discrimination law either concerned 'nationality' or 'sex'.

The two judgments we shall examine concern the interpretation of non-discrimination Directives relating to the discrimination ground 'sex'. In the first one, the CJEU considers whether discrimination on the grounds of homosexuality could be seen as an instance of discrimination on the grounds of sex? In the second, 'transsexuality' constitutes the issue of concern. On the basis of a comparative analysis of these two judgments we shall be able to derive a conceptual distinction with respect to the difference between the discrimination grounds of 'sex' and 'sexual orientation' - a distinction which will provide us with a conceptual foundation for the non-name 'Sexual Orientation'. As we shall see, the distinction is both fragile and ambiguous.

In the *Grant*-judgment from 1998, it was made clear that discrimination on the grounds of homosexuality should not be considered an instance of discrimination on the grounds of sex. Ms Grant was denied travel concessions for her female partner by her employer, South-West Trains Ltd. According to her contract, both she and her spouse

⁴⁹⁵ Case C-267/06, *Maruko*, and Case C-147/08, *Römer*

⁴⁹⁶ Case C-81/12, *Asociația ACCEPT*, and Case C-267/12, *Hay*

would be granted travel concessions. But the company regulations laid down that only a 'legal spouse' or, alternatively, an 'opposite sex spouse' with whom the employee had had 'a meaningful relationship for more than 2 years' could be recognized as a spouse⁴⁹⁷. The employer consequently found that the female partner of Ms Grant did not satisfy the conditions.

Ms Grant claimed that she had been the victim of discrimination on the grounds of sex, and that her employer had violated the principle of equal pay for women and men guaranteed by the Treaty⁴⁹⁸ and/or Directive 76/207/EEC⁴⁹⁹. The case was referred to the CJEU which found that the regulations laid down by South-West Trains Ltd did not constitute discrimination on the grounds of sex, since they applied in the same way to male and female workers. '*Living with a person of the same sex*' constituted the precise ground of discrimination in this case, the CJEU emphasized⁵⁰⁰. Subsequently, the court considered whether the term 'sex' should be interpreted as including 'sexual orientation', and found that it should not⁵⁰¹ - hereby implying, though, that Ms Grant could possibly be a victim of discrimination on the grounds of sexual orientation. The judgment ends by predicting a future state of EU-law in which discrimination on the grounds of sexual orientation will be prohibited.⁵⁰²

In other words, the Grant-judgment, delivered approximately 3 years before the adoption of the General Framework Directive, prepared for the understanding of the discrimination ground 'sexual orientation' by excluding homosexuals from being protected by the principle of non-discrimination on the grounds of sex (manifested in the Treaty and in Directives) and implying that protection of homosexuals would require the application of another discrimination ground, namely 'sexual orientation'. Another judgment dating before the adoption of the General Framework Directive, the P.-judgment from 1996, contributes to the clarification of the discrimination ground

⁴⁹⁷ Case C-249/96, *Grant*, par. 2-5

⁴⁹⁸ Art. 157, TFEU (art. 119 at the time of the judgment)

⁴⁹⁹ 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, now repealed by Directive 2006/54/EC

⁵⁰⁰ Case C-249/96, *Grant*, par. 27-28

⁵⁰¹ *Ibid*, par 37-47

⁵⁰² '*It should be observed, however, that the Treaty of Amsterdam [...] provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council [...] to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.*' *Ibid*, par. 48

‘sex’, but by inclusion instead of exclusion. The judgment does not mention ‘sexual orientation’ as an alternative discrimination ground. But just like the Grant-judgment, it operates in complex conceptual waters as concerns the meaning of ‘sex’.

The issue of concern is transsexuality. Mr. P. (who became Ms. P) was dismissed because he underwent gender reassignment. Before initiating this process - beginning with a ‘life test’, a period during which Mr. P dressed and behaved like a woman, followed by surgical operations - he informed his employer of his intention to do so. After the first surgical operations had taken place, Mr. P was given notice, and the dismissal took effect shortly after Mr. P. had completed his transformation into a woman.⁵⁰³

The CJEU considers whether dismissing a person on grounds of transsexuality constitutes discrimination on grounds of sex, and finds that it does: *‘the scope of the directive [Directive 76/207/EEC] cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned [...] he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.’*⁵⁰⁴

Undeniably, discrimination which arises from the gender reassignment of a person concerns the issue of sex. But the same could have been said of discrimination based on same-sex-relationships in the Grant-judgment delivered 2 years later. Or, vice versa, it could have been argued in the P.-judgment that transsexuality does not constitute discrimination on grounds of sex, since that discrimination is not dependent on whether it is a man or woman who undergoes gender reassignment, but on the reassignment itself. This was the argument made with respect to same-sex-relationships (that discrimination based on same-sex-relationships apply to both men and women), as described above. In fact, the referring court in the P.-case argues exactly that: *‘If P. had been female before her gender reassignment, the employer would still have dismissed her on account of that operation’*.⁵⁰⁵

⁵⁰³ Case C-13/94, *P v S*, par. 3-4, 6

⁵⁰⁴ *Ibid*, par. 20-21

⁵⁰⁵ *ibid*, par. 7

In other words, when carefully analyzed, the two cases of discrimination are logically similar in the sense that both cases are manifestations of discrimination *on grounds of sex*, but none of them are manifestations of discrimination against *either* men or women. Both cases are manifestations of discrimination against *both* men and women. Consequently, the CJEU entangles itself in a logical contradiction, when concluding in the P-case that transsexuality constitutes discrimination on the grounds of sex and in the Grant-case that homosexuality does not.

How is this contradiction to be explained? The two cases are only logically different in one respect. As concerns transsexuality, it is the sex of the *victim* of discrimination which gives rise to discrimination. As concerns same-sex-relationships, it is the sex of the *lifepartner of the victim* which leads to discrimination.

Once again, we are faced with logical ambiguities concerning the meaning of 'discrimination ground'. Does 'discrimination ground' mean exactly what it says - a ground of discrimination and nothing more - or does it imply a certain way of characterizing the victim of discrimination? If 'ground' was what mattered, it would be irrelevant whether it was the sex of the victim of discrimination or the sex of the lifepartner which had given rise to discrimination. Just like Ms Coleman could be regarded as a victim of discrimination on the grounds of disability even though it was her son who was disabled.

It is clear that in the P- and Grant-judgments, the CJEU does not rely on a distinction between 'ground' of discrimination and 'victim' of discrimination. In the argumentation given in the P.-judgment, quoted above, the CJEU presupposes that the 'ground' should characterize the victim: '*Such discrimination is based, essentially if not exclusively, on the sex of the person concerned*'. This formulation is repeated in the Grant-judgment two years later.⁵⁰⁶ Further, it is noticeable that the CJEU, as part of the argumentation in the P.-judgment, refers to a statement of the European Court of Human Rights the conclusion of which reads: '*Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group*.'⁵⁰⁷

The presumption implied in these statements - that non-discrimination-rights apply to '*a particular category of person*', characterized by the particular discrimination ground - logically dissolves the sheer contradiction which would otherwise be the result of a

⁵⁰⁶ Case C-249/96, *Grant*, par 42

⁵⁰⁷ Case C-13/94, *P v S*, par. 16. The quote stems from the European Court of Human Rights' judgment of 17 October 1986, *Rees v United Kingdom*, paragraph 38, Series A, No 106

comparison between the two judgments. But that presumption expresses, in turn, the lack of a distinction between 'ground' and 'victim'. It expresses the understanding that being discriminated against *on grounds of sex* means being discriminated against because one is either a man or a woman.

We shall return to the issue of the meaning of the discrimination ground 'sex', including the relationship between 'transsexuality' and 'sex', in Part I.3. From the point of view of the discrimination ground 'sexual orientation', we have learned the following: issues of homosexuality are covered by that ground, whereas issues of transsexuality are not. That is, a double distinction has been established: a distinction between homosexuality and transsexuality corresponding to another distinction, namely the distinction between the discrimination grounds 'sexual orientation' and 'sex'. We shall now engage in a critical reflection on the implications of this double distinction.

A two-fold reflection concerning the meaning of the concept of 'sex'

The double distinction does not appear controversial. In fact, it would be in accordance with a common understanding of 'sex': Same-sex-relationships have to do with sexuality in the sense of sexual attraction and physical intimacy, transsexuality does not. Transsexuality has to do with 'sex' in the sense of being one or the other sex. In other words, two different meanings of 'sex' are implied.

But logically, this is not a strong argument. Same-sex-relationships involve many other aspects than those of attraction and physical intimacy; the term '*lifepartner*' in itself indicates the vastness of aspects implied. And it certainly implies 'the sexes.' And reversely: would it be possible to account for the importance of 'being one or the other sex' in all its social manifestations, without reference to that other meaning of sex?

I will argue that we are facing a complex conceptual landscape with respect to the double-nature of the concept of 'sex'. 'Sex' and 'sexual' may refer to the sexes, or it may refer to sexual feelings and attractions and physical intimacy.⁵⁰⁸ It is not at all clear whether the discrimination ground 'sexual orientation' refers to the former or latter or both. The fact that discrimination against same-sex-relationships is regarded as an instance of discrimination on the grounds of sexual orientation helps us little in this

⁵⁰⁸ Clearly, this double-nature of the concept of 'sex' is most obvious in English and in the Romance languages (in which 'sex' both covers 'the sexes' and 'the sexual'). However, in languages in which two different words are applied, those different words are often closely etymologically connected - like in Danish, Swedish, Norwegian or German.

matter since same-sex-relationships involve both meanings of 'sexual': the element of 'sexes' as well as elements of feelings, attractions and physical intimacy.

The reader might find me being unnecessarily polemical. Within international law, politics, and academic literature, the expression 'sexual orientation' is well established and refers to a person's pattern of attraction in terms of either heterosexuality, homosexuality or bi-sexuality. But this application of the expression still implies both meanings of 'sexual'. We may even complicate the matter further by questioning the meaning of the term 'orientation'. Is it so that '*sexual*' means 'relating to the sexes', and '*orientation*' means 'sexual attraction' within the expression '*sexual orientation*', - or is it rather so that '*sexual*' implies both meanings and '*orientation*' is only a neutral appendage, simply meaning 'direction'?

The purpose of polemicizing is merely to indicate the intensity with which the double-nature of the concept of 'sex' manifests itself with regard to this ground of discrimination. One could continue further along the lines of the questions raised above. But it would leave nowhere. The two meanings of sex are intertwined with one another to such a degree that trying to separate them within the expression would be obsolete. We may simply conclude that the full expression '*sexual orientation*' implies the double-meaning of 'sexual'; that this is due mainly to the double-nature of the concept of 'sex' or 'sexual', but that the term '*orientation*' is colored by the same doubleness within this context.

If the discrimination ground should be freed completely from the first meaning of sex' (according to which 'sex' refers to the sexes), then it should apply solely to attractions and practices of physical intimacy in which the sex of the persons involved plays no crucial role, - or at least to aspects of attractions and practices which could be separated from the question of the sexes of the persons involved. Different kinds of fetish sex attractions and practices might satisfy that criterium. So far, there is no sight of such a development in the caselaw. The two judgments which interpret the General Framework Directive with respect to 'sexual orientation' and which we shall investigate shortly, both deal with issues of same-sex-relationships. On present grounds, we must maintain that the double-meaning of 'sex' manifests itself intensely in the interpretation of this discrimination ground.

Moreover: wouldn't the same double-meaning be manifested in the issue of 'transsexuality'? Certainly, a sexual attraction is involved, an attraction so deep so that

the person in question wants to become the other sex, wants to be that sex - although possibly an attraction of a different nature. This brings us to a second reflexion.

Another conceptual complexity comes into sight in the landscape before us. It springs from the complexities of the concept of sex as well, but seen from a slightly different perspective, the perspective of self- versus other-relations. Heterosexuality, homosexuality and bisexuality refer to sexual relations (according to both meanings of 'sexual') to *other persons*. In contrast, transsexuality refers to a sexual relation to *one-self* (and if this does not imply the same two meanings of 'sexual', it certainly implies another mode of the double-nature of 'sexual', as indicated above). Transsexuality is, in other words, a matter of self-relation, whereas heterosexuality, homosexuality and bisexuality are matters of other-relations.

However, heterosexuality, homosexuality and bisexuality involve issues of self-relations as well. Just like transsexuality have unavoidable consequences for sexual relations to other people. A person who is heterosexual before undergoing gender-reassignment will be homosexual afterwards, and vice versa. Or, a person who undergoes gender reassignment may stay heterosexual or homosexual, but only by changing sexual preferences. Even bisexual attractions and practices will be unfolded on new sexual conditions. The point is the following: Heterosexuality, homosexuality and bisexuality may be characterized as *sexual other-relations with implications for the sexual self-relation*, whereas transsexuality may be characterized as *a sexual self-relation with implications for sexual other-relations*.

Accordingly, the conceptual landscape of the non-name 'sexual orientation' implies both sexual self- and other-relations, entangled in one-another. We may conclude that the non-name 'Sexual orientation' takes its starting point in other-relations, in contrast to the non-name 'Sex', which takes its starting point in a self-relation. But obviously, the distinction is subtle, and it would not be difficult to tear it down completely.

These reflections bear witness to the opaque sourcefulness of the concept of 'sex' within a European historical-conceptual context. The man-woman-distinction, attractions and physical interactions are deeply intertwined with one another, as are sexual relations to oneself and to others. I shall be the first to admit that the formulations of the two meanings of 'sex' used in the discussion above are insufficient and superficial. But they have served me in opening the complexities of the concept and hereby in pointing to inescapable conceptual tears relevant to the analytical comparison of the P.- and the Grant-judgments. And this has been my purpose. Through this opening and twofold-

reflexion we have gained sight of endless and intransparent conceptual waters. In these waters, logical lines of demarcation are drawn with great difficulty - and hardly ever without contradictions.

However, we shall not be resting in these endless waters, without conclusion. The last reflection gives a foundation, however subtle, for drawing a line of demarcation between the two discrimination grounds without adhering to a conception of rights which depend on the designation of particular right-holders. The difference can be nailed down as follows:

The discrimination ground 'sexual orientation' concerns sexual other-relations, in contrast to the discrimination ground of 'sex', which concerns sexual self-relations.

It should be emphasized, though, that this possibility springs from a reflection on the conceptually complex landscape underpinning the concept of 'sexual orientation'. It is not what the CJEU says, neither directly, nor indirectly.

We shall continue with to newer judgments, dealing explicitly with the discrimination ground 'sexual orientation'.

Two contemporary judgments: discussions of 'comparability' and material scope

The Maruko and Römer judgments, from 2008 and 2011 respectively, provide us with highly interesting discussions of the issue of 'comparability'. But they also entail discussions of an issue which we have left untouched in our analyzes of the case-law so far, namely the issue of distinguishing between '*payments made by the State*' versus payments linked to the employment relationship (crucial in relation to the material scope of the Directive). Also, both judgments deliver interpretations of recital 22 according to which the Directive is '*without prejudice to national laws on marital status and the benefits dependent thereon.*'⁵⁰⁹ That discussion concerns the competences of the EU vis á vis those of the member states and will show us another example of how the CJEU delicately includes within its territory national legislation which in the relevant EU-legislation is situated on the border of it.

Due to their parallel argumentation as concerns these three issues, the two judgments will be analyzed together.

⁵⁰⁹ Recital 22, Dir. 2000/78/EC.

‘Comparability’ in the light of the problem of multi-layered discrimination

The Maruko-judgment concerns the denial of granting a widowers pension to a homosexual man, Mr. Maruko. The life partner of Mr. Maruko, a designer of theatrical costumes, had been a contributing member of a mandatory pension scheme for German stage artists for 46 years, when he died. At that time, he and Mr. Maruko had been registered partners for 4 years, since the entry into force of the German Law which made such registration possible. After the death of his partner, Mr. Maruko applied to the Vddb (‘Versorgungsanstalt der Deutschen Bühnen’) that manages the pension scheme for a widower’s pension. He was denied it on the ground that life partners were not, like spouses, entitled to a widower’s pension, according to the regulations of the scheme. Mr. Maruko found that he had been the victim of discrimination on the grounds of sexual orientation and brought a claim before the national courts.⁵¹⁰

Also the Römer-judgment concerns the pension rights of persons who have entered into a registered partnership instead of marriage. Mr. Römer and his male partner had, just like Mr. Maruko and his partner, entered into registered partnership in 2001, when German Law made it possible. At that time, Mr. Römer was a pensioner. He informed his former employer that he and his partner had registered as life partners and requested that the amount of his supplementary pension be calculated on the basis of a more favorable tax deduction to which married pensioners are entitled, according to national social security provisions. He was denied the recalculation on the ground that he was not married. He found that his rights of non-discrimination under the General Framework Directive had been violated, and brought proceeding before the national courts.⁵¹¹

When discussing whether national legislation which does not give homosexuals in registered partnerships the same pension rights as married heterosexuals amounts to discrimination on the grounds of sexual orientation, the CJEU establishes - in both cases - that the crucial criterium to consider is the criterium of *comparability*. As we recall, ‘*direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation*’.⁵¹² If the situations of life partners are ‘comparable to’ those of married people as regards entitlements to the

⁵¹⁰ Case C-267/06, *Maruko*, par. 17, 19-23,

⁵¹¹ Case C-147/08, *Römer*, par. 18, 21-26,

⁵¹² Art. 2(2)(a), Dir. 2000/78/EC, quoted in Case C-267/06, *Maruko*, par. 66 and in C-147/08, *Römer*, par.

benefits in question, then such national legislation constitutes direct discrimination according to the definitions of the Directive. However, it is for the national courts to determine whether those situations are to be considered comparable.⁵¹³ So far, the lines of argument are similar in the two judgments. They are different, though, with respect to the level of specification provided by the CJEU when guiding the national courts in how they should be carrying out their respective analyses of the matter.

In the *Maruko*-judgment the CJEU mainly refers to the information and reflections given by the referring court. It is highlighted that German Law has '*created for persons of the same sex a separate regime, the life partnership, the conditions of which have been gradually made equivalent to those applicable to marriage*'; that a '*gradual harmonisation of the regime*' has occurred within recent years, also with respect to social security, including widow's or widower's pension. In view of these developments, the referring court considers that '*a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the main proceedings*'.⁵¹⁴

As can be seen, the information and considerations provided by the referring court already answer the question as to the comparability of the two situations, by a 'yes'. On the basis thereof, the CJEU concludes that if this will be the decision of the referring court, the national legislation in question does indeed constitute direct discrimination.⁵¹⁵ In other words, in the *Maruko*-judgment, the CJEU merely guides the referring court indirectly, by highlighting and confirming the significance of certain aspects of the material and argumentation which it has already produced. According to these highlighted aspects, the degree of 'comparability' depends solely on the status of national law; if homosexuals and heterosexuals are already secured *almost equal* (but not identical) pension rights within national law, then their situations are to be considered comparable, and the remaining parts of national law which do not live up to the general tendency of harmonization, should be seen as discriminatory.

In the *Römer*-judgment, the CJEU establishes explicit and general criteria for how to proceed when analyzing whether two situations are to be considered 'comparable'. The CJEU relies on the *Maruko*-judgment in the sense that it reframes the considerations of the national court in the *Maruko*-case into general criteria of EU-law: '*as is apparent from*

⁵¹³ Case C-267/06, *Maruko*, par. 72; Case C-147/08, *Römer*, par. 41 and 52,

⁵¹⁴ Case C-267/06, *Maruko*, par. 67-69,

⁵¹⁵ *Ibid*, par 72

the judgment in Maruko (paragraphs 67 to 73), first, it is required not that the situations be identical, but only that they be comparable and, second, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned.' The CJEU specifies the meaning of the latter point. The analysis must take into account *'the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings'*.⁵¹⁶ Applying these criteria to the Römer-case, the CJEU finds that according to the purposes and conditions laid down by national law, the rights of life partners are comparable to those of married people due to the existence of a *'separate regime [...]* *which has been gradually made equivalent to that of marriage'*. And the duties are comparable as well: *'life partners have duties towards each other, to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses during their life together'*⁵¹⁷. On the basis of the comparability thus established, the CJEU finds that the national provision at issue in the Römer case constitutes direct discrimination - although it still emphasizes that it is for the referring court to assess the particular facts.⁵¹⁸

We see that the Römer-judgment confirms the crucial criterium springing from the Maruko-judgment: if national law has *already* established rights for people in registered partnerships which are almost the same as the rights of married people (and are relevant for the benefits in question), then the situations of the two groups are to be considered comparable. But the Römer-judgment also develops this criterium further: not only established rights, but also duties are to be taken into account; and not only conditions, but also the declared purposes of rights should be considered.

Hereby, a frame of interpretation is established which is precise in that it requires specific attention to the benefit at issue, but also broad and flexible in that it involves reflexions on the overall purposes of national legislation, such as the meaning of marriage and registered partnership in society and human life. It is crucial to underline, though, that since the question of comparability is made completely dependent on the status of national law, the Directive will only help homosexual couples in EU-countries in which they have already been granted substantial rights, similar to those of

⁵¹⁶ Case C-147/08, *Römer*, par. 42-43

⁵¹⁷ *Ibid*, par. 44, 47

⁵¹⁸ *Ibid*, par. 52

heterosexual couples. In EU-countries where homosexual couples have no rights what so ever, the Directive can do nothing for them. The procedural criteria established on EU-level do not allow for an estimation of the situation of homosexual couples independently of how national law already acknowledges their situation. It would not be possible to argue, f.inst., that a homosexual man in a given situation within a given member state has responsibilities towards his longterm partner comparable to those of a married man if the law of that state does not acknowledge that.

However, one little word creates an opening. The paragraph which concludes the argument in the Römer-judgment entails the expression '*under national law, [...] in a legal and factual situation comparable to that of a married person [...]'*'.⁵¹⁹ That is: not only '*legal*', but also '*factual situation*'. The discussion in the judgment is based purely on national legislation and does, accordingly, not help us as to the meaning of '*factual situation*' within this context. To the extent that it could mean something different from '*legal situation*', an opening would have been created for future interpretations, making possible the integration of *other* aspects of the situations of homosexuals, beyond the articulations of national law, yet still ascribable to the concrete context of the case in question.

The Maruko- and Römer-judgments reveal a fundamental limitation characterizing non-discrimination-directives. Multi-layered or deeply contextualized discrimination may not be capturable within the logical framework of these directives. A certain level of equality must have been established already, in order for the prohibition of discrimination to be effective at all. Otherwise, there will exist no logical framework within which the discrimination can be seen as such.

The right to marry is not covered by the scope of the General Framework Directive (an issue to which we shall return shortly). Accordingly, a deeper level of equality on the basis of which the discriminatory nature of marriage-related pension rights can be considered, is lacking. Only because of the existence of a parallel regime of rights, it has been possible for the CJEU to apply the Directive - more precisely by way of *stretching the concept of 'comparable situation'*. In countries in which homosexual couples suffer from much more severe discrimination than in Germany, the Directive would have been of no help.

⁵¹⁹ Ibid, par. 52

The power of the concept of ‘pay’ vis-a-vis state purposes and state organization

We shall now proceed with the next issue, that of the material scope of the General Framework Directive. The CJEU considers whether the pensions at issue in the two judgments fall within the scope of the Directive.

As we recall, the Directive covers the public as well as private sector, with respect to a range of rights related to work and education, but it excludes from its scope social rights the financial source of which is the state.⁵²⁰ Since many social security schemes exist on the basis of the employment-relationship as well as state-arrangements, the line of demarcation is not necessarily easily drawn. The pension schemes at issue in the two judgments are both of a complex nature in that respect.

In both judgments, the CJEU finds its criteria in recital 13 of the preamble which reads: *‘This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 [now article 157] of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment’*.⁵²¹ In the words of the CJEU: if the pensions at issue constitute ‘pay’ according to the meaning given to that term in the Treaty, they will fall within the scope of the Directive⁵²². Hereby, the CJEU has confirmed the distinction implicitly established by the recital, namely the distinction between ‘payment’ (which may come from the state) and ‘pay’ (which comes from the employment relationship).

The argumentations in the judgments are completely parallel. Only, the Maruko-judgment involves an extensive analysis, whereas the Römer-judgment simply relies on the Maruko-judgment and on findings produced by the referring court.⁵²³ We shall therefore dedicate our attention the Maruko-judgment the argument of which can be reconstructed as follows:

According to the Treaty, *‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.*⁵²⁴ The CJEU finds, firstly, that pensions, including survivors pensions, may be regarded as pay according to this definition: *‘the*

⁵²⁰ Art. 3, Dir. 2000/78/EC

⁵²¹ Recital 13, *ibid*

⁵²² Case C-267/06, *Maruko*, par. 41-42; Case C-147/08, *Römer*, par. 32,

⁵²³ Case C-147/08, *Römer*, par. 29-33

⁵²⁴ Art. 157(2), TFEU

*fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being ‘pay’.*⁵²⁵ Secondly, the court turns to the complicated question of how to distinguish between pension schemes which have their financial source in the state, and pension schemes which have their source in the employment-relationship and therefore constitute ‘pay’ according to the definition. The court states that a pension scheme does not need to be paid exclusively ‘*by reason of the employment relationship*’, as long as it ‘*reflects, wholly, or in part, pay in respect of work*’, in order to live up to the criteria of being ‘pay’. It is sufficient that it is ‘*derived from the employment relationship*’. This means that a *public and compulsory* pension scheme, like the one at issue in the Maruko-case, may constitute pay.⁵²⁶

Three specific criteria are established in order to evaluate whether the survivor’s pension claimed by Mr. Maruko is derived from the employment relationship of Mr. Maruko’s deceased partner. The pension must concern ‘*a particular category of workers*’, it must be ‘*directly related to the period of service completed*’ and its amount must be ‘*calculated by reference to the last salary*’.⁵²⁷ The court examines the pension in question in relation to all three criteria and finds that it meets them all: it concerns only ‘*theatrical professionals employed in theatres operated in Germany*’ and ‘*is financed exclusively by the workers and employers of the sector*’; ‘*the amount of the retirement pension [...] is determined by reference to the period of the worker’s membership*’ and ‘*is calculated by reference to the total amount of the contributions paid throughout the worker’s membership, to which an indexing factor is applied*’. Consequently, the pension constitutes ‘pay’ and falls within the scope of the Directive.⁵²⁸

We see that the distinction established is not a distinction between public and private, nor is it a distinction between benefits which results directly and exclusively from an employer and benefits which do not. Crucial is, that the pension ‘*reflects*’ or is ‘*derived from*’ the employment relationship, which means, more specifically, that it can be connected to a specific individual working history, in a specific sector, for a specific period and a specific pay. In this connection, it is irrelevant whether the pension may

⁵²⁵ Case C-267/06, *Maruko*, par. 44,. In par. 45, the CJEU argues that survivor’s pensions should be regarded no differently, since ‘*the pension accrues to the survivor by reason of the employment relationship between the employer and the survivor’s spouse and is paid to the survivor by reason of the spouse’s employment*’.

⁵²⁶ *Ibid*, par. 46-47, 56-57

⁵²⁷ *Ibid*, par. 48

⁵²⁸ *Ibid*, par. 50-51, 54, 55, 56, 61

also be the reflection of ‘considerations of social policy, of State organisation, of ethics, or [...] budgetary concerns’⁵²⁹.

The exemption regarding marital status

The last question concerning the scope of the Directive, that relating to the role of recital 22, is dealt with in prolongation of the argument analyzed above - culminating in the classification of the pension at issue as ‘pay’.

As quoted in the beginning of this chapter, recital 22 states that the Directive ‘is without prejudice to national laws on marital status and the benefits dependent thereon’⁵³⁰. Does this mean that a case such as the Maruko-case which has everything to do with national laws on marital status falls outside the scope of the Directive?

We have already seen that it does not. The answer of the CJEU is simply: ‘Since survivor’s benefit such as that at issue in the main proceedings has been identified as ‘pay’ within the meaning of Article 141 EC and falls within the scope of Directive 2000/78 [...], Recital 22 of the preamble to Directive 2000/78 cannot affect the application of the Directive.’ The CJEU emphasizes that ‘the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination’⁵³¹, also in matters which fall within their own competence. In other words, if the benefit which is the issue of concern - in this case a pension - falls within the denounced scope of the Directive, then no other modifications laid down in the Directive will affect that result. But herein is only implied that a pension which involves national laws of marriage as a part of the conditions on which it is granted may fall within the scope of the Directive, not that these laws of marriage may fall within the scope.

The multiple-level-discrimination at issue in the Maruko- and Römer-cases which has appeared through our analysis of ‘comparability’, can be discerned in the statement regarding the role of recital 22 as well. We may conclude that the CJEU has managed to gain new territory for EU-law, by including within its scope pension rights the conditions of which involve national marriage laws, and by establishing ‘comparability’ on the basis of a parallel regime of rights. However, this new territory is both delicate and limited; it does not alter in any way the fundamental limitation of

⁵²⁹ Ibid, par. 48

⁵³⁰ Recital 22, Dir. 2000/78/EC

⁵³¹ Case C-267/06, *Maruko*, åar. 59-60. Similar formulations in Case C-147/08, *Römer*, par. 34-35

non-discrimination-directives, that they cannot function if a fundamental level of equality is not established already.

In conclusion: A non-name exhibiting the complexities of the concept of 'sex'

Also the non-name 'Sexual Orientation' operates in complex conceptual waters.

It has been established that the discrimination ground 'sexual orientation' covers homosexual relationships. This application of the discrimination ground is supported by the understanding of 'sexual orientation' which prevails today: 'sexual orientation' refers to a person's sexual patterns in terms of either 'heterosexuality', 'homosexuality' or 'bi-sexuality'. However, knowing some of the particular names which could arise on the basis of this non-name is not the same as having a conceptual understanding of it. In order to gain such an understanding, we engaged in an analysis of the distinction between the two discrimination grounds 'sex' and 'sexual orientation'.

First, we found that the distinction established in the case-law between the discrimination grounds 'sex' and 'sexual orientation' is contradictuous on the basis of the arguments given by the CJEU. According to the court, the issue of transsexuality should be covered by the discrimination ground 'sex', whereas the issue of same-sex-relationships should be covered by the discrimination ground 'sexual orientation'. The argumentation was based on the presumption that the discrimination ground 'sex' should characterize the right-holder in the sense that he or she would be a victim of discrimination because he or she was either a man or a woman. The disregard of the non-significance-logic entailed herein could be explained by the fact that the discrimination ground 'sex' gives rise to a different logic. But even on this condition, the argumentation of the court was contradictuous: Discrimination on grounds of transsexuality is an expression of discrimination directed against men *as well as* women, not men *or* women - just like discrimination on grounds of homosexuality.

On the basis of the derived double-distinction - a distinction between the two discrimination grounds corresponding to a distinction between transsexuality and homosexuality - we engaged in a two-fold reflection centering on the meaning of the concept of 'sex'. Could the double-distinction be given a better foundation than the contradictuous argumentation provided by the CJEU? A foundation, moreover, in accordance with the logic of non-names - which does not presume 'a category of person'?

The first part of the reflexion focused on the double-nature of the concept of 'sex'. 'Sex' and 'sexual' may refer to the sexes, or it may refer to sexual feelings and attractions and physical intimacy. I argued that same-sex-relationships involve both of these meanings of 'sex', - just like heterosexual and bisexual relationships. In other words, when seen as a signifier for 'homosexuality, heterosexuality or bisexuality', the discrimination ground 'sexual orientation' is conceptually characterized by the *intertwinement* of the two meanings of sex, not by one of those meanings in contrast to the other. Similarly, I argued that the issue of 'transsexuality' involves both meanings of sex. Accordingly, a distinction between the two discrimination grounds cannot be based on the double nature of the concept of sex. Both discrimination grounds are characterized by the complexities of the concept of sex.

It was through the second part of the reflection, focusing on sexual self- versus sexual other-relations that we gained a possible foundation for the distinction between the two discrimination grounds - although a fragile foundation. On the basis of this reflection the difference may be nailed down as follows: The discrimination ground 'sexual orientation' concerns *sexual other-relations with implications for the sexual self-relation*, in contrast to the discrimination ground of 'sex', which concerns *sexual self-relations with implications for sexual other-relations*. The double-meaning of the concept of sex is implied in both of them.

Apart from being subtle and fragile, it should be emphasized that these definitions are based on reflections on the conceptually complex landscape underpinning the concept of 'sexual orientation', not on statements or arguments given by the CJEU. They are, however, based on the court's establishment of two corresponding distinctions.

Consequently, we are confronted with a non-name which is not conceptually defined by the court, but which none the less appears to function unproblematically. Our reflections demonstrated that it is difficult, but not impossible, to formulate a conceptual foundation which supports this well established understanding of the discrimination ground. But this formulation clashes with the argumentations given by the CJEU.

Regarding the non-discrimination-rights attributed to the non-name 'Sexual Orientation, they resemble those attributed to the non-name 'Disability'. The material scope is limited to working conditions and only the general justification possibilities apply. The case-law entails no examples of justification of discrimination. As far as the material scope is concerned, though, we learned how powerful the concept of 'pay' is

within the context of EU-law. Due to the wide-reaching meaning of this concept, also social rights which have a public nature in the sense that they are organized or motivated by the state may be covered by the General Framework Directive.

The Directive entails only one provision which is special for the non-name 'Sexual Orientation': the Directive is '*without prejudice to national laws on marital status and the benefits dependent thereon.*' We analyzed two judgments (the Maruko and Römer judgments) in which the importance of this provision was expressed most exemplarily. Both judgments concern national pension-rights which are dependent on marital status. Since neither Mr. Maruko, nor Mr. Römer, were married to their male partners, they were not entitled to those pension rights. But as homosexuals couples they had not been able to marry - due to the national marriage laws.

The Maruko- and Römer-judgments reveal a fundamental limitation characterizing non-discrimination Directives in general. Multi-layered discrimination may not be capturable within the logical framework of these directives. A certain level of equality must have been established already in order for the prohibition of discrimination to be effective at all. In the case of homosexuals, the right to marry constitutes a crucial foundation for the efficiency of non-discrimination rights within the field of social rights. For this reason, the exemption of marriage laws and benefits dependent on marital status from the scope of the Directive constitutes a very serious limitation.

However, in the case of Mr. Maruko and Mr. Römer, the CJEU did in fact find a way in which to grant the two men and their partners the same pension rights as married people. Firstly, the court laid down that the pension rights in question were indeed covered by the Directive, in spite of the fact that they concerned benefits which related to marriage laws. Secondly, the argumentation of the court relied on an interpretation of the crucial concept of 'comparability'. By arguing that 'comparable situations' would not necessarily need to be 'identical situations', the court established that being in a registered partnership constituted a situation 'comparable' to that of being married.

Accordingly, the CJEU has by delicate logical means found a way in which to modify the exemption laid down in the Directive with respect to marital status so as to secure the non-discrimination-rights of *some* homosexual couples who are not married. However, this possibility is only available to the court in cases in which a 'separate law regime' concerning registered partnership, resembling the national regime of marriage laws, can be said to exist in the member state in question. The court can only help

homosexual couples who have *already* been granted rights which are similar to those granted to heterosexual couples.

The non-name 'Sexual Orientation' is according to its substance a strong non-name. It functions unproblematically, although it is given no conceptual foundation. The fact that a consistent conceptual foundation *can* be established - however subtle and fragile - strengthens the non-name. It constitutes an important potential - a potential which may be actualized or developed in connection with future cases or merely exist as an unarticulated foundation, silently supporting the meaningfulness of the non-name 'Sexual Orientation'.

However, this non-name is severely inhibited because of the exemption regarding marriage laws and marital status laid down in the Directive. The CJEU has demonstrated its will to circumvent this exemption, at least in some cases, but the logical means available to the court are - so far - limited.

Chapter 14

Non-name 'Religion or Belief'

We have now come to the investigation of the last non-name arising from the General Framework Directive, 'Religion or Belief'. Although we have encountered numerous difficulties and peculiarities on our journey so far, this non-name is arguably the strangest of them all. It addresses directly the spiritual aspects of historical human life. As such, it is associated with the highest purposes of human life - whereas the other non-names are associated rather with presumed conditions.

Regrettably, there is, so far, no CJEU-judgments interpreting the Directive with respect to this discrimination ground. We are left, therefore, with very limited possibilities of unfolding the complexities of this non-name on the basis of EU-law. The Directive does entail a special provision, though. On the basis of this provision, and on the concepts entailed in the non-name itself, we may indicate a range of conceptual problems, crucial to the application of the Directive.

In lack of CJEU-judgments, we shall turn to the case-law of the European Court of Human Rights (ECtHR). Not that we can rely on the CJEU following that case-law in any foreseeable manner if - or when - sometime in the future it will stand confronted with a case of discrimination on grounds of religion or belief. But the case-law of the

ECtHR does constitute a legal source which the CJEU inevitably will relate to. Conceptual distinctions and criteria concerning the right to freedom of religion and belief established in this case-law are relevant to our discussion; we may say that these distinctions and criteria form the initial conceptual contours of the complexities and dilemmas which the CJEU will meet.

Basic problematics springing from a special provision of the Directive

The General Framework Directive entails one special provision, dedicated to the discrimination ground 'religion and belief'. It relates to justification of discrimination and is added to the general provision concerning 'occupational requirements'. It provides that *'in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.'*⁵³²

It should be mentioned that this special provision only applies to national legislation already in force at the date of adoption of the Directive and to future national legislation based on existing practices. In other words, this special provision respects the history and traditions of churches and organizations the ethos of which are based on religion and belief, but leaves open whether churches and organizations arising in the future might also be allowed to treat job seekers and employees differently, according to their religion or belief.

Also, it is emphasized that the permitted *'difference of treatment [...] should not justify discrimination on another ground.'*⁵³³ This opens up the complex issue of distinguishing between and possibly hierarchizing different non-discrimination rights. If an organization is based on a belief which implies discriminating views on women or homosexuals, should that organization be justified in pursuing an employment policy in accordance herewith? According to the wording of the provision, it should not. However, if the views in question form a deep part of the belief as such, it is difficult to see how the views and the belief may be separated. To deny an organization the right to pursue these views would mean to undermine its belief as such. A hierarchization of

⁵³² Art. 4(2), *ibid*

⁵³³ Art. 4(2), *ibid*

different non-discrimination rights (and hereby a relativization of some of them) may very well be necessary - whether in general or in the context of particular cases.

A second paragraph sums up the points of the first, but introduces a new formulation. Churches and other organizations the ethos of which is based on religion or belief may thus *'require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'*⁵³⁴ This opens the question of whether *'acting in good faith and with loyalty'* necessarily means sharing the religion or belief of the organization? It touches upon the difference between inner belief and expressions of loyalty to a belief. How much may an organization require of an employee? Just loyalty, or deep spiritual compliance?

Finally, the preamble underlines that EU-law *'respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations'*⁵³⁵.

To sum up, the Directive establishes a strong foundation for justification of discrimination on the grounds of religion or belief. A number of problematics springing from the special provision are already indicated: the role of history and tradition in contrast to new religions or beliefs which may arise in the future; the possible intertwinement of different grounds of discrimination; and the nature, or even fervor, of the religion or belief which may be required by employers.

There is an even more fundamental problematic, though, namely the meaning of 'religion or belief'. Would any religion and any belief be included? And how should we understand the phrase *'organisations the ethos of which is based on religion or belief'*? Is an ethos not always based on a religion or belief? And, does not any organization have an ethos? Obviously, these questions show that the fundamental problematic concerning the meaning of 'religion and belief' is closely connected to the above-mentioned problematics concerning history, absoluteness/relativity, substantiality and depth.

Interwoven with these problematics is yet another: By which standard should it be evaluated whether a particular requirement formulated by an employer constitutes *'a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'*, and taking into account *'the nature of these activities or the context in which they are carried out'*? Since the requirements in question spring from a religion or belief - and possibly a complex system of thought - it is fair to ask whether someone who does not

⁵³⁴ Art. 4(2) (second subparagraph), *ibid*

⁵³⁵ Recital 24, *ibid*

share that religion or belief, a judge f.instance, would be capable of evaluating the legitimacy of an occupational requirement in the view of that religion or belief? Strictly speaking, could that standard of evaluation not only come from the religion or belief itself?

We should not forget, either, what may appear as the ‘reversed situation’. That is, the situation of an employer who discriminates against an employee, not because the workplace is based on a particular religion or belief, but because the religion or belief of the employee is not welcome at the workplace (or certain manifestations of that religion or belief are not welcome, like clothing or symbols, practices or oral articulations). In a discrimination case of that kind - in which the ethos of the workplace is presumably not based on religion or belief - it would be the general provision on ‘occupational requirements’ which would apply, and not the special provision presented above.

We should, however, be careful with respect to viewing this as the ‘reversed situation’ in a substantial sense. The question is whether an organization which claims to be neutral and not based on a particular religion or belief is in fact neutral if it forbids religious manifestations within its space? Is it not, then, based on a particular belief? We are here again faced with the two basic questions: What is ‘religion or belief’? And by which standard may cases of discrimination on the grounds of religion or belief be judged? Is there such a thing as a neutral standard?

We shall now introduce and reflect upon certain aspects of the case-law of the European Court of Human Rights, with the purpose of unfolding the conceptual problematics derived above - most notably the two basic ones: *the meaning of ‘religion or belief’* and *the nature of the standard*. The analysis will be structured according to these two basic problematics.⁵³⁶

The first basic problematic: What is a ‘religion or belief’?

The ECtHR has interpreted the meaning of ‘*thought, conscience and religion*’ in connection with cases concerning the possible violation of article 9 of the European Convention on Human Rights.

⁵³⁶ It should be mentioned that once in the history of the EU/EEC, the CJEU has dealt with religious freedom, namely in Case C-130/75, *Prais*, from 1976. This judgment in itself bears witness to the scarce role of the rights of religious freedom and non-discrimination on the grounds of religion in the EU/EEC-case-law so far. The court neither discusses the implications of the fundamental right of freedom of religion, nor the question of discrimination, as raised by Miss Prais. These rights are - although recognized as fundamental - approached merely as a concern among many others, and lighter than those. See in particular ‘Facts’, I and III, compared to par. 13-20 of the judgment.

The first part of article 9 reads: *'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance'*.⁵³⁷ The second part of article 9 concerns the manifestations of one's religion or belief; we shall return to that in a short while. For now, it is merely important to note that a distinction between thought, conscience and religion on the one side, and manifestations of religion or belief on the other, is established.

From a number of judgments, we learn that *'freedom of thought, conscience and religion [...] is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.'*⁵³⁸

This is a complex statement. It implies that religion should be distinguished from atheism, agnosticism, scepticism and general unconcern with such matters, but also that religious and non-religious conceptions of life are all protected by the same overall human right which in turn corresponds to the same overall idea of a pluralistic society. In this sense, believers and (non-believers) are ultimately united, rather than separated by this statement; they are united through the overall idea of pluralism which is seen as intrinsic to the idea of democracy.

In addition, the concept of 'identity' is introduced: religion appears to be an issue of identity. One might ask: is religion primarily a matter of individual identity, is it not a matter of ultimate truths, conditions and purposes, transcending the individual and any characteristics applicable to it? It is - at least as far as many religions are concerned. However, in view of the overall idea of plurality, the concept of 'identity' functions as a safe category in which different 'ultimate truths' may be placed side by side.

Furthermore, as regards the nature of religion, we learn the following: *'While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion" alone and in private or in community with others'*.⁵³⁹ The

⁵³⁷ Art. 9(1), European Convention on Human Rights

⁵³⁸ ECtHR, *Moscow Branch of the Salvation Army v. Russia* (no. 72881/01), 2006, par. 57; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova* (no. 45701/99), 2001, par. 114; ECtHR, *Hasan and Chaush v. Bulgaria* [GC] (no. 30985/96), 2000, par. 60 (only the last sentence of the quote)

⁵³⁹ ECtHR, *Moscow Branch of the Salvation Army v. Russia* (no. 72881/01), 2006, par. 58; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova* (no. 45701/99), 2001, par. 114; ECtHR, *Hasan and Chaush v. Bulgaria* [GC] (no. 30985/96), 2000, par. 60

community-aspect of religion is recognized, but religion is primarily seen as a matter internal to the individual him- or herself.

The ECtHR has given no definition of religion, but has made clear that churches which have arisen recently within a given country are protected by article 9, as are churches with a long history. The court accepts scientology as a religion⁵⁴⁰. In one judgment, it was made explicit that a state may not prevent a religion which has only existed in a given territory for a few years from obtaining legal entity-status.⁵⁴¹ This does not clarify, however, whether an entirely new religion, just arisen, not only in a given country, but globally, would be granted the same protection. Also, the court simply accepts scientology as a religion within the context of the cases in question. Scientology is in no way analyzed and evaluated in terms of its ideas, practices and organization.

As concerns the notion of 'belief', the wording of the first part of Art. 9, as quoted above, is slightly ambiguous. Does 'belief' refer back to religion, or to the whole unifying phrase '*thought, conscience and religion*'? In view of the statement of the ECtHR analyzed above according to which religious and non-religious standpoints are united in the overall idea of pluralism, we must assume the latter. 'Belief' refers not only to religious beliefs, but to the plurality of both religious and non-religious standpoints which are protected by the article. Indeed, within the context of article 9, we must assume that 'belief' refers to non-religious beliefs, since the notion plays a complementary role to the notion of 'religion'.

The ECtHR has interpreted the meaning of 'belief' in another context, that of article 2 of protocol 1 to the European Convention on Human Rights which lays down the right of parents to ensure that their child's education is '*in conformity with their own religious and philosophical convictions*'.⁵⁴² When interpreting the meaning of 'philosophical convictions' in article 2 of protocol 1, the court explicitly mentions and defines the meaning of 'beliefs' in article 9: '*In its ordinary meaning the word "convictions", taken on its own, is not synonymous with the words "opinions" and "ideas", such as are utilised in Article 10 of the Convention, which guarantees freedom of expression; it is more akin to the term "beliefs" (in the French text: "convictions") appearing in Article 9 - which guarantees freedom of thought, conscience and religion - and denotes views that attain a certain level of cogency,*

⁵⁴⁰ ECtHR, *Kimlya and others v. Russia* (no. 76836/01 and 32782/03), 2009; ECtHR, *Church of Scientology Moscow v. Russia* (no. 18147/02), 2007; ECtHR, *X and Church of Scientology v. Sweden* (no. 7805/77), 1979

⁵⁴¹ ECtHR, *Kimlya and others v. Russia* (no. 76836/01 and 32782/03), 2009, par. 98-102

⁵⁴² Art. 2, Protocol 1 to the European Convention of Human Rights

*seriousness, cohesion and importance.*⁵⁴³ Beliefs are more than ‘opinions’, they imply a certain level of cogency, seriousness, cohesion and importance, and they are akin to ‘convictions’.

The court continues with defining ‘philosophical convictions’: ‘*As regards the adjective “philosophical”, it is not capable of exhaustive definition [...]. Having regard to the Convention as a whole, [...] the expression “philosophical convictions” in the present context denotes [...] such convictions as are worthy of respect in a “democratic society” [...] and are not incompatible with human dignity [...]*’.⁵⁴⁴ This is a definition of ‘philosophical convictions’ within the context of art. 2 of protocol 1 and not of ‘beliefs’ within the context of art. 9. However, convictions are understood as akin to beliefs, ‘philosophical’ does apparently not bring any particular new aspect to ‘conviction’, and the Convention as a whole has been taken into account when interpreting art. 2 of protocol 1. In the light of all this, we would have good reasons to assume that ‘beliefs’ are also characterized by their being worthy of respect in a democratic society and compatible with human dignity. And, by prolonging the chain of substitutions one step further, we might infer that not only non-religious beliefs, but also religious beliefs should comply with democratic society and human dignity in order to be protected by the Convention.

This is an assumption based on a chain of fragile inferences, however. For the time being, no criteria as to the substantial normative nature of ‘religions and beliefs’ protected by the first part of art. 9 of the Convention have been laid down by the court. Only the *manifestations* of religions and beliefs must comply with democracy, as we shall see. But it is clear that we are in ambiguous waters here. The chain of inferences produced above is not without foundation, although not very solid either. Even if the chain of substitutions, *philosophical conviction - belief - religion*, were accepted, it could be argued that the ‘philosophical convictions’ at issue in the specific judgment concerning parents’ rights were *manifested* philosophical convictions. Yet, we cannot deny that *if we assumed* that a particular belief should comply with democratic society and human dignity in order to be protected by the Convention, such an assumption would be in

⁵⁴³ ECtHR, *Campbell and Cosans v. UK* (nos. 7511/76 and 7743/76), 1982, par. 36

⁵⁴⁴ *ibid*

deep alignment with the idea of a pluralistic society uniting religious and non-religious beliefs, as derived above, in that this idea is seen as intrinsic to democracy.⁵⁴⁵

Returning to what we may safely infer from the statements of the ECtHR : Beliefs are more than ‘opinions’; they imply a certain level of cogency, seriousness, cohesion and importance. Although this criterion excludes some beliefs, it certainly opens the door to many others. The United Kingdom Employment Appeal Tribunal has accepted that ‘spirituality’ as well as ‘belief in man-made climate change, and the alleged resulting moral imperatives’ are capable, if genuinely held, of being protected as philosophical beliefs under British Discrimination Law, and it based its decisions, inter alia, on the cogency-seriousness-cohesion-importance-criterion laid down by the ECtHR.⁵⁴⁶

As regards the meaning of ‘religion and belief’, we may derive the following from the aspects of the case-law of the ECtHR highlighted above:

A distinction is drawn between freedom of thought, conscience and religion *as such* and *manifestations* thereof. This distinction is underpinned by statements of the court according to which religion is primarily a matter of individual conscience, and only derivatively a matter of manifestation, either alone or in community with others.

As far as article 9 is concerned, only manifestations of religion and belief need to comply with democracy, not freedom of thought, conscience and religion as such. But we see that in statements by the court, an overall idea of a pluralistic society, coinciding with the idea of democracy, is presupposed as that which unites all the religions and beliefs protected by the Convention, including atheistic, agnostic and sceptic beliefs and those of the unconcerned. Similarly, the definition of ‘philosophical conviction’ in another context indicates - without solidly implying - a deep connection between religions and beliefs protected by the Convention and democracy and human dignity.

These ambiguities may in turn be seen as intimately connected with ambiguities inherent in the distinction between religion or belief as such and manifestations thereof.

⁵⁴⁵ In fact, a British Judge, Munby J, assumed that the statement concerning ‘philosophical convictions’ in the context of art. 2 of protocol 1 would also apply to ‘religions’ in the context of article 9: ‘I have in mind, for example, the principle stated by the Strasbourg court that the Convention recognises only religions which “are worthy of respect in a “democratic society” and are not incompatible with human dignity.”’ *R(e) v governing body of JFS* [2008] EWHC 1535/1536 (admin) 2008 All ER (D) 54 (Jul), par. 155. However, according to Aileen McColgan, this understanding is heretical. See her discussion in: “Prohibitions against Discrimination and Integration of Welfare Functions into EU Law: Potential Pitfalls?”, in Ulla Neergaard, Ruth Nielsen, Lynn Roseberry (eds): *Integrating welfare functions into EU Law. From Rome to Lisbon*, p. 362-363

⁵⁴⁶ *Power v Greater Manchester Police Authority* EAT/0087/10; *Grainger plc and others v Mr T Nicholson* EAT/0219/09

A religion or belief which was not expressed in any way, which was an inner belief entirely, and as such invisible, unhearable, unnoticeable, could hardly conflict with democracy and pluralism. We might even say that it would be part of the nature of that belief to accept the existence of other beliefs. In other words, in the case of a completely inner and non-manifesting belief, no criteria of compliance with democracy would be necessary. But this would be an extreme case. Do beliefs not generally find expression in the lives of those who believe in them, some way or another? And do those who seek protection under the Convention not generally wish to articulate their beliefs and ask for the court's recognition of them? Articulation and request for recognition already constitute manifestations.

Strictly speaking, the distinction between religion or belief as such and manifestations thereof will in most of the cases meeting the ECtHR border on absurdity. Manifestations of some sort will be involved as a presupposition of the procedure itself. We could imagine, though, the possibility of a case in which this was not so: an individual claiming a right to keep his or her belief *a secret*, and seeking protection under the Convention without revealing to the court the nature of the belief. Such a case would be possible, but extremely rare. And even in this extreme case, the belief in question would manifest itself, although purely negatively, in the shape of rejection and secrecy.

This reflection casts light on the ambiguities as regards the question of whether religions and beliefs as such should comply with democracy in order to be protected by the Convention. Religions and beliefs which are not manifested at all would not need to. They would already comply. Their doctrines would be entirely hidden and secret. But these are rare cases. As regards most religions and beliefs, manifestations are practically inescapable. But manifestations could be influencing the lives of other people more or less. In that sense they could be more or less compatible with democracy and pluralism.

In a word, the distinction which proves to be crucial is not so much the distinction between religions and beliefs as such and manifestations thereof, but rather the distinction between manifestations which are considered compatible with pluralism and democracy and those which are not considered compatible. The core of the religion or belief - which is seen as an entirely internal, individual matter - may be anything. But to the extent that this core is manifested at all, it must - in its manifested form - be evaluated from the point of view of pluralism and democracy.

This still leaves open the question of what should be most important for an evaluation of that kind: the *ideational content* of a belief which is manifested or *the ways in which this content is being manifested*? Or should both be taken into account? Can they be separated?

In addition to these deeply interwoven distinctions and criteria, we are given the cogency-seriousness-cohesion-importance-criterion. It is clear that this criterion opens the door to complex interpretational issues as well. On the basis of what standard may the cogency, seriousness, cohesion and importance of a belief be judged?

We shall now raise the basic question of the nature of the standard of evaluation and judgment. May we conceive of a neutral standard? Or a standard of democracy? Or should the self-understanding of the religion or belief be taken into account?

That is, we shall ask how the distinction between manifestations which are compatible with pluralism and democracy, and manifestations which are not, is being made.

The second basic problematic: the nature of the standard

As has become clear from the last reflection, the question of the nature and source of the standard on the basis of which particular restrictions on the right to freedom of religion or beliefs can be laid down, must be raised with respect to the area of manifestations. So, what rights of manifestation of religion or belief are guaranteed by the Convention?

The second part of article 9 reads as follows: '*Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.*'⁵⁴⁷

At the outset, the right to manifest one's religion or belief should not be subjected to intervention from the part of the State, says the ECtHR: '*The right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. The State's duty of neutrality and impartiality, as defined in the Court's case-law, is incompatible with any power on the State's part to assess the legitimacy of religious*

⁵⁴⁷ Art. 9(2), European Convention on Human Rights

beliefs.’⁵⁴⁸ We notice in particular the following expressions: ‘*autonomous existence*’ and ‘*the State’s duty of neutrality and impartiality*’ which means that the State has no power ‘*to assess the legitimacy of religious beliefs*’.

In fact, although not constituting the essence of ‘religion’, participation in religious communities is seen as crucial to the right of freedom of religion: ‘*Participation in the life of the community is thus a manifestation of one’s religion, protected by Article 9 of the Convention. [...] Were the organizational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.*’⁵⁴⁹

However, not any manifestation of religion or belief is protected by the Convention: ‘*Article 9 lists a number of forms which manifestation of one’s religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief. [...] The Court has also said that, in a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.*’⁵⁵⁰

We learn that the State should have no power to assess the legitimacy of religious beliefs and should be neutral and impartial with respect to the manifestations of beliefs in religious communities as well as otherwise. But on the other hand, it may intervene. It may intervene *from the point of view of pluralism*, from the point of view of reconciling the various interests and ensuring that everyone’s beliefs are respected. On the basis hereof we must ask: Should we see, then, this intervention as an expression of neutrality and impartiality? In other words, is pluralism a neutral and impartial stand? Or is it not? In any case, does it constitute, alone, a standard on the basis of which restrictions may be laid down, or should other factors be involved?

We shall investigate this ‘problem of the standard’ by way of a comparative analysis of five judgments by the ECtHR. More precisely, we shall aim at establishing *what role is ascribed to the State* with respect to the problem of the State’s intervention in the right to

⁵⁴⁸ ECtHR, *Moscow Branch of the Salvation Army v. Russia* (no. 72881/01), 2006, par. 58; ECtHR, *Hasan and Chaush v. Bulgaria* [gC] (no. 30985/96), 2000, par. 62 (almost similar formulations)

⁵⁴⁹ ECtHR, *Hasan and Chaush v. Bulgaria* [gC] (no. 30985/96), 2000, par. 62

⁵⁵⁰ ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova* (no. 45701/99), 2001, par. 114-115; ECtHR, *Hasan and Chaush v. Bulgaria* [gC] (no. 30985/96), 2000, par. 61 (not the last sentence)

manifest a particular religion or belief. Is it truly a neutral role? Or is it based on a belief itself?

The five judgments are chosen on the basis of three different perspectives on the role of the State. Accordingly, one judgment concerns *the State's own relationship to religion or belief*: to what extent may a State represent, itself, a particular religion or belief? Two judgments concern *the State's intervention in the right of individuals to manifestation of religion or belief*. And finally, two judgments concern *the State's intervention in the right to autonomy of religious communities*, with respect to the requirements these communities may impose on their members and employees.

It should be emphasized that these six judgments and the analyses of them do not in any way exhaust the problematic as far as the ECtHR is concerned. But they help us to unfold the complexities of the problematic - in the shape of conceptual distinctions, underlying assumptions, and not least, dilemmas which look like dead ends.

The State's own relationship to religion or belief

First, we shall look at a judgment in which the State does not only play the role as reconciler of the various beliefs and religions of its territory, but represents itself a particular religion which it imposes on its citizens.

The judgment *Buscarini and others v. San Marino* delivered in 1999 concerns two politicians elected to the General Grand Council of the Republic of San Marino. According to national law, all elected representatives of the people of San Marino are obliged to take an oath; to swear to serve the republic and be faithful to its constitution. At that time, the elected representatives should take the oath on the Gospels. The two politicians, Mr. Buscarini and Mr. Della Balda, requested permission from the head of government to take the oath without making reference to the Gospels, but were denied it. Ultimately, they took the oath because otherwise they would have lost their seats in the General Grand Council.⁵⁵¹

The argument given by the Government of San Marino is based on history and tradition, rather than on religion alone. The meaning of the oath is to pledge loyalty to republican values, including the traditional values of San Marino, as derived from its history - a history linked to Christianity. Accordingly, the oath serves '*public order, in the form of social cohesion and the citizens' trust in their traditional institutions*'.⁵⁵²

⁵⁵¹ ECtHR, *Buscarini and others v. San Marino*, (no. 24645/94), 1999, par. 7-14

⁵⁵² *ibid*, par 36

In its judgment, the ECtHR does not consider the legitimacy of that aim, since it finds that article 9 of the Convention has in any case been violated: *'[...] requiring the applicants to take the oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion, a requirement which is not compatible with Article 9 of the Convention.'* And the court adds: *'[...] it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs.'*⁵⁵³

We see that the State is denied the right to represent a particular religion itself, at least to the extent that it requires its citizens to adhere to the same. The historical arguments provided by the government of San Marino has no affect on the court. In contrast, the court implies that the existence of such an oath in a democracy is a contradiction in itself. In overall, the judgment doubtlessly point in the direction of an ideal of the State as a neutral frame within which a plurality of beliefs and non-beliefs may exist and manifest themselves.⁵⁵⁴

Now, is this ideal sustained or challenged by other judgments? We shall continue with two judgments laying down restrictions on the right of individuals to manifest their religion.

The State's intervention in the right of individuals to manifestation of religion or belief

The judgment *Dahlab v Switzerland* concerns a primary-school teacher in the Canton of Geneva. The teacher, Mrs. Dahlab, had been wearing a headscarf according to her Islamic faith for 5 years (of which she had been teaching in the same school for periods amounting to approximately 4 years) when she was requested by Geneva authorities to stop wearing the headscarf while carrying out her professional duties, as such conduct was incompatible with Geneva Educational Law.⁵⁵⁵

The authorities explained that the aim of the law were *'the protection of the rights and freedoms of others, public safety and public order'*. Ms Dahlab on her part found that her right to manifest her religion had been violated. Furthermore, she emphasized that no

⁵⁵³ *ibid*, par. 39

⁵⁵⁴ Also the more recent judgment *Alexandridis v. Greece* concerns an obligatory oath, demanded by the state. This case concerns the right of an individual *not to manifest* his or her religion or belief, not just the right *not to have a particular religion imposed*. The ECtHR makes clear that the freedom of an individual to manifest his or her religion or belief contains a negative aspect as well, the freedom not to be obliged to manifest those beliefs (before the state). ECtHR *Alexandridis v. Greece* (no 19516/06), 2008

⁵⁵⁵ ECtHR, *Dahlab v Switzerland* (no. 42393/98), 2001, The Facts, A

complaints had been made by pupils or parents, and no disturbance of the religious harmony in the multi-national school had occurred during the 5-year period in which she had been wearing the headscarf; she said she had always shown tolerance towards her pupils.

The ECtHR found no breach of article 9; the measure taken by the Geneva authorities was seen as both legitimate and not unreasonable: *'The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.'*⁵⁵⁶

The quoted statement contains a double argument. Firstly, the age of the children is considered to be significant. It is implied that small children should, in general, be protected against the influences from religions which exist in a pluralistic society to a much higher extent than adults. Secondly, the court finds that the headscarf is, in any case, contrary to the principle of equality and non-discrimination. It is not at all clear which argument is the crucial one.

If it is the first one, then the judgment is carried by an underlying assumption according to which the pluralistic society is dangerous. It is dangerous because it entails the possibilities of people influencing each other with their respective beliefs. For this reason, small children must be protected against the pluralistic society in order to learn to live in it.

If the second argument is the crucial one, then the underlying assumption is rather the following. The pluralistic society accepts the manifestation of religions and beliefs which are in conflict with the pluralistic society as such. This means that certain religions and beliefs must be subjected to much stronger restrictions than others as far as their manifestations are concerned.

⁵⁵⁶ *ibid*, The Law, 1

If the first argument is the crucial one, then any religious symbol or otherwise non-neglectable religious manifestation would be problematic in a primary-school, regardless of the nature of the belief. If the second argument is the crucial one, then the headscarf would not only be problematic in schools and kindergartens, but in many other institutional contexts as well. The headscarf would constitute a religious manifestation on the border of society, something which could just barely be tolerated. Since we cannot say which argument is the crucial one, we have to accept that both are crucial, even if building on different assumptions. As a double argument, do they constitute a neutral standard of judgment from the point of view of the pluralistic State reconciling the various interests of its citizens and ensuring that everyone's beliefs are respected?

The second argument is obviously not neutral. It implies that the headscarf as such is contrary to pluralism, and not just a particular expression of pluralism - in spite of the fact that nothing in the behavior of Ms Dahlab had suggested a stand against pluralism. The religious meaning of the headscarf is interpreted and evaluated vis-à-vis pluralism and democracy and is found to be incompatible with those principles. Undeniably, this amounts to '*an assessment of the legitimacy of religious beliefs*' and a breach with the neutral and impartial role ascribed to the State. It is the *belief as such*, as manifested in the headscarf, which is interpreted and evaluated by the court, - not just *the way of manifesting it*. It is the headscarf *as a symbol of a particular belief*, not just Ms Dahlab's choice of displaying religious symbols, which is seen as deeply problematic by the court.

Had the judgment used only the first argument, one could still have seen the ideal of the neutral and impartial State - only intervening in the freedoms of individuals for the sake of the freedoms of other - upheld by the judgment. It would have been the vulnerability of small children with respect to the influences of religions, and it would have been religious symbols as *a way of manifestation*, which would have been seen as problematic. However, the first argument is not entirely free from contradictions, either. It certainly is contradictuous that in order for children to learn to live in the pluralistic society, they should be kept away from it. The ideal society is presumed to be a dangerous society.

One could modify this contradiction by saying that children need to meet pluralism in small and well-balanced doses, and that a teacher wearing a headscarf would overburden the delicate balance aspired for. In other words, teachers and others

working with small children should abstain from manifesting their religious or non-religious beliefs in front of the children, at least abstain from manifesting their beliefs too strongly. That could be reasonably argued. But we should not be blind to what it means: a person of the pluralistic society must possess a double nature, *a nature of believing* in accordance with his or her inner conscience, and *a neutral nature* in accordance with the pluralistic society, and should be able to manifest either one or the other depending on context and situation. This in turn raises the question of what 'believing' means, as it casts doubt on the presumption that the ideal of pluralism constitutes a neutral frame and not a belief in itself.

There is another judgment, which also concerns the wearing of a headscarf in public space, the Sahin-judgment. This judgment can both be seen as a repetition and as a strengthening of the Dahlab-judgment. Again, the headscarf is seen as a symbol of a particular belief, which is found to be discriminating against women and therefore deeply problematic in a democratic society.⁵⁵⁷ Furthermore, it is presupposed that pluralism is dangerous, but not just for children. The woman wearing the headscarf, Ms Sahin, was a University student.

Most notably, it is not the principle of pluralism, but the principle of 'secularism' which the judgment protects. This is specifically due to the Turkish context; the 'specific domestic context' must be respected, according to the court.⁵⁵⁸ In this connection, however, the court finds that the Turkish principle of secularism is '*consistent with the values underpinning the Convention*'.⁵⁵⁹ But according to the Turkish Constitutional Court, the Turkish principle of secularism means that religion should ideally be kept in the '*private sphere of individual conscience*'. Religion should have no dominant role in the public spheres; in particular, it should have no political role. Once outside the private space, religion is outside its '*respectable place*' and therefore suspectable from the point of view of secularism.⁵⁶⁰

This principle of secularism is certainly not identical to the principle of pluralism as defined by the ECtHR, a principle connected to the idea of the State as the neutral and impartial organizer of the interests of different groups, religious as well as non-religious. Turkish secularism does not see religious beliefs as equal to the beliefs of

⁵⁵⁷ ECtHR, *Leyla Şahin v. Turkey* (no. 44774/98), 2005, par. 116

⁵⁵⁸ Ibid, par. 109

⁵⁵⁹ Ibid, par. 114

⁵⁶⁰ ibid, par. 39

atheists, agnostics, skeptics and the unconcerned. And it does not just imply the restriction of the right to manifestation of religion *when necessary* for the sake of the rights of other people, it regards religion as *basically* belonging to the private sphere.

Accordingly, when the ECtHR finds the Turkish principle of secularism to be '*consistent with the values underpinning the Convention*', we may say that, within the context of the case, the court *transforms* the understanding we have acquired so far of what those values would be. On the other hand, this transformation is *not without logical connection* to certain presuppositions related to these values, more precisely presuppositions regarding the individual and internal nature of religion.

Directly, the ECtHR simply grants the Turkish State extensive discretion with respect to balancing fundamental rights within its territory, taking account of the specific Turkish context. But indirectly, the court accepts that religion as such may be regarded as suspectable in public space.

In the Dahlab- and the Şahin-judgments, we have found that the role ascribed to the State is not a neutral and impartial role. It is not neutral, firstly, because the court accepts and justifies the fact that the Turkish as well as the Genova authorities interpret and evaluate the belief manifested in the headscarf in view of the principles of democracy and equality. In a word, these authorities do not abstain from '*assessing the legitimacy of the religious belief* in question. The Islamic belief manifested in the headscarf is more precisely assessed as being on the border of democratic society.

Secondly, both judgments presuppose that pluralism in general is dangerous, not just the headscarf and what it symbolizes. The Dahlab-judgment only presupposes that pluralism is dangerous for fragile individuals, like children. This presumption in itself does not contradict the ideal of pluralism, only complicates this ideal. It means that a certain double nature is required by the citizens of the pluralistic state. The citizens cannot express their beliefs freely in any context, but must be capable of abstaining from expressing their inner conscience. They must be capable of acting not only *tolerantly* towards others, but also *neutrally* with respect to differences of beliefs.

But hereby, the seed has been sown for a more radical understanding which is no longer neutral. According to this understanding, a space can be created which is freed from the dangerous beliefs of pluralism. This space is claimed to be neutral, but it is based on a distinction between dangerous and non-dangerous beliefs, namely religious and non-religious beliefs. This space is the space of non-religious beliefs, and it is called '*secularism*'. It cannot be denied that this version of secularism has become a belief

itself, including some and excluding others. This is what we saw in the Şahin-judgment; public spaces being dedicated to 'secularism', while expressions of religious beliefs had been relegated to private spaces.

The State's intervention in the right to autonomy of religious communities

The last perspective on the basis of which we shall analyze the role of the State concerns the relationship between the State and religious communities, with respect to the autonomy given to religious communities in relation to its members and employees.

We shall be looking at two recent judgments.⁵⁶¹ Both concern the dismissal of an employee of a church in Germany because of an extra-marital relationship. That is, both of the employees were dismissed because of events and decisions concerning their private lives.

The first one, Mr. Obst, held the post of Director of public relations within the Mormon Church. He had grown up in the Mormon faith and had fulfilled various functions in the Church. His marriage ceremony had also been completed in accordance with Mormon rites. Following the advice of his pastor, Mr. Obst informed his superior that he had had an affair with another woman. As a consequence, he was dismissed and excommunicated.

The other one, Mr. Schüth, was organist and choirmaster in the Catholic Church, also in Germany. A year after separating from his wife, he began living with a another woman. A few years later, they were expecting a child. This came to the attention of the dean of the parish, who dismissed Mr. Schüth; in the understanding of the Catholic Church, he was guilty of both adultery and bigamy. In both cases, the ECtHR was confronted with a clash of two human rights: the right to respect for private and family life, on the basis of article 8⁵⁶², and the right of religious communities to autonomy and protection against State interference, on the basis of article 9 read in the light of article 11 guaranteeing the right to freedom of association⁵⁶³.

⁵⁶¹ ECtHR, *Obst v. Germany* (no. 425/03), 2010; ECtHR, *Schüth v. Germany* (no. 1620/03), 2010

⁵⁶² Art. 8(1), European Convention on Human Rights: '*Everyone has the right to respect for his private and family life, his home and his correspondence.*'

⁵⁶³ Art. 11(1), *ibid*: '*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*' The ECtHR generally bases the freedom of believers to associate freely and form autonomous religious communities, on a conjoint reading of article 9 and art. 11.

Now, in spite of the many similarities between the two cases, the ECtHR came to two different conclusions. The court found that the right to respect for private and family life had indeed been violated in the case of Mr. Schüth, but not in the case of Mr. Obst. Which means that the autonomy of the Mormon Church in this matter was respected by the court, whereas the autonomy of the Catholic Church was not. How come this difference?

To a large extent, the arguments of the two judgments follow parallel lines. In both cases, the ECtHR identifies the task in front of it as a *balancing* exercise with respect to the two clashing rights, the right to respect for private and family life, and the right to autonomy of religious communities, respectively. In this connection, it is emphasized that the State should be granted a certain margin of appreciation with respect to matters of state-religion-relations. But this does not mean that the ECtHR readily accepts the balancing done by the German courts; the ECtHR carefully goes through the different steps of the argumentations provided by these courts - and finds in the case of Mr. Obst that the balance struck by the national courts is reasonable and the result of a comprehensive consideration of all relevant aspects, while in the case of Mr. Schüth, this is not so.

In both cases, the ECtHR accepts with no hesitation the first step of the argument, that the requirements of the respective churches concerning marital fidelity does not conflict with the fundamental principles of the German legal order. Granting autonomy to religious communities may only happen on the condition that these communities comply with the national legal order. As regards marital fidelity, the German court state that since marriage is of preeminent importance also for other religions within Germany as well as for German Basic Law, the requirement of marital fidelity does not conflict with the fundamental principles of the legal order.⁵⁶⁴

We take note of the fact that compliance with the legal order means compliance with a certain interpretation of the fundamental principles of it. Marital fidelity is not illegal in Germany, nor is it a requirement for German employees in general.

The two judgments are also parallel to a certain extent in the sense that they consider similar aspects of the cases - aspects which are to be weighed against each other in order to strike the right balance between the conflicting rights. The aspects considered are the following: the *seriousness of the breach* of marital fidelity within the church in

⁵⁶⁴ ECtHR, *Obst v. Germany* (no. 425/03), 2010, par. 46-47

question; the *nature of the position* held by Mr. Obst and Mr. Schüth, respectively; issues concerning the *employment contract and the regulations of the church* with respect to the way in which the requirement was known to Mr. Obst and Mr. Schüth; the *consequences of the dismissal* for Mr. Obst and Mr. Schüth; how the church *acquired information* concerning the infidelity; whether *milder sanctions* had been an option; and the issue of *media coverage*. Finally, the issue of the meaning and significance of '*private life*' within the context of the cases is being addressed.

All of these aspects are seen, by the German courts as well as by the ECtHR, as relevant to both cases, that is, to both balancing exercises. Only, the ECtHR finds that in the Schüth-case the national examination has not been sufficiently thorough and critical.

The two judgments fall out differently because the examination of the ECtHR of the above-mentioned aspects fall out differently - with the result that the balance tips toward the right to autonomy of religious communities in the Obst-case, and toward respect for private and family life in the Schüth-case.

In the Obst-case, the ECtHR finds that the German courts have examined all aspects thoroughly, and that the outcome of the judgment of the Federal Labour Court, namely that Mr. Obst's right to respect for his private life has not been violated, is not unreasonable.⁵⁶⁵ All the above-mentioned aspects are taken into account, but the following three aspects are emphasized particularly: the seriousness of the breach, the nature of the position and the way in which the requirement of fidelity was known to Mr. Obst.

The ECtHR notes that in the view of the Mormon Church, infidelity constitutes a very serious offense. Moreover, as director of public relations, Mr. Obst held an important position within the Church, significant to its credibility, and was therefore subjected to increased obligations of loyalty. And regarding the way in which the requirement of fidelity was known to him: Although his employment contract did not explicitly mention the issue of marital fidelity, it stated very clearly that he was obliged to observe 'high moral principles'; and since he had grown up in the Mormon Church and had held various positions in it, he should have known how serious his offense was.⁵⁶⁶

The ECtHR also refers to the analysis of the Federal Labour Court according to which the consequences of the dismissal for Mr. Obst would not be too severe, due to his

⁵⁶⁵ Ibid, par. 52

⁵⁶⁶ Ibid, par. 50-51

relatively young age and the length of his service in the position.⁵⁶⁷ It is, however, not clear how important this aspect is in the eyes of the ECtHR; it is not emphasized in the concluding paragraphs of the judgment. The remaining aspects are not emphasized particularly either: the fact that Mr. Obst informed his employer about the infidelity himself; that there had been no media coverage; and that a milder sanction would not have been an option for the Church. As it appears, these aspects are important to the balance exercise as such, yet not crucial to the tipping of the balance towards the right of the Mormon Church.

As concerns the heart of the issue of concern, interference in '*private life*', the ECtHR simply states that the fact that the dismissal was based on the conduct of Mr. Obst in his private life sphere should not be seen as decisive to the case. Mr. Obst had taken upon himself a position offered by an employer the ethos of which was based on religion.⁵⁶⁸

In the Schüth-case, in contrast, the ECtHR finds that the national courts have not examined all aspects thoroughly, and that the outcome of the judgment of the Federal Labour Court does not comply with the Convention.⁵⁶⁹ The Federal Labour Court had found that the rights of Mr. Schüth had been violated no more than the rights of Mr. Obst.

The ECtHR attaches importance to the same three aspects as in the Obst-case, but the examination falls out differently because the ECtHR challenges the views of the Church employer with respect to these three aspects.

As concerns the first, the seriousness of infidelity in the view of the Catholic Church, the ECtHR allows for the possibility of a different interpretation than the one presented by the Church employer, namely the interpretation of Mr. Schüth. According to his understanding, only a second marriage would have constituted a severe misconduct; the fact that he lives together with another woman after separating from his wife is not equal to a grave offense. The ECtHR blames the German courts for not having accepted the possibility of a different understanding of the fundamental rules of the Church. The ECtHR finds that the German courts have considered the matter only from the point of view of the Church employer.⁵⁷⁰

⁵⁶⁷ Ibid, par. 48

⁵⁶⁸ Ibid, par. 51

⁵⁶⁹ ECtHR, *Schüth v. Germany* (no. 1620/03), 2010, par. 74-75

⁵⁷⁰ Ibid, par. 62, 68

As concerns the second aspect, the nature of the position held by Mr. Schüth, the ECtHR challenges the view of the Church employer again. The Church employer had found that Mr. Schüth's functions as organist and choirmaster were so closely connected to the Catholic Church's proclamatory mission that the Church would lose credibility if he stayed in his position. But the ECtHR emphasizes that according to the fundamental rules of the Church, an organist and choirmaster is not among those who should be dismissed in the case of serious misconduct. The German courts should have examined whether Mr. Schüth's work was truly closely connected to the Church's proclamatory mission, instead of accepting the employers' view.⁵⁷¹

The considerations of the ECtHR with respect to these two first aspects lay the foundation for the way it approaches the third aspect, namely the way in which the requirement of fidelity was known to and accepted by Mr. Schüth. The ECtHR finds that Mr. Schüth's signature on the employment contract could not be interpreted as implying an unequivocal obligation to live a life of abstinence in the case of separation or divorce, - although the court accepts that the signature did oblige Mr. Schüth to show loyalty towards the Catholic Church, a loyalty that did limit his right to respect for his private life '*to a certain degree*'.⁵⁷² Seen in the light of the two other aspects, the possibility of a different interpretation of the fundamental rules of the Church and of the significance of the position of organist and choirmaster to the Church's proclamatory mission, the ECtHR clearly finds that Mr. Schüth was not subjected to clear and unmistakable requirements concerning abstinence after a separation.

As regards the remaining aspects, a couple of them are seen as particularly important to the case. Especially the aspect of the consequences of the dismissal for Mr. Schüth: The ECtHR considers that Mr. Schüth would only have limited opportunities of finding employment outside the Catholic Church, due to his special qualifications, and to the rules of the Protestant Church according to which only members of the Protestant Church would be accepted as full time employees. Also the fact that Mr. Schüth's situation had received no media coverage and that he had been respectful to the Church throughout his 14 years of service, as well as the fact that he could not have kept his family situation secret to his employer, is emphasized particularly by the court.⁵⁷³ None of these aspects were treated as significant in the case of Mr. Obst.

⁵⁷¹ Ibid, par. 63, 66, 69

⁵⁷² Ibid, par. 71

⁵⁷³ Ibid, par. 67, 72, par. 73

Finally, and significantly, the issue of the right to private and family life, is being presented in a completely different light than what was the case in the *Obst*-judgment. The ECtHR finds that the German courts had neither taken Mr Schüth's de facto family life nor the legal protection afforded to it into consideration.⁵⁷⁴ As we recall, Mr Schüth had had another child with his new partner. Also, the ECtHR presents Mr. S's unwillingness to live in abstinence for the rest of his life as constituting '*the very heart*' of his right to respect for private and family life.⁵⁷⁵ The court does not explain what it might mean that according to his contract he was obliged to a loyalty limiting the respect for his private and family life '*to a certain degree*'. But we must conclude that the court finds that '*to a certain degree*' still means leaving '*the heart*' of this right untouched, and that having a family life as such constitutes '*the heart*' of the right. In particular, the court points out that a church may require respect for certain '*high principles*', but this does not mean that the legal status of an employee shall be '*clericalized*' into '*an ecclesial status which captures the employee and encompasses his or her private life entirely*'.⁵⁷⁶

When comparing the two judgments, we detect a different approach by the ECtHR in relation to various aspects.

In the case of Mr. *Obst*, the court did not open for the possibility of a different view on the seriousness of his offense, but accepted the point of view of the Mormon Church entirely. Mr. *Obst*'s position in the Mormon Church was undoubtedly a high position, but he was not a priest or religious councillor, no more than Mr. Schüth. The employment contract of Mr. *Obst* did not explicitly forbid infidelity, but referred to '*high moral principles*' - a requirement even less specific than the requirement facing Mr. Schüth in the form of the basic rules of the Catholic Church, forbidding a void marriage. The court found that Mr. *Obst* '*should have known*' on the basis of having been raised and having worked in the Mormon Church, whereas Mr. Schüth was not supposed '*to have known*' after 14 years of work in the Catholic Church.

In the *Obst*-judgment, the church employer is seen as *the* authority with respect to interpreting the seriousness of the offense within the church, the role of the position in the church and the question of whether the employee should have known that an extra-marital relationship was incompatible with his work in the church. In other words: the church employer is seen as *the* authority with respect to interpreting the religion of the

⁵⁷⁴ Ibid, par. 67

⁵⁷⁵ Ibid, par. 71. ('*le cœur même du droit au respect de la vie privée de l'intéressé*')

⁵⁷⁶ Ibid, par. 70

church and its implications for the organization and the work functions of it. In the Schüth-judgment, in contrast, the ECtHR interprets religious and organizational issues of the Church, *neglecting* the interpretations of the Church employer. The court bases its interpretations mainly on the written regulations of the Church, including the employment contract, but also on factual assessments (as to whether the function as organist and choirmaster is closely connected to the proclamatory mission of the Church or not) and on Mr. Schüth's understandings. The court establishes *its own standard* by which it analyses *internal matters of the Church*, - matters which are inseparable from the content of the religion of the Church in that they concern its fundamental moral principles.

We also detect that a number of aspects are given more weight in the Schüth-judgment than in the Obst-judgment, namely the consequences of the dismissal; how the offense came to the knowledge of the church and whether there had been media coverage. Or more precisely, these aspects are emphasized as important to consider in the Schüth-case, whereas their role in the Obst-case is either ambivalent or explicitly non-crucial. Whether they are in fact given different weight in the two cases is almost impossible to detect. Ultimately, the two judgments are defined as balancing exercises. The respective balances are not obtained through a quantitative formula, but through the comprehensive gesture of '*everything considered*'. This means that the respective roles of the individual aspects are difficult to derive, they are, so to speak, *meant to drown* in the comprehensive gesture of '*everything considered*'. As long as they are mentioned, they form part of this gesture, - but their individual weight dissolves.

These considerations are not meant to deny that there are differences between the two cases, or to claim that the judgments would have come out differently had the approach of the ECtHR been different. A more detailed analysis than the one provided above could have brought forward yet other elements supporting the judgments. However, for our purposes, it is noteworthy that the ECtHR chooses a different approach in the two cases: accepting the Church itself as an authority in its own matters, or not accepting it and establishing a separate standard. And it is noteworthy that a number of aspects *apparently* play different roles in the two judgments.

This makes one wonder whether, ultimately, the balance exercise is intransparent? Not only with respect to the relative weights given to the various aspects of the cases, but also with respect to the standards by which the individual aspects are evaluated? Or is there a hidden 'crucial aspect', behind the alleged gesture of '*everything considered*'? In

order to at least consider this latter possibility, we shall take a careful look at the way in which the right to respect for private and family life appears in the two judgments.

First, we may ask, what does 'private life' mean, at all, and what spheres of life do we refer to by this notion? Both judgments include a reflexion thereon: *'The Court recalls that the concept of "private life" is a broad concept which cannot be defined exhaustively. This concept covers the physical and moral integrity of a person and may encompass physical and social identity, including the right to build and develop relations with others, the right to "personal development" or the right to autonomy as such.'*⁵⁷⁷ Furthermore, the court emphasizes that issues related to the sexual life of a person are covered by article 8 of the Convention.

'Private life' is connected to the integrity of the person, and to the basic issue of relating to oneself and others. This indicates that private life has to do with the core of a person's self- and other-relations, - and that it, in principle, is something which occurs, or at least could occur, in any place and any time, no matter how public. However, when seen in the light of the addition concerning sexual life, and the fact that the wording of article 8 connects 'private life' and 'family life', the statement indicates that there might be certain spheres of life in which the core of a person's self- and other-relations develops better, or more freely, than in others. These spheres shall accordingly be given special protection.

The definition - or should we just say characterization - of 'private life' given by the ECtHR is in other words not only broad and open-ended, it is also highly complex.

Now, as we saw in the Obst-judgment, the ECtHR finds that the fact that the dismissal was based on the conduct of Mr. Obst in his private life sphere should not be seen as *decisive* to the case, since Mr. Obst had accepted an important position in an organization the ethos of which is based on religion. This short statement is striking from several perspectives. First and foremost, with this statement the court dismantles the balance-exercise according to its basic formulation. The two clashing human rights - the right to respect for private and family life, and the right of religious communities to autonomy - constituted the original cornerstones of the balancing exercise. By saying that one of these cornerstones should not be seen as decisive to the case, the court in

⁵⁷⁷ My own translation of the French text which reads: *'La Cour rappelle que la notion de « vie privée » est une notion large, non susceptible d'une définition exhaustive. Cette notion recouvre l'intégrité physique et morale de la personne et englobe parfois des aspects de l'identité physique et sociale d'un individu, dont le droit de nouer et de développer des relations avec ses semblables, le droit au « développement personnel » ou le droit à l'autodétermination en tant que tel.'* ECtHR, *Obst v. Germany* (no. 425/03), par. 39, ECtHR, *Schiith v. Germany* (no. 1620/03), par. 53

fact tears down the foundation of the balance exercise as such. In stead, the court could have said that interference in the private life sphere was acceptable *to a certain degree* in the present case, due to its circumstances, and explained why the infidelity of Mr. Obst would constitute the kind of private life phenomena in relation to which interference would be acceptable, all aspects of the case considered. Maybe this is what the court means, but it is not what it says. It says that 'everything considered', the private life aspect *as such* is not decisive, - and destroys the balance exercise according to its original formulation.

In addition, it is noteworthy that canceling the significance of the private life aspect is being connected directly with the fact that the ethos of the organization is based on religion. This shows the complexities of the relationship between religion and private life, as established by the court. On the one hand, religion is understood as a matter of conscience, internal to the individual. That is, religion is defined as something essentially private. On the other hand, a religious organization may intervene in the private life sphere of its employees exactly because it is a religious organization. This reads as a contradiction: if religion is essentially something private, should a truly religious organization then not respect the privacy of its employees, more than any other organization? Two answers may be given to this. Firstly, more than one meaning of private life is at stake, one concerning the inner self-relation of an individual, another concerning the realization of relations to other people. Secondly, and more fundamentally: The basic distinction made by the court, between the belief as such and manifestation of belief, based on a specific understanding of the essential nature of belief, is insufficient with respect to grasping the issue we touch upon here: the deep connections between the *conduct* or *life realization* and the *inner conscience* of a church employee as concerns the moral demands to which he or she is subjected by the Church employer.

Mr. Schüth's right to respect for his private life appears in a completely different lightning. Mr. Schüth's *de facto family life* should be considered, the court finds. He has, *de facto*, a new family, a new partner and a new child, and that cannot be ignored, even if the new family constitutes an instance of both infidelity and bigamy seen from the point of view of the Church employer. Furthermore, we must conclude from the statements of the court that having a family life as such - also after a separation or divorce - constitutes '*the very heart*' of the right to respect for private and family life. Seen in the light of the characterization of 'private life' as provided by the court, we

may say that the court hereby defends Mr. Schüth's right '*to build and develop relations with others*' in a way, or in a sphere of life, which should be seen as privileged and enjoy special protection. This '*very heart*' of the right to respect for private and family life is opposed to the right granted to the Church employer, namely the right to interfere in the private life of Mr. Schüth '*to a certain degree*'. And we understand that the concluding statement of the ECtHR as to this matter, that the legal status of an employee must not be transformed into '*an ecclesial status which captures the employee and encompasses his or her private life entirely*', means that the '*very heart*' of his right to private and family life should remain untouched.

Accordingly, we must conclude that Mr. Obst's right to private life was not hit in the '*very heart*', and his private life not captured entirely. How come not? The interference of the Mormon Church concerned his family life, his sexual life and the building of an intimate relationship to a woman. It concerned matters of crucial importance to his relation to himself and to others. The only clear difference between the two cases in this respect is that Mr. Obst had a family life already when he involved himself in a relationship with another woman, while Mr. Schüth had lost his wife when he initiated a new relationship. In other words, the case of Mr. Schüth concerns his right to a family life as such, whereas the case of Mr. Obst concerns the conduct of a person who already has a family. In this way, we can make sense of the expression '*the very heart of the right to private and family life*'.

We cannot say whether this interpretation of '*the very heart of the right to private and family life*' constitutes the hidden '*crucial aspect*' of the two judgments, - behind their balance exercises, behind their alleged gestures of '*everything considered*'. But if it does, then we would be witnessing an understanding of human rights according to which we may talk about *the heart of a right* the protection of which should be privileged over all other aspects, and *border zones of a right* the aspects of which enjoy no privileged protection, but should be approached like all other aspects. This would not necessarily mean that the heart of the right should not be seen in the full context of a case, and that it could not still form part of a comprehensive balancing exercise, the final outcome of which could not be determined without the integration of all aspects. But it would mean that the understanding of the heart of the right would guide the balancing exercise as such - with respect to the relative weights given to the various aspects as well as with respect to the standards by which these aspects are evaluated.

It would not be unreasonable to read the two judgments according to this understanding of human rights. At least, such a reading would explain the different approaches of the ECtHR towards the two cases. Such a reading would acknowledge, simultaneously, that the court presents its two judgments as balancing exercises, but would not surrender to the intransparency of the comprehensive gesture of 'everything considered'. There would be a hidden hand guiding the balance exercises, holding in its palm '*the heart of the right*'.

On the basis of this last analysis of the role of the State, we must conclude that we do not find a neutral role ascribed to the State when the issue of concern is the autonomy granted to religious communities in relation to its members and employees.

The neutrality is broken when the ECtHR in the Schüth-judgment criticizes the national courts for accepting the view of the Church employer when it comes to the interpretation of the organizational implications of the religion of the Church, that is, of matters which are inseparable from the content of the religion of the Church and its fundamental moral principles.

This breach of neutrality is either due to the multiple aspects of the balance exercise, or it is based on a consideration of the heart of the right to respect for private and family life.

If the former is the case, we are faced with coincidences springing from the given context and accordingly with fundamental intransparency; churches will sometimes be challenged with respect to the interpretation of their own moral principles, other times not.

If the latter is the case, however, we are faced with a very subtle way of breaching the neutral role of the state. The breach of neutrality manifested in the interpretation of the internal matters of the Catholic Church would be carried by the assumption that the Catholic faith and the right to respect for private and family life are not fundamentally incompatible. That is, this breach of neutrality would be carried by the idea of *reconciling* the autonomy of the Catholic Church with the basic rights of the democratic society - even if it means arguing against the Church Employer. In contrast, the Dahlab- and Şahin-judgments were carried by the idea of a fundamental *conflict* between the headscarf and the principles of democratic society.

**In conclusion: A non-name dependent on ideological
considerations as to the foundation of the State**

Led by two basic problems which we derived from the General Framework Directive, we entered the caselaw of the ECtHR. The first was the problem of *the meaning of 'religion or belief'*. The second was the problem of *the standard of evaluation*: from which point of view may the legitimacy or non-legitimacy of demands springing from religion or belief, and vice versa the legitimacy or non-legitimacy of denying the right to certain forms of expressions of religion or belief, be assessed? From the point of view of the belief itself? From the point of view of other beliefs? Or is there such a thing as a neutral standard?

Although our journey into the ECtHR-case-law has been very selective and far from comprehensive, it has provided us with rich material for our discussion of the two basic problems. On this journey we have found serious inconsistencies and complex, even disturbing, underlying assumptions. We are confronted with a seemingly uneven and intransparent landscape, full of dark spots.

As to the first basic problem, that of the meaning of 'religion or belief', the ECtHR has left us with no substantial definition. We only learn that 'religion' is an individual matter of inner conscience. As regards 'belief', the court provides us with the cogency-seriousness-cohesion-importance-criterion.

We are left with a problem of delimitation in a twofold way. Firstly: *what is not a belief?* Are not the hearts and minds of people full of all sorts of convictions, ideals, presuppositions, theoretical assumptions, stories and intuitions, feelings of hope and disaster? The cogency-seriousness-cohesion-importance-criterion seems far from sufficient with respect to creating lines of demarcation within this chaos. Would not any person who believed strongly in something claim the seriousness and importance, and most likely also the cogency and cohesion of this belief? Seen from the point of view of the believer, the criterion borders on being tautological. On the other hand, seen from an external point of view, could not almost any belief be teared down and claimed to lack both cogency and cohesion, seriousness and importance? We might even go a step further and ask whether the cogency-seriousness-cohesion-importance-criterion is at all adequate, given that beliefs - religious as well as non-religious - would often encompass grandiose narrative figures and conceptual tensions, and sometimes also enigmas and paradoxes?

Secondly, we are left with the problem of *normative delimitation*. Are beliefs (religious or not) which are contrary to the ideals of pluralism and democracy in principle protected by the Convention, as long as they are not manifested in a way which would harm the rights and freedoms of others? This is the classical problem of liberalism: should liberalism accept the views which undermine liberalism itself? Should tolerance include tolerance towards the intolerant? We are given no clear answer, only hints and traces.

In a sense, the latter problem - however important it would seem - can be ignored, or more precisely be transformed into another problem, namely: Under what circumstances is a manifestation of belief harmful to the rights and freedoms of others? A completely un-manifested belief would never need protection from the Convention. Even the border examples, an entirely secret belief or a non-belief in something would imply a certain kind of manifestation, the manifestation of secrecy or non-belief.

The twofold problem of delimiting the meaning of 'religion and belief' cannot be solved on the basis of the characterizations provided by the ECtHR. Instead, we are led to our second basic problem, that of the standard of evaluating the legitimacy of demands springing from religion and belief, as well as of restrictions of expressions of religion or belief.

When examining this problem through the prism of the role ascribed to the State by the court, we found huge discrepancies between the formulated ideal and the assumptions underpinning the arguments given in the analyzed judgments. Ideally, the State should be the incarnation and enactor of the ideal of pluralism and democracy, that is, as understood by the ECtHR on the basis of the Convention. The 'margin of appreciation' doctrine which allows for certain differences of interpretation in the different member states does not change anything to this ideal role of the State. We saw in our analyses, most notably in the *Sahin*-judgment, that the 'margin of appreciation' does not mean that a State may deviate from the Convention; it is crucial that the national interpretation is consistent with the principles underpinning the Convention.

More precisely, ideally, the state should be a neutral and impartial reconciler of the variety of beliefs in its territory and never assess the legitimacy of those beliefs. But we saw this ideal broken several times. It was broken when the belief expressed in the headscarf was interpreted by the court as a belief contrary to the principle of gender equality and therefore in conflict with democratic society. It was broken again when the regulations of the Catholic Church were interpreted by the court as not implying an

obligation to live in abstinence after a separation or divorce and therefore as not in conflict with human rights and democratic society. In both cases, the content of a particular belief - and not just the way of manifesting it - was interpreted and evaluated vis-a-vis the ideal of democratic society. Only, in the first case, a fundamental conflict was found to exist between the headscarf and democratic society; in the second, the regulations of the Catholic Church were found to be, in principle, reconcilable with democratic society.

Finally, the ideal of the neutral State was broken when the court found the Turkish notion of secularism - amounting to the idea of a purified public space as regards the influences of religion - to be consistent with the Convention. Hereby the court justified the Turkish distinction between religious and non-religious beliefs and undermined the ideal of pluralism. We found a related, but different, understanding underpinning the Dahlab-judgment, namely that pluralism as such is dangerous. According to this understanding, a certain double nature is required by the citizens of the pluralistic state, namely *a nature of believing* in accordance with their inner conscience, and *a neutral nature*, meaning the ability to abstain from expressing their inner conscience.

This perplexing picture, as derived from our selective journey into the case-law of the ECtHR, is not coincidental. I will argue that the inconsistencies and dark spots are there for a reason; they bear witness to inescapable conceptual dilemmas.

More precisely: the inconsistencies and dark spots can be seen as intimately connected with the understanding of religion as being essentially a matter of individual, inner conscience, and only derivatively a matter of manifestation and community.

Because of this understanding of religion it becomes extremely difficult to delimit the meaning of 'religion or belief'. If religion is essentially something purely inner and subjective - and not also tradition, texts, narratives, communities, rituals and practices, ways of living and of approaching the questions of life - how may we then distinguish between any thought or idea claimed by a person to constitute his or her belief, and a belief which is truly crucial to the life of a person? Is it not in the relationship between inner belief and ways of living with oneself and others that we may discern the profoundness and significance of religion in human life? And most often, though not always, tradition, history and community are essential to the relationship between conscience and manifested life.

Non-religious beliefs are haunted by the same problem. We assume that they are to be understood as a matter of inner individual conscience as well; in any case, a

fundamental distinction between the belief as such and the manifestation of it is presupposed. The cogency-seriousness-cohesion-importance-criterion is a symptom of that understanding as well. The connection to life forms, communities and traditions are cut of.

I have argued that separating the belief as such from its manifestation borders on absurdity within the context of the caselaw of the ECtHR which can deal only with manifestations. However, the understanding of religion as being essentially a matter of inner, individual conscience explains this distinction. It is in fact a direct expression of it. Although not upheld in practice, this distinction makes impossible the development of a richer and more substantial characterization of the meaning of 'religion or belief'.

Likewise, *because of this understanding of religion*, the question of the standard of evaluation becomes very difficult. If religion is essentially something purely inner and subjective, then we are confronted with a sharp dichotomy: on the one hand subjective conviction which cannot, in principle, be questioned as such, on the other hand the ideal of pluralism and democracy used as a standard for the assessment of particular beliefs. In other words, the evaluator - the court on behalf of the state - must either bluntly accept the legitimacy of the belief (because *qua belief* its legitimacy cannot be questioned) or assess its legitimacy on the basis of a standard which from the outset is understood as independent from that belief. By doing the latter, however, the evaluator will still need to interpret the belief, but it will be interpreted from the point of view of the independent standard, that of pluralism and democracy. The consequences of the sharp dichotomy are twofold: the neutrality will be broken because the legitimacy of the belief is being interpreted by an outsider, and the ideal of pluralism and democracy which makes out the independent standard will have become a belief itself. It will have become separated from all the particular beliefs instead of constituting an overall political concept which embraces them all.

The evaluator - the court or the state - could only avoid breaking the neutrality in this twofold way if it abstained completely from assessing the legitimacy of the particular belief under examination and only questioned *the way in which it was manifested* - that is, as clothing; as proselytizing; as a closed community; as an open community undertaking a social responsibility; as particular rituals or rules; or, to take the extreme examples, as violence or social coercion. But we have seen that the ECtHR does not stick to an examination of the way in which a religious belief is manifested, but

examines the way of manifestation in connection with the content of the belief which is manifested.

But we cannot blame the court for breaking down this distinction. Just as the belief appears amputated when cut off from manifested life, the manifestation of a belief cut off from the content of that belief itself would constitute a weirdly hollow and abstract object of examination. Naturally, the legitimacy of violence or coercion could be rejected without examining the belief itself which was thus manifested - but only because violence and coercion would be unlawful in any case. The court would not be able to grasp the complexities of the issue in its full societal context, did it not consider both the content of the belief and the way of manifesting it. We may even say that *the court has to break its own principle of neutrality and ignore its fundamental understanding of the nature of religion, finding expression in the distinction between the belief as such and the manifestation of it.*

So, what if religion was not seen as being essentially a matter of individual, inner conscience, and the deep connection between the belief as such and the manifestation of it was accepted? Would that change anything as to the problem of the standard of evaluation? It would of course not change the fact that the evaluator - the court or state - would have to breach the ideal of neutrality in the sense that it would need to examine the legitimacy of the belief itself and not just the way of manifestation. But it would open the door for a different kind of examination. The sharp dichotomy between 'inner subjectivity' and the ideal of pluralism and democracy used as an independent standard of evaluation could be broken down, or at least modified, because there would be other sources which could be brought into the examination, namely communities, traditions and heritage. Those other sources would constitute a bridge between the individual, inner belief, and the standard of pluralism and democracy. In fact, they would transform the meaning of both. The inner belief would be seen as deeply rooted in a social world and a historical heritage. Also the standard of pluralism and democracy would be transformed. It would no longer be independent from the belief. It would be clear that the ideal of pluralism and democracy is related to and connected to a variety of beliefs, on the grounds of history as well as on the grounds of the contemporary situation, - yes, that rather than being opposed to all those beliefs, pluralism and democracy is made up of them.

By bringing such other sources into the investigation, the evaluator would maybe have lost neutrality in the formal sense of it, but would have gained neutrality in a more

substantial sense. The evaluation would not be based on an initial opposition between democratic society and a particular belief, but on an initial familiarity between the two. The ideal of the neutral state would then not just imply the organization of a variety of beliefs so that no-one's freedom would be harmed; it would imply the richness of a society made up of multiple manifestations of beliefs. More profoundly, it would imply the continuous interpretation of particular beliefs as well as of the ideal of pluralism and democracy itself.

It is crucial to emphasize, however, that the understanding of religion as being essentially a matter of individual, inner conscience has deep historical-conceptual reasons. The modern European State was founded on the ruins of the religious wars. In Northern Europe, protestantism which advocated the inner and individual nature of religion became the ally of the State. There is no doubt that today, in Europe, the idea of religion as being essentially something private and individual, is a commonly shared idea, by believers as well as non-believers.

Old State-Church-battles and a still present fear of the political influences of religion are inherent in the court's understanding of religion, as in the Convention itself. We should be aware that the connection between religion and 'private', 'inner' and 'individual' is deeply entangled within the development of the modern European State and the understanding of it today. It constitutes an understanding which could not simply be discarded - however paradoxical its implications.

Also, the importance of the right to secrecy and the right to *not* believe in something should not be ignored. Secrecy constitutes - undeniably - the culmination of 'private life'. In addition, secrecy may be seen as a symptom of repression, but it may also be seen as a subversive and potentially forceful critical power. Secrecy is that in us which eludes participation in what is commonly acknowledged, and in the ongoing collective processes of legitimation thereof.

It appears that we have come to a dead end. The understanding of religion as being essentially a matter of individual, inner conscience and the distinction between belief as such and manifestation of belief lead to inescapable difficulties and inconsistencies. On the other hand, this understanding has deep historical-conceptual reasons and cannot be discarded without undermining the conceptual foundations of the modern European State; in addition it implies important and forceful elements, most notably the recognition of individuality and secrecy.

May there be a path out of the dead end? Seen from the point of view of this investigation, there would be no escape from the dilemma, only ways of navigating within it: Including the sources of community, history and heritage without neglecting the importance of individual beliefs or non-beliefs or the rights of newly arisen communities based on belief; integrating the recognition that neutrality in the sense of complete freedom from belief will never be possible, and that the ideal of pluralism is nourished by the different beliefs by which it is made up, and by a continuous interpretative effort to reconcile them - without hereby excluding that reconciliation may sometimes prove to be impossible.

So, these are the complexities which the CJEU will meet when sometime in the future it will stand confronted with a case concerning discrimination on the grounds of religion or belief. It will be facing the inescapable dilemmas which haunt the field of religious freedom and the restrictions of it, inherited as part of the modern European State. Should it invoke an understanding of 'religion or belief' centering on 'inner conscience' and a formal ideal of neutrality, - but be in risk of breaking this understanding and this ideal in practice, like the ECtHR? Should the full step into ideological secularism be taken? Or should an integrating approach be adopted - meaning that the sources of communities, history and tradition would be taken into account? Or would the CJEU rather need to navigate between these three approaches, the contradictuous formal approach, the alienating approach of ideological secularism and the integrating approach which transforms our inherited understanding of the relationship between state and religion - since all three are obviously deeply problematic?

There would be a fourth possibility, of course: establishing an ideological foundation of the pluralistic state which is not called 'neutrality'. This possibility does not seem to be in play in the argumentations of the ECHR. None the less, we may raise the question of whether such an ideological foundation does not somehow underpin the understandings of democracy, pluralism and human rights afterall. Is it not so that an interpretational horizon exists within which these concepts are meaningful at all? We cannot, however, get any closer to this fourth possibility on the basis of the ECHR-judgments concerning religious freedom.

The ECtHR-case-law leaves us with inescapable dilemmas rather than clear directions or tendencies. These dilemmas are as relevant to the interpretation of the General Framework Directive, as they are to the ECtHR-cases we have analyzed. With respect to these dilemmas, there is one conclusion we can definitely draw: they concern

ideological understandings of the foundations of the state - that is, of the meaning of democracy, pluralism and human rights. Consequently, the non-name 'Religion or Belief' is dependent on complicated ideological considerations as to the foundation of the state. This makes it extremely fragile, and potentially weak.

PART I.3: SIGNIFIERS IN-BETWEEN

NAMES AND NON-NAMES

In Part I.3, we shall not only be confronted with one kind of signifiers, as in Part I.1 and I.2 - but with a number of different signifiers along with a range of different logics.

We may speak of one dominant kind of signifier, though: double-names. Double-names spring from the following formula: *'There shall be equal treatment between men and women'*. This formula constitutes the overall formula of EU non-discrimination Directives with respect to sex, and it corresponds to what we shall call the 'determinately reduced version of the non-significance logic'.

Double-names are names which are not stated in isolation, but only in pairs. This means that a double name is never stated unambiguously. A double name is always stated together with another name which could be called the shadow name of the first name. But since double names come in symmetrical pairs, it cannot be said in advance which one of the two would be the shadow name. They are both potentially using the other as a shadow name, and they are both potentially being used by the other as a shadow name. *'There shall be equal treatment between men and women'* simultaneously means *'there shall be no discrimination of women in comparison to men'* and *'there shall be no discrimination of men in comparison to women'*.

Double-names have features in common with both names and non-names, for which reason they can be said to lie in between two.

They resemble names in the sense that they are designated in advance, that is, in a permanent manner. We are confronted with two double-names, and we know them: *'Woman in contrast to being a man'* and *'Man in contrast to being a woman'*. However, as explained above, only in connection with particular applications of the non-discrimination Directives in question would we be confronted with either one or the other. Also, we know in advance the exact meaning of the discrimination ground. *'Sex'* means *'being of one sex (and not the other sex)'*. Hereby, we also know which relations of comparison may be established in particular cases. The situations of women may be compared with the situations of men, and the situations of men may be compared with the situations of women. But again, only in connection with particular applications will we stand confronted with either one or the other.

Accordingly, double-names also resemble non-names: they arise and die in each particular application, as do the particular comparisons by which non-discrimination rights depend. But in contrast to non-names, double-names are permanently known: we know which particular names and comparisons will rise and die in connection with ever new cases.

Due to this logical position in-between names and non-names, double names are neither finished nor unfinished names, but rather finished names which are held back. And they are partly unwanted: they are meant to be insignificant in relation to the matters covered by the non-discrimination Directives in question, but they are still permanently stated and as such they correspond to specific categorizations of people.

Apart from this dominant kind of signifier, the double-name, the discrimination ground 'sex' gives rise to a number of other signifiers which are either names (but mostly implicit and very flexible names) or point to the logic of non-names. In this sense, we are facing a field in-between names and non-names in more than one way. These other signifiers will be derived from the legislation (in chapter 15) and - as far as one very important signifier is concerned - from the case-law (in chapter 16).

We shall begin with an analysis of the four non-discrimination Directives which presently form the secondary law basis of the principle of non-discrimination with respect to sex within the area of social rights and workers rights. Afterwards, we shall examine the case-law with a view to the substances and attributes of the various signifiers derived from the legislation. However, not all of the signifiers implied in the legislation have proved to be important in the case-law, at least not so far. I shall be focusing, therefore, on those signifiers which play important parts, namely the maternity-related names (which, as we shall see, can be united under a CJEU-established name), the signifier 'Transsexuality' (which point in the direction of non-names), and finally the double-names '*Man in contrast to being woman*' and '*Woman in contrast to being man*'.

As we shall see, substances and attributes are in many cases closely connected - for which reason the analyses will be carried out in ways which do not always distinguish strictly between the two. However, in the concluding sections of the chapters, the distinction will be reestablished, and the respective strengths and weaknesses of the different signifiers will be evaluated. The main elements involved are the same as those involved in Part I.2: flexibility versus fixation; precision versus openness; formal versus

associative or contextualized approaches; the role of exclusions and ‘justifications of discrimination’; and the role of fundamental principles and rights.

Chapter 15

Four complementary Directives

- a conglomerate of signifiers and logics

The discrimination ground ‘sex’ is certainly the most complex of all the discrimination grounds we will be meeting on our journey. ‘Sex’ has been an important discrimination ground since the late 1970’s - in which years the first non-discrimination Directives appeared, covering vast areas such as major parts of social security, equal pay and other working conditions, and access to work and training.⁵⁷⁸

The Treaty article requiring equal pay between men and women goes back to the Treaty of Rome of 1957⁵⁷⁹. From the late 1970’s, the principle of non-discrimination on the grounds of sex was subject to an explosive development, reflected in secondary law as well as case-law. In 1999, when the The Treaty of Amsterdam entered into force, primary law was strengthened as well. The promotion of equality between men and women now appeared among the general aims which should be pursued by the EU, and even more importantly, a new paragraph had been added to the article listing the activities of the Community, laying down that in all those activities, ‘*the Community shall aim to eliminate inequalities, and to promote equality, between men and women*’.⁵⁸⁰ This principle, known as the principle of ‘gender mainstreaming’ within the EU has now

⁵⁷⁸ The late 1970’s also witnessed a core judgment, in which the CJEU stated that ‘*respect for fundamental personal human right is one of the general principles of Community law, the observance of which it has a duty to ensure*’, and that there ‘*can be no doubt that the elimination of of discrimination based on sex forms part of those fundamental rights*’. Case C-149/77, *Defrenne, III*, par. 26-27. At the time of the events which formed the basis of the case there was still no rule of Community law prohibiting discrimination between men and women other than the Treaty article on equal pay. Accordingly, the judgment could not declare the discrimination suffered by Miss Defrenne to be contrary to to Community Law since that discrimination concerned rules regarding the termination of her employment contract (par. 33). When the judgment was delivered (1978), two important non-discrimination Directives had already been adopted, and a third one was under way (see below)

⁵⁷⁹ Art. 119 of the Treaty of Rome, now Art. 157, TFEU

⁵⁸⁰ The Treaty establishing the European Community, as amended by the Amsterdam Treaty, Art. 2 and 3(2)

been given its own article in the Lisbon Treaty.⁵⁸¹ Also, in the Lisbon Treaty, 'equality between men and women' is brought forward as a fundamental value of the EU as such, in line with pluralism, non-discrimination, tolerance, justice and solidarity.⁵⁸²

So, as it appears, the discrimination ground sex is given special attention in the Treaty in comparison with the other discrimination grounds, and it certainly comes with a heavy case-law and a range of non-discrimination Directives (and amended Directives) in its baggage. Indisputably, non-discrimination-rights with respect to sex have been given a high priority in of EU law, and they still constitute a major concern. However, whether this means that we should understand 'sex' as a discrimination ground ranged above the other discrimination grounds, is not given. Just as we cannot presuppose that those non-discrimination rights unfold any easier, or any less problematic from a conceptual point of view, than what we have seen in connection with those other grounds.

Obviously, I cannot do justice to the signifier 'sex', not even to the contemporary problematics adhering to it. I shall therefore focus on the issues which have been our general concern throughout the investigation: the nature of the signifier itself (the question of who 'the persons concerned' might be); the specific non-discrimination logics attributed to it and finally the role of exclusions (connected to issues of material scope) and justification of discrimination. Also, in connection with this signifier, we shall be particularly aware of whether any fundamental presumptions as to the nature of men and women, respectively, are implied.

However, we shall begin with an analysis of the four Directives which presently form the secondary law basis of the principle of non-discrimination with respect to sex. These four Directives are structured just like the Race Equality Directive and the General Framework Directive. And to a large extent, they entail the same provisions and formulations as those Directives. But they also deviate from the latter Directives in certain important ways. Most notably, they imply a conglomerate of different signifiers and logics of rights. But also as far as material scope is concerned, they have their own specific features.

The analysis will mainly focus on the signifiers of right-holders and the particular logics of rights connected to them. But before digging into these complexities, we shall

⁵⁸¹ 'In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women', art. 8, TFEU

⁵⁸² Art. 2, TEU

go through the main features of the four Directives from the point of view of material scope.

Four complementary Directives

The four Directives come with very different histories. The oldest, Directive 79/7/EEC⁵⁸³ dates back to the late 1970's; it is one of the original 'first-born' Directives. It is a core Directive seen from our point of view in that it deals with social security and social assistance benefits, and it comes with an enormous case-law. We shall refer to it as the Social Security Equality Directive.

Another core Directive, 2006/54/EC⁵⁸⁴, dealing with employment issues in a very broad sense, is fairly new, but directly traceable to some of the original 'first born' Directives. It is a recast which brings together in one Directive no less than four earlier Directives and their amendments. Directive 2006/54/EC has still only scarcely been subjected to interpretations by the CJEU, but the earlier Directives it is composed of bring with them a huge and substantial case-law, including very recent judgments, since the earlier Directives remained in force until August 2009. We shall refer to it as the Employment Equality Directive.

Also Directive 2010/41/EU⁵⁸⁵, concerning the rights of self-employed workers, has traces in the past. It builds on an earlier Directive from the mid 1980's and its amendments. The deadline for implementation of the new Directive in the member states has only just recently been passed (August 2012), so naturally, it has not yet been interpreted by the CJEU. The old Directive it builds on has only been interpreted in a few cases. In the words of the new Directive, the old Directive '*has not been very effective*'⁵⁸⁶. The scarce case-law may be seen as a symptom thereof. This Directive shall be called the Self-employment Equality Directive.

Finally, Directive 2004/113/EC⁵⁸⁷ concerning goods and services is completely new. It has been implemented in the member states (or is at least supposed to be so) since

⁵⁸³ Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security

⁵⁸⁴ Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

⁵⁸⁵ Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC

⁵⁸⁶ Recital 1, Dir. 2010/41/EU

⁵⁸⁷ Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services

December 2007. However, it has scarcely gathered any case-law. Except for a number of judgments concerning the failure of implementation by member states, only one judgment is noteworthy in that it lays down the invalidity of a specific paragraph of the Directive.⁵⁸⁸ This Directive will be referred to as the Goods and Services Directive.

The four Directives are complementary⁵⁸⁹ as concerns their respective material scopes. The three of them can be said to presume (and hereby establish) three different institutional areas, including lines of demarcation between them: *social rights stemming from the legislation of the State*; *social rights stemming from the employment relationship* and *goods and services, carrying exchangeable economic value*. The first distinction is already familiar to us. In chapter 13, we analyzed how it was drawn by the CJEU in the Maruko and Römer judgments. In this connection, the concept of pay played a crucial role.

The fourth Directive, the Self-employment Equality Directive is a *residual* Directive in the sense that it only covers issues which are not already covered by the other three Directives. It does not establish an institutional area of its own.

Let me first briefly describe the four directives with respect to their material scopes. Afterwards, I shall address the issue of how to distinguish between them. As is already clear from the Maruko and Römer judgments, lines of demarcation are not always easily drawn. There are situations in which it would not be evident whether a given right (or scheme) would be covered by one or the other of the Directives. And since the Directives are different with respect to the exemptions they lay down, it may very well be crucial to the outcome of a judgment under which Directive the case in question is being considered.

The Social Security Equality Directive

The Social Security Equality Directive covers statutory social security schemes which protect against sickness, invalidity, old age, accidents at work and occupational diseases and unemployment, as well as social assistance which either supplements or replaces those mentioned social security schemes⁵⁹⁰. The Directive underlines that

⁵⁸⁸ Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL a. o.*, which declares art. 5(2) of Directive 2004/113/EC invalid with effect from 21 December 2012

⁵⁸⁹ This is even stated in the Directives themselves. See f. inst. the preamble of Art. 79/7/EEC and Art. 1(2) of Dir. 76/207/EEC (a predecessor of Directive 2006/54/EC)

⁵⁹⁰ Art. 3(1), Dir. 79/7/EEC

provisions concerning family and survivors benefits are excluded from its scope.⁵⁹¹ Apart from that, it is clear that there will be a number of benefits - social security as well as social assistance benefits, but especially the latter - which are not triggered by the listed risks and therefore not included. It could be housing or basic means of subsistence.⁵⁹² Furthermore, occupational schemes are excluded; the Directive covers only statutory schemes.⁵⁹³

In addition to these overall exclusions, the member states may choose not to apply the principle of non-discrimination with respect to a range of more specific areas. Some of these exclusions concern the derived benefits of a dependent wife (with respect to benefits granted in the cases of old age, invalidity, accidents at work and occupational diseases); some of them concern benefits granted to persons who have brought up children; and finally some of them concern the determination of pensionable age in the respective member states and the consequences thereof for retirement pensions and other benefits.⁵⁹⁴ Especially the latter issue has given rise to a number of cases, as we shall see.

These more specific exclusions are accompanied by the following statement: *'Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.'*⁵⁹⁵ This statement reflects the title of the Directive according to which the Directive concerns *'the progressive implementation of the principle of equal treatment for men and women in matters of social security'*. The Directive marks in other words the beginning of a gradual development; and in the beginning, the principle of equal treatment is only expected to be partly implemented.

The specific exclusions bear witness to an acknowledgement of the existence of deep layers of discrimination which cannot (presently) be captured by non-discrimination rights. National systems often favor women with respect to the above mentioned

⁵⁹¹ - unless they are granted by way of increases of the benefits concerning sickness, invalidity, old age, accidents at work and occupational diseases and unemployment, Art. 3(2), *ibid*

⁵⁹² The CJEU has for instance clarified that *'housing benefits'*, *'supplementary allowance or income support, which may be granted in a variety of personal situations to persons whose means are insufficient to meet their needs as defined by statute'*, and *'concessionary fares on public passenger transport services'* are excluded from the scope of Dir. 79/7/EEC. See Case C- 243/90, *The Queen*, Joined Cases C-63/91 and C-64/91, *Jackson and Cresswell*, and Case C-228/94, *Atkins*

⁵⁹³ Art. 3(3), *ibid*.

⁵⁹⁴ Art. 7(1), *ibid*

⁵⁹⁵ Art. 7(2), *ibid*

benefits in order to compensate them for the discrimination they suffer in other respects. The Directive offers a path of compensation in order to meet the problem of multiple layers of discrimination. This path is possible simply because positive discrimination of women already exists in the social security systems of the member states.

It should be noted, though, that the specific exclusions are not necessarily just there for the sake of the women. It is clear that they also serve the existing structures of the national systems. The member states are not required to change everything at once.

Due to the specific exclusions, the idea of *cultural and changeable forms of discrimination* is inscribed within the Directive. For a transitional period, positive discrimination of women might prove necessary in order to compensate for comprehensive forms of discrimination on grounds of sex pervading society. Are there, then, also forms of discrimination which are permanent, we may ask? This is left open by the Directive

The Employment Equality Directive

The Employment Non-discrimination Directive is a recast which brings together in one Directive four earlier Directives and their amendments. The new Directive is composed in a way which makes the earlier Directives directly traceable in it. It is divided into three chapters, corresponding to the three earlier Directives: chapter 1 concerns *pay*⁵⁹⁶, chapter 2 concerns *occupational social security schemes*⁵⁹⁷, and chapter 3 concerns *access to employment, vocational training and promotion and working conditions*⁵⁹⁸.

We see that originally, non-discrimination Directives on the ground of sex was drafted according to a division into four different areas: statutory social security schemes; pay; working conditions in a broader sense; and occupational social security schemes. By bringing together in one Directive the areas of pay, working conditions in a broader sense and occupational social security schemes, the original division into four areas have been reduced to a division into two overall areas, one work-related and another related to statutory schemes. The concept of pay plays a huge role for this

⁵⁹⁶ - hereby integrating the earlier *Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women*

⁵⁹⁷ - integrating *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*

⁵⁹⁸ - integrating *Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes*. Finally, also *Directive 97/80/EC on the burden of proof in cases of discrimination based on sex* has been integrated (in art. 19 of 2006/54/EC)

development. According to the CJEU, all occupational pension schemes constitute 'pay'.⁵⁹⁹

'Pay' is defined in chapter 1 of the Directive as *'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/ her employment from his/her employer'*⁶⁰⁰. This is clearly a very broad definition, - but it depends on the employment relationship.

The occupational social security schemes, dealt with in chapter 2 applies to the same risks as does the Social Security Equality Directive, namely sickness, invalidity, old age, industrial accidents and occupational diseases. But in contrast to the latter Directive, it also applies to survivors benefits and family benefits, *'if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment'*.⁶⁰¹

'Occupational social security schemes' are defined negatively, as *'schemes not governed by Council Directive 79/7/EEC'*. But they are also defined positively, as schemes the purpose of which is to *'provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional'*.⁶⁰²

The occupational social security schemes covered by chapter 2 of the Employment Equality Directive appear, in other words, as complementary schemes in relation to the schemes covered by the Social Security Equality Directive. In this connection, it is important to note that the former Directive is not characterized by substantial exclusions as is the latter. Chapter 2 does, however, list a number of exclusions from the material scope. These exclusions more or less all center on schemes concluded on an individual basis. In addition, certain exclusions apply in relation to schemes for self-employed people.⁶⁰³

Chapter 3 specifies that discrimination is prohibited in relation to a range of working conditions: *'conditions for access to employment, to self-employment or to occupation [...], access to all types and to all levels of vocational guidance, vocational training [...]; employment*

⁵⁹⁹ 'In its judgment of 17 May 1990 in Case C-262/88 (1), the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 of the Treaty.' Recital 13, Dir. 2006/54/EC

⁶⁰⁰ Art. 2(1)(e), *ibid.*

⁶⁰¹ Art. 7(1)(a,b), *ibid.*

⁶⁰² Art. 2(1)(f), *ibid.*

⁶⁰³ Art. 8(1), art. 11, *ibid.*

and working conditions, including dismissals, as well as pay [...]; membership of, and involvement in, an organisation of workers or employers [...]'.⁶⁰⁴ No exemptions are laid down, but a path of justification of discrimination is provided in the form of the occupational-requirement-argument ⁶⁰⁵ (already known to us from the General Framework Directive and the Race Equality Directive).

It is noteworthy that the earlier, now amended Directives dealing with 'working conditions' and 'occupational social security schemes', respectively, were characterized by a number of exclusions. Both Directives were 'progressive' Directives, just like the Social Security Equality Directive, allowing the member states to uphold discrimination in a range of areas, asking them merely to assess periodically whether the exclusions would still be justifiable. ⁶⁰⁶ In the new Directive, however, most of these dynamical exclusions have disappeared.⁶⁰⁷

The Goods and Services Directive

The Goods and Services Directive applies to '*all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.*'⁶⁰⁸ This statement comprises numerous informations as to the material scope of the Directive.

First and foremost: What is meant by 'goods and services'? According to the preamble, 'goods and services' are to be understood within the meaning of the provisions of the Treaty in relation to the free movement of goods and services.⁶⁰⁹ The Treaty is brief as to the respective definitions of 'goods' and 'services'. But these notions - which constitute fundamental concepts within EU-law - have been extensively interpreted by the CJEU. For our purposes, it will be sufficient to emphasize the following features:

⁶⁰⁴ Art. 14(1), *ibid*

⁶⁰⁵ Art. 14(2), *ibid*

⁶⁰⁶ Art. 3(2)(c) and art. 5(2)(c), Dir. 76/207/EEC; art. 9, Dir. 86/378/EEC. Also the original provision on 'occupational requirements' (art. 2(2) of Dir. 76/207/EEC) was to be assessed periodically '*in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned*' (Art. 9(2)).

⁶⁰⁷ A few dynamical exclusions have survived as regards occupational social security schemes for self-employed persons. Art. 11, Dir. 2006/54/EC

⁶⁰⁸ Art. 3(1), Dir. 2004/113/EC

⁶⁰⁹ Recital 11, *ibid*: '*Goods should be taken to be those within the meaning of the provisions of the Treaty establishing the European Community relating to the free movement of goods. Services should be taken to be those within the meaning of Article 50 [now art. 57] of that Treaty.*'

As to the concept of goods, the Treaty makes clear that not only products originating from the member states, but also products from third countries which are in free circulation in the Member States, are to be understood as goods within the context of 'free movement of goods'.⁶¹⁰ The CJEU has clarified that the range of goods covered is extremely wide, but that the market-aspect of a given entity constitutes a fundamental condition: an entity must have economic value and be exchangeable in order to constitute a good: *'By goods [...] there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.'*⁶¹¹

As to the concept of services, the Treaty is only slightly more informative. Article 57 declares: *'Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.'*⁶¹² 'Remuneration' proves to be crucial for the CJEU. In principle, services related to health care, education or the labor market could be covered by the concept of services. But only if they are provided for remuneration. Private schools courses which are mainly financed by private means, f.inst., are covered by the concept⁶¹³, whereas courses provided by establishments forming part of a public system of education and mainly financed by public means, are not.⁶¹⁴ As concerns the establishment and upholding of that distinction, the overall *intention* of the State is considered important: *'The Court has thus stated that, by establishing and maintaining such a system of public education, normally financed from the public purse and not by pupils or their parents, the State does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational fields'*.⁶¹⁵ In other words, the distinction is carried by a particular understanding of the role of the state: The state is supposed to be occupied with serving the needs of its population socially, culturally and educationally, and not with making money on its population with respect to these needs.

⁶¹⁰ Art. 28(2), TFEU

⁶¹¹ Case C-7/68, *Commission v Italy*, Grounds of Judgment, B(1)

⁶¹² Art. 57, TFEU. Art. 57 also provides that *'services' shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions.'*

⁶¹³ Case C-318/05, *Commission v Federal Republic of Germany*, par. 69, 71-72

⁶¹⁴ Case C-281/06, *Jundt*, par. 30; C-263/86, *Belgian state v Humbel and Edel*, par. 18; C-109/92, *Wirth*, par. 15-16

⁶¹⁵ Case C-318/05, *Commission v Federal Republic of Germany*, par. 68; C-281/06, *Jundt*, par 30

However, the distinction between services which are provided for remuneration, and services which are not, proves to be more complicated than that. Firstly, the court makes clear that a service is still provided for remuneration even if it is not the users of it who pay for it (like f.inst. the pupils of a school and their parents).⁶¹⁶ This means that services financially based on different sorts of private funds might still constitute services within the meaning of article 57 of the Treaty. But it also opens up the possibility that services which are ultimately paid by public means might constitute services within the meaning of article 57. If a member state chooses to outsource some or more of its welfare services to private companies, then these services will be services within the meaning of article 57, - also if it is ultimately the state and not the users of the services who pay for them, largely or entirely. Likewise, the court makes clear that the person (or organization) providing a service does not need to be seeking to make a profit, in order for the service to fall within the scope of article 57. This means that *'services carried out for or on behalf of an institution established under public law'* (a public university f.inst.) may still constitute services in accordance with article 57. Decisive is only that the service is provided for remuneration; as the court says, *'the activity must not be provided for nothing.'*⁶¹⁷

Also in transnational cases where a citizen of one member state receives a service, hospital treatment f.inst., in another member state for remuneration, but is reimbursed for his or her expenses by the state in which he or she is a citizen, the service in question will constitute a service within the meaning of article 57. In such cases it is entirely irrelevant how the state in which the person is a citizen has chosen to organize its welfare services, - whether or not identical services are being provided free of charge in that system, and whether or not those identical services would fall within the scope of article 57 or not.⁶¹⁸

What we find is a basic distinction between *particular purposes of the state, namely serving the needs of its population socially, culturally and educationally*, on the one hand, and *the phenomena of economic exchange, generally oriented towards profit-making*. However, this basic distinction is blurred by the fact that also public activities provided for

⁶¹⁶ 'According to consistent case-law, Article 50 EC does not require that the service be paid for by those for whom it is performed.' Case C-318/05, *Commission v Federal Republic of Germany*, par. 70

⁶¹⁷ Case C-281/06, *Jundt*, par 32, 33, 36-38. See also C-318/05, *Commission v Federal Republic of Germany*, par. 67: 'It has already been held that [...] the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question.'

⁶¹⁸ Case C-372/04, *Watts*, par. 90-91

remuneration but not with the aim of profit-making, and activities for which the state ultimately pays, performed by private providers, or performed in other member states, might constitute services within the meaning of article 57 of the Treaty. In other words: The fact that an exchange of values takes place, that a welfare service is provided for something and not for nothing, is in itself sufficient for breaking down the basic distinction between state purposes and the phenomena of market exchange, - no matter what kind of purposes lie behind the service in question.

So, equipped with an insight into the basic definitions of the concepts of 'goods' and 'services', let us return to the definition of material scope in the Goods and Services Non-discrimination Directive. The Directive applies to *'all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies [...]'*⁶¹⁹. The last part of this quote confirms what we learned about goods and services above. Goods and services are both defined as something which have economic value and which can be exchanged in return for something. In principle, they are defined as belonging to a sphere which is opposed to the state purpose of serving the population socially, culturally and educationally. But due to the power of the expression 'provided for remuneration' within the context of services⁶²⁰, this basic opposition breaks down. The economic exchange-aspect in itself proves to be more powerful than any declared or presumed purposes. Accordingly, the Directive does not only cover the area of economic profit-making - what we usually call 'the market' - it also covers a range of services which are provided by public bodies, or for public reasons.

The second half of the definition of material scope reads as follows: *'[...] and which are offered outside the area of private and family life and the transactions carried out in this context.'*⁶²¹ In other words: Private and family life constitute a sphere of its own - different from the sphere of economic exchange (although, as the wording implies, economic transactions do exist within this sphere as well), and different from the state purpose of serving the population socially, culturally and educationally.

⁶¹⁹ Art. 3(1), Dir. 2004/113/EC (also quoted above)

⁶²⁰ I have chosen not to discuss to what extent the concept of goods open up for similar ambiguities. For the present purposes - to determine the material scope of Directive 2004/113/EC with special emphasis on the state-market-distinction - it is sufficient to show that at least one of the two concepts ('goods' and 'services') is capable of submerging that distinction.

⁶²¹ Art. 3(1), Dir. 2004/113/EC (also quoted above)

Furthermore, we learn that *'matters of employment and occupation'* are excluded from the scope of the Directive. Only *'insurance and pensions which are private, voluntary and separate from the employment relationship'* fall within the material scope. In other words, the Directive is supposed to complement the Employment Equality Directive, not overlap with it. Also matters of self-employment are excluded, but only in so far as they are covered by other legal instruments.⁶²²

Also education and the content of media and advertising are excluded from the material scope.⁶²³ This means that all sorts of education which would otherwise be covered by the concept of *'services'* (education given at private schools and universities, courses provided by public educational bodies for remuneration) are excluded. Obviously, these excluded areas are important areas: they are areas which greatly affect the reproduction of historically inherited patterns of discrimination. And media and advertising belong to the *'dream-shapers'* of contemporary society.

The Self-employment Equality Directive

The Self-employment Non-discrimination Directive contains no overall positive designation of material scope. We must piece it together through various statements.

Firstly, the subject matter of the Directive is declared to be *'putting into effect [...] the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, as regards those aspects not covered by Directives 2006/54/EC and 79/7/EEC.'*⁶²⁴ This is a purely negative designation of material scope, namely *'those aspects not covered by Directives 2006/54/EC and 79/7/EEC'*. But many aspects are not covered by those two directives! Also, it is added, that the Directive does not apply to matters covered by the Goods and Services Equality Directive, or to matters covered by any other Directive laying down the principle of non-discrimination with respect to sex.⁶²⁵

A few articles later, we are told that *'there shall be no discrimination whatsoever on grounds of sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.'*⁶²⁶ This statement does contain a positive designation of the

⁶²² Art. 3(4), recital 15, *ibid*

⁶²³ Art. 3(3), *ibid*

⁶²⁴ Art. 1(1), Dir. 2010/41/EC

⁶²⁵ Art. 1(2) and recital 10, *ibid*

⁶²⁶ Art. 4(1), *ibid*

material scope, but a very general one, namely '*public or private sectors*'. The remaining parts of the statement provides us with *examples* of what would fall within the material scope.

The Directive also contains provisions on social protection and on maternity benefits.⁶²⁷ These provisions grant rights to specified right-holders - spouses and life partners of self-employed workers, taking part in the self-employed activity, and female self-employed workers, spouses and life-partners - and are not formulated as non-discrimination rights.

On the basis of this piecemeal, primarily negative designation of material scope, we may draw the following two conclusions:

Firstly, the material scope of the Self-employment Non-discrimination Directive does not correspond to an area of its own, like the Social Security Equality Directive corresponds to the area of *social rights stemming from the legislation of the State*, the Employment Equality Directive corresponds to the area of *social and workers rights stemming from the employment relationship* and the Goods and Services Non-discrimination Directive corresponds to the area of *goods and services, carrying exchangeable economic value*. The Self-employment Non-discrimination Directive does not contribute to the establishment of a basic complementary institutional structure. It simply presupposes the structure established by the other three Directives. We may describe it as a *residual Directive*: It complements the other Directives by identifying specific issues which have been neglected by those Directives.

When read as a whole, it is clear that the meaning of the Directive is to take into account problems which are specific to self-employed workers, such as the establishment of a business, the status of a spouse who contributes to the self-employed activity of the person with whom he or she is married, and the access to maternity rights for self-employed women. In general, work- and social rights issues of self-employed workers are covered by the other three Directives. But since these Directives have not taken into account that conditions for gaining access to self-employed work are of a specific nature, that the spouses of self-employed workers constitute a specific - and not always recognized - category of workers, and that self-employed women are not necessarily covered by social security schemes which ensure them maternity benefits, an additional Directive has been drafted with respect to those issues.

⁶²⁷ Art. 7 and 8, *ibid*

It should be mentioned that although the Directive itself is very new the idea of complementing the basic structure made out by other Directives with a residual Directive of this kind is not new. The Self-employment Non-discrimination Directive builds on an earlier Directive from 1986, Directive 86/613/EEC⁶²⁸.

Secondly, we may conclude that although the overall purpose of the Self-employment Non-discrimination Directive as a residual Directive becomes clear when read as a whole, its designation of material scope is still inadequate. The Directive covers aspects in the private and public sector which are *not* covered by other existing non-discrimination Directives with respect to sex. We are merely given *indications* and *examples* of what it does cover. That leaves the material scope very open.

The Directive does hardly specify any exclusions from its ragged and open material scope. Internal family-relations are excluded, though: *'The principle of equal treatment should cover the relationships between the self-employed worker and third parties within the remit of this Directive, but not relationships between the self-employed worker and his or her spouse or life partner.'*⁶²⁹ This is in line with what we saw in the Goods and Services Equality Directive: Private and family life constitute a sphere of its own - a fourth institutional area, so to speak, in addition to the three areas underpinning the complementary structure of the four Directives. But an institutional area characterized by non-regulation as far as the principle of non-discrimination on the grounds of sex are concerned.

Ambiguous borders - due to concepts with colonizing capacities

So, an institutional structure consisting of three different areas is underpinning the four Directives - which, accordingly, are seen as complementary. The areas are the following: *social rights stemming from the legislation of the State; social rights stemming from the employment relationship and goods and services, carrying exchangeable economic value.*

However, as has already been indicated, the borders between them are not unambiguous. Most importantly, the wide-reaching definition of the concept of 'pay' means that certain statutory schemes might fall under the scope of the Employment Equality Directive, instead of under the Social security Equality Directive. As we saw in

⁶²⁸ Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood. Dir. 79/7/EEC and the three earlier Directives on which the three chapters of Dir. 2006/54 are build (Dir. 75/117/EEC, Dir. 76/207/EEC and Dir. 86/378/EEC) were all in force at that time.

⁶²⁹ Recital 13, *ibid*

the Maruko and Römer judgments (analyzed in chapter 13), and as confirmed in the Employment Equality Directive, social security rights of a public nature may constitute pay, as long as they 'reflect' the employment relationship. In this connection, it is irrelevant whether overall purposes, organizational concerns or even funding of the state are reflected in the schemes in question.

Likewise, the wide-reaching definition of the concept of 'services' (which in turn depends on the concept of 'remuneration') means that certain statutory schemes might fall under the scope of the Goods and Services Directive, instead of under the Social Security Equality Directive. In principle, services are defined as belonging to a sphere which is opposed to the state purpose of serving the population socially, culturally and educationally, - but the economic exchange-aspect in itself proves to be more powerful than any state purposes. Accordingly, the concept of 'services' does not only cover the area of economic profit-making, but also a range of services which are provided by public bodies as well as services provided by private bodies, but for public reasons.

The fact that statutory schemes might be 'transported' from the Social Security Equality Directive to the Employment Equality Directive or to the Goods and Services Directive might very well be crucial to the outcome of particular judgments since the former Directive is characterized by far more exemptions than the two latter Directives, not least the 'dynamical' exemptions.

But there are also other border issues which deserve mentioning. The relationship between 'pay' and occupational social security schemes in general is not entirely unambiguous (this concerns the relationship between chapter 1 and 2 of the Employment Equality Directive). Furthermore, it could be asked when insurance or pensions are truly 'separated from the employment relationship' (this concerns the relationship between the Employment Equality Directive and the Goods and Services Directive and may influence the rights of self-employed people). Finally, a range of questions arise with respect to the categorization of the rights of self-employed people in this institutional structure: when do they amount to statutory rights, to employment issues or to goods and services, and when do they fall outside all of these areas so that it will be the residual Directive, the Self-employment Equality Directive, which will apply?

We shall, however, emphasize in particular the two first-mentioned issues, concerning the concepts of 'pay' and 'services'. Both of these concepts have 'colonizing capacities', that is, they are capable of integrating within their scope a range of rights which might

otherwise have been viewed upon as statutory rights. Interestingly, the Social Security Equality does not, likewise, entail a concept with colonizing capacities. What the area of *rights springing from the legislative power of the state* has is, at best, intentions and purposes such as serving the needs of the population in various ways. But faced with the concepts of 'pay' and 'services', such purposes become irrelevant. This means that the overall complementary structure is marked by asymmetry.

A conglomerate of different signifiers and logics

As already mentioned in the Introduction to Part I.3, the field of non-discrimination rights with respect to the discrimination ground sex entails a conglomerate of different signifiers and logics. In the following, the different signifiers entailed - explicitly or implicitly - in the four Directives described above will be sought and analyzed.

The double-names 'Man in contrast to being woman' and 'Woman in contrast to being man' - corresponding to the determinately reduced non-significance logic

All four Directives refer to 'women' and 'men', and not just to 'the discrimination ground sex'. To be accurate, the title of all Directives contains the expression '*the principle of equal treatment for men and women*', and so does their first article: '*The purpose of this Directive is the progressive implementation [...] of the principle of equal treatment for men and women in matters of [...]*'⁶³⁰. Only when non-discrimination is introduced specifically, we encounter the expression 'ground of sex': '*The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly [...]*'.⁶³¹

This means that we are provided with a clear designation of right-holders, 'men' and 'women'. However, these signifiers are not established as names in their own right, but as names which should be seen in the light of another name. More precisely, the signifiers in question would be 'Man in contrast to being a Woman' and 'Woman in contrast to being a Man'. As such, the standard of comparison (due to which the logic of non-discrimination may function at all) is already implied in each signifier. For this reason, we shall call them double-names. A double name is always stated together with another name which could be called the shadow name of the first name. But since

⁶³⁰ Art. 1, of Dir. 76/207/EEC, Dir. 2006/54/EC, Dir. 2010/41/EU and Dir. 2004/113/EC

⁶³¹ Art. 2(1), Dir. 76/207/EEC; art. 2(1), Dir. 2006/54/EC; art. 3, Dir. 2010/41/EU and 4(1), Dir. 2004/113/EC

double names come in symmetrical pairs, it cannot be said in advance which one of the two would be the shadow name.

Double names resemble non-names in the sense that they arise and die as names in each particular application. But in contrast to non-names, double-names are permanently known: we know in advance which particular names and comparisons will rise and die in connection with ever new cases.

Double-names correspond to the *determinately reduced non-significance logic*. The significance logic is determinately reduced exactly because the discrimination ground is not given free (meaning that an in principle endless number of different particular names could arise on its basis), but limited to two possibilities, determined in advance. This logic would read: *'The aspect of 'being one or the other sex' shall be insignificant within a certain area of rights'*.

But also a reversed version of the determinately reduced non-significance-logic exists (just as a reversed version of the non-significance-logic exists), namely due to the possibility of positive discrimination opened by the Directives: *'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.'*⁶³² And Article 141(4) of the Treaty (now article 157(4)) lays down that such measures would provide for *'specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'*.

Positive discrimination implies a reversal of the determinately reduced non-significance-logic saying 'there shall be discrimination between men and women'. Strictly speaking, this logic constitutes an exception from the principle of non-discrimination, but an exception which is meant to serve the same principle. When stated in general, it is a logic based on the double-names 'Man in contrast to being a women' and 'Woman in contrast to being a Man'.

However, to the extent that it is indicated that it is 'The Underrepresented Sex' which shall be favoured, a new signifier has been introduced. This signifier functions on the basis of the double-names in the sense that it specifies, in any given context, which one of the double names 'Man' and 'Woman' will constitute the shadow name and which one will use the other as such. That is, it functions on the basis of a contextualized comparison of the two sexes. In some of the Directives, it is indicated that 'The

⁶³² Art. 4, Dir. 2006/54/EC. Similar formulations in art. 6, 2004/113/EC, and art. 5, Dir. 2010/41/EU

Underrepresented Sex' is most likely to be a signifier of women⁶³³, rather than men, but in principle, it can only be determined in a particular context who 'The Underrepresented Sex' might be.

As far as concerns the substances of the double-names, no definition is given of either of them. No definition is required, one might say. We know what people should be categorized as men or women, respectively; only in rare and extreme cases could there be any doubts. As we shall see in some of the cases concerning transsexuality, the sex of a person may in fact be subjected to dispute. When later examining the relevant case-law, we shall be witnessing how the CJEU approaches such disputes.

But do the Directives not in any way entail any definitions or understandings of the nature of 'Man in contrast to being a Woman' and 'Woman in contrast to being a Man'? I believe that such understandings are in fact implied in two statements in the preamble of the Goods and Services Equality Directive.

The first statement concerns the crucial notion of 'comparability': *'Direct discrimination occurs only when one person is treated less favourably, on grounds of sex, than another person in a comparable situation. Accordingly, for example, differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination.'*⁶³⁴

For a closer look, this specification of the meaning and use of the notion of 'comparability' is remarkable. We have not seen a similar connection between 'comparability' and 'discrimination ground' established before. That would have corresponded to statements of the following kind: 'Differences of treatment (in ...) which result from the differences between religious and non-religious individuals do not relate to comparable situations and therefore, do not constitute discrimination on grounds of 'religion or belief'.'

The establishment of a direct connection between the notion of 'comparability' and the discrimination ground by way of establishing a particular principle of discrimination based on a particular aspect of the discrimination ground, disrupts completely the logical functioning of the notion of 'comparability' within the context of non-discrimination. For the notion of 'comparable situation' to function, it needs to concern *something else* than the discrimination ground, f.inst. being in a comparable job-

⁶³³ For instance in art. 5, Dir. 2010/41/EU

⁶³⁴ Recital 12, Dir. 2004/113/EC

situation, in a comparable unemployment-situation, in a comparable educational situation etc. When 'comparable situation' suddenly concerns an aspect of the discrimination ground itself, it undermines the principle of non-discrimination as far as that discrimination ground is concerned.

These considerations are in no way meant to indicate that it is unreasonable to treat men and women differently in the provision of healthcare services as a result of the physical differences between them. Only, for the sake of not undermining the logic of non-discrimination as such - which is completely dependent on the proper functioning of the notion of 'comparability' - it would have been more senseful to simply formulate an exception from the principle of non-discrimination, rather than confusing the notion of comparability by connecting it directly with the discrimination ground sex.

But apart from that, it is clear that the Goods and Services Equality Directive implies a presupposition of permanent differences between men and women - in the shape of unspecified physical differences. These differences are not differences for which compensation is needed so that discrimination may be eliminated; these are differences which are *supposed to be there* and which should be protected as such, and on the basis of which a particular principle of discrimination (in contrast to non-discrimination) on the grounds of sex is being established.

The second statement which I would like to bring forward strengthens the same point; likewise, it concerns the protection of differences between men and women - instead of seeking to eliminate them or compensate for them. Only, the formulation leaves it open whether the differences at stake are to be seen as *permanent* or *cultural and changeable* differences. In contrast to the first statement, the second statement is formulated as a justification-of-discrimination path and does therefore not involve a confusion of the functioning of 'comparability'. It reads as follows: *'Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). [...]'*⁶³⁵.

⁶³⁵ Recital 16, *ibid.* This recital elaborates on Art. 4(5), Dir. 2004/113/EC: *'This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'*

Although it is not explicitly said that general differences between men and women exist and that these differences require respect and protection as such, the meaning is the same. If it was not assumed that general differences between men and women exist and that these differences were important, why should the establishment of single-sex shelters be of any help to victims of sex-related violence? - why should privacy and decency be served by ensuring that only members of one sex may be accepted as lodgers in a person's private home? The differences presupposed in these examples are of a complex nature. Obviously, physical differences are at stake. But also much more than that. Physical differences as such have nothing to do with neither violence nor privacy and dignity. The expression '*sex-related violence*' is clearly an expression which combines the two meanings of 'sex' discussed in chapter 13. It is violence which has to do with the relationship between the two sexes, but it is also violence of a sexual nature. When victims of sex-related violence are to be protected against the other sex by way of single sex-shelters, they are supposed to be protected against the presence of physical differences as well as sexual feelings and attractions. But even more than that is at stake. They are to be protected against the presence of the other sex as such in a situation which is seen as a very private situation. Just like a person may choose only to let people of the same sex into his or her home as lodgers '*for reasons of privacy and decency*'. In places such as a person's home, the presence of the opposite sex as such may be equivalent to a violation of privacy and decency.

Consequently, in these examples we see, firstly, an inseparability of the two meanings of the concept of 'sex', and secondly, the establishment of intimate connections between the concepts of 'sex', 'privacy' and 'decency'. These connections mean that much more than physical differences between men and women are at stake. *Something else* - which may be related to physical differences, but which cannot be explained by physical differences as such - is presupposed in these examples. And this *something else* is seen as potentially dangerous, and not only in the sense that it may lead to physical violence, but also in the sense that simply by its presence, it may violate something which is precious for a person, namely privacy and decency. This *something else* concerns the relationship between the two sexes as such, and 'sexuality' in the sense of attractions between the sexes obviously forms a huge part of it. But does 'sexuality' exhaustively explain to us what is at stake in this *something else*?

The intimate connections established between the concepts of 'sex', 'privacy' and 'decency' tell us that fundamental differences between men and women are

presupposed, and differences of a kind which are not reducible to physical differences. Even if one assumed that they were physical differences, it would be clear that the implications of those differences were seen as more than physical. Privacy and decency refer not only to physical, but also to psychological aspects of the situation and treatment of a person. But more than that: As we have seen so far, both within the context of EU-law and within the context of European Human Rights Law, 'privacy' concerns something even beyond definable physical and psychological issues, something not quite capturable, related to concepts such as dignity, autonomy and integrity, and to rights centering on self-development and intimate other-relations, most notably family-relations. We have not met the concept of 'decency' before, but also this concept involves something not quite capturable, an ideal underpinning a range of social institutions and norms, but which in itself would be hard to define. It is related to the concept of 'dignity', although not identical to it. If we are to take these not quite capturable aspects of 'privacy' and 'decency' seriously, as well as the conceptual configurations within which we have previously encountered the concept of 'privacy', the connections established between 'sex', 'privacy' and 'decency' will imply that *being a self* relies on the possibility of being one sex *in contrast to the other* - which means *in separation from the other*, in certain situations.

Accordingly, I will argue that the differences between men and women presupposed in the statement of the preamble are of the most fundamental nature: they relate to the possibility of *being a self*. But how may we describe those fundamental differences, then, if they are not reducible to physical differences? No specific characteristics are implied on the basis of which such fundamental differences could be defined. Rather, we are confronted with the idea of *difference as such*: the idea that in order to be a self one needs to be either man or woman, and to know oneself as different from the other sex.

Is this fundamental idea of difference as such between the sexes then culturally changeable, or permanent? That will depend on the point of view. Some might find that a future in which the relationship between the sexes is no longer crucial for being a self - and no longer crucial to 'decency' and 'privacy' - is possible. Others might find that the idea of difference as such will permanently be there, either due to natural differences, or because it is crucial to civilization. The statement of the preamble does not tell us whether or not the intimate connections between sex, privacy and decency are likely to change as a result of increased equality between women and men over the years. But it presents these connections as if they were obvious. Culturally changeable

or not, a deep connection between *being one or the other sex* and *being a self* is presupposed in the statement.

The latter three examples provided in the statement - single-sex bodies for the promotion of gender equality, single-sex private clubs and single-sex sports events - are of a different nature. They concern another fundamental freedom, the freedom of association, as well as the combat against discrimination. However, also these examples make clear that differences between the sexes are presupposed, not only as existing differences but also as important differences which should be respected and protected in a range of situations.

In chapter 13, I reflected upon the relationship between the discrimination grounds 'sex' and 'sexual orientation' and suggested the following subtle distinction: The discrimination ground 'sexual orientation' concerns sexual other-relations, in contrast to the discrimination ground of 'sex', which concerns sexual self-relations. We may say that this subtle distinction has been strengthened by the analysis given above. The discrimination ground 'sex' concerns not only a person's sexual self-relations, it concerns the possibility of being a self. But being a self has deep implications for sexual other-relations; it even relies on the possibility of distinguishing one-self from the other sex, of being one sex in contrast to and in separation from the other.

Maternity-related names attributed *as-if*-rights

Throughout the four Directives, 'women' are designated as right-holders in relation to pregnancy and maternity leave. The relevant formulations vary a bit.

The Employment Equality Directive states that '*A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.*'⁶³⁶ What is the logical nature of this provision? Firstly, we are confronted with the name 'Woman on maternity leave' (and not with double-names). As to the logic of the right attributed to this name, it can be nailed down as follows: A woman on maternity leave shall be treated, after the end of her period of maternity leave, *as-if* she had never been away. In this connection, the right-holder, the woman who has returned from maternity leave, is in fact being compared with an imaginary version of herself.

⁶³⁶ Art. 15, Dir. 2006/54/EC

She is not being compared to other women who have not been on maternity leave, nor to men (both could have been promoted or degraded or fired while she was away). She is being compared to herself *as-if* she had not been away on maternity leave, and *as-if* neither she nor others would have actively done anything to change her employment position to the worse. That is, we are confronted with *a name* and with a specific variation of the *as-if-logic*.

The Employment Equality Directive and the Goods and Services Directive both include the following definition of discrimination: *'For the purposes of this Directive, discrimination includes [...] any less favourable treatment of a woman related to pregnancy or maternity leave [...].'*⁶³⁷ The wording *'any less favorable treatment of a woman'* is obviously crucial, but not clear; *'any less favorable treatment of a woman'* compared to whom? *To men, to other women, or to the right-holder herself* had she not become pregnant, and not been on maternity leave? This is left open. However, we will have to conclude that the implied logic is in fact the same as the one derived above - at least to the extent that a non-discrimination logic is at stake at all⁶³⁸. Again, it is the issue of 'comparability' which is crucial. A woman who is pregnant or on maternity leave could in principle be compared to men or to other women who are not pregnant or on maternity leave, but only to the extent that they would, in all other respects, be in a 'comparable situation'. Accordingly, the most accurate formulation of the logic would be the following: a woman who is pregnant or on maternity leave should not be treated less favorably *than she would have been treated* had she not become pregnant, and not been on maternity leave. Again we have an implicit name 'Woman who is pregnant or on maternity leave' and an *as-if-logic*. Also, we should take note of the fact that the discrimination ground at issue is no longer 'sex' in the sense of 'being of one or the other sex'. The discrimination ground is 'being pregnant or on maternity leave'.

Finally, the Social Security Equality Directive and the Goods and Services Directive entail a slightly different formulation: *'The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.'*⁶³⁹ Again, women are designated as right-holders, but the implied logic is not an *as-if-logic* (neither is it a non-significance-logic). The provision simply lays down an exception from the principle of non-discrimination.

⁶³⁷ Art. 2(2)(c), *ibid.*, art. 4(1)(a), Dir. 2004/113/EC

⁶³⁸ When examining the case-law, we shall see that the CJEU also goes beyond non-discrimination rights in order to protect women in relation to maternity.

⁶³⁹ Art. 4(2), Dir. 79/7/EEC, art. 4(2), Dir. 2004/113/EC

The above-mentioned names. ‘Woman on maternity leave’ and ‘Woman who is pregnant or on maternity leave’ would seem to be rather unproblematic as far as their substances are concerned. None the less, due to the technological possibilities of today, the issue of ‘pregnancy’ is not entirely uncontroversial - as we shall see when examining the case-law.

Other names - introducing indeterminate access-rights, a substantial right combined with a modified *as-if*-right, and another modified *as-if*-right.

In the Employment Equality Directive, ‘Father on paternity leave’ and ‘Adopting parent on leave’ appear as names: *‘Those Member States which recognise [distinct rights to paternity and/or adoption leave] shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.’*⁶⁴⁰ This right implies exactly the same *as-if*-logic as the right we discussed above: Fathers and adoptive parents exercising their right to paternity or parental leave shall be treated *as-if* they had never been away. The right-holders are being compared to an imaginary version of themselves. The discrimination ground at issue is obviously ‘being on paternity or parental leave’.

The Self-employment Equality Directive entails four names: ‘Spouses and life-partners of self-employed workers, taking part in the self-employed activity’, ‘Female self-employed workers’, ‘Female spouses and life-partners of self-employed workers, taking part in the self-employed activity’ and ‘Spouses or life-partners establishing a company together’.⁶⁴¹

To the first name, ‘Spouses and life-partners of self-employed workers, taking part in the self-employed activity’, is attributed the right ‘to benefit from a social protection’, if a system of social protection for self-employed workers exists in the Member State in question. When read in light of the corresponding recital of the preamble, it becomes clear that this right is not a right to benefit from the national system for social

⁶⁴⁰ Art. 16, Dir. 2006/54

⁶⁴¹ These positive names appear in art. 6, 7 and 8, Dir. 2010/41/EU. The first and third name depend on the definition laid down in art. 2(b). I have shortened this definition; the full definition reads: *‘the spouses of self-employed workers or, when and in so far as recognised by national law, the life partners of self-employed workers, not being employees or business partners, where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks.’*

protection on the same terms as self-employed workers who are *not* spouses and life-partners of self-employed workers. It is simply the right to have access to social protection, on the condition that national social rights for self-employed workers exist. It is for the member states to decide how this social protection should be organized.⁶⁴²

Since this right is made dependable on the existence of national social rights, it is not a substantial right. But neither is it a non-discrimination right. The right-holders are simply granted the right to some social protection. We shall call it an indeterminate access-right, attributed to names.

To the second and third name, 'Female self-employed workers' and 'Female spouses and life-partners of self-employed workers, taking part in the self-employed activity' are attributed rights of a more detailed nature. They are to be granted '*a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks*'. It is specified what 'sufficient' means in this context. The allowance shall guarantee an income which is at least equivalent to any other family-related allowance established under national law or the allowance which the woman would be granted in the case of sickness. Or it should be equivalent to the average loss of income, subject to any ceiling laid down under national law.⁶⁴³ To the second and third name are also attributed rights of access to '*any existing services supplying temporary replacements or to any existing national social services*'.

The latter rights resemble the access-rights mentioned above; they depend on the existence of national rights, and apart from that, they do not guarantee anything as to the conditions under which they are granted. The former right is specific in so far as the 14 weeks are concerned. But apart from that, it depends on a comparison to *any* of a range of other national allowances or ceilings by which an allowance is limited. Since the member states are free to choose which one of these allowances or ceilings they will use as the standard of comparison, the right in question is merely a right to an allowance equivalent to the lowest one of them. Due to the establishment of such a standard of comparison, an as-if-logic is involved. 'Female self-employed workers' and 'Female spouses and life-partners of self-employed workers, taking part in the self-employed activity' are entitled to an allowance which guarantees them an income *as-if they were entitled to the lowest possible allowance* within a certain group of allowances, or based on any national ceiling. It is a *modified as-if-logic*, though, since it is the

⁶⁴² Art. 7(1) and Recital 17, *ibid*

⁶⁴³ Art. 8(1) and 8(3), *ibid*

manifestation of a minimum-requirement. In addition, it is to be combined with the 14-weeks-requirement, for which reason we may call it a combination of a content-right and a modified equal-treatment-right.

To the fourth and last positive name ‘Spouses or life-partners establishing a company together’ is attributed the right to establish their company on conditions which *‘are not more restrictive than the conditions for the establishment of a company between other persons.’*⁶⁴⁴ This right sounds almost like a new non-discrimination right (there shall be no discrimination on the grounds of marriage or life-partnership), but due to the expression ‘not more restrictive than’, it is not. It is not prohibited to discriminate on the grounds of marriage or life-partnership; it is not prohibited to make separate rules for spouses or life-partners who wish to establish a company together. Only, such rules must not be *‘more restrictive’* than the rules which apply to other persons. Also here, we are faced with a modified version of an as-if-logic: the content of the right is made dependable on a comparison with existing national rules for the establishment of a company. It is a modified version of an as-if-logic both because it is the manifestation of a minimum-requirement, but also because this minimum-requirement (*‘not more restrictive than’*) opens widely for interpretation.

The two modified as-if-rights of the Self-employment Equality Directive are based on the discrimination grounds ‘receiving maternity allowance’ and ‘being married or engaged in lifepartnership’, respectively.

Whereas the logics of rights involved are rather complicated, the names as such are less problematic. They may imply possibilities of dispute, though. Within some national systems, it could be disputed, for instance, when a ‘leave’ is in fact a ‘paternity leave’ or a ‘parental leave’. Likewise, it could be questioned what ‘taking part in the self-employed activity’ implies. The concept of ‘lifepartner’ is controversial as well.

‘Transsexuality’ as a particular qualification of the discrimination ground ‘sex’

From the P.-judgment analyzed in chapter 13, we know already that discrimination related to ‘transsexuality’ is covered by non-discrimination law with respect to ‘sex’. This result from the case-law has been inscribed in the Employment Equality Directive: *‘The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is*

⁶⁴⁴ Art. 6, *ibid*

*of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.*⁶⁴⁵

The wording of the recital is interesting from our point of view in that it clearly rejects the presumption implied in the Grant-judgment, that the right-holder would be a victim of discrimination because he or she belonged to one sex in contrast to the other sex. The recital implies that 'transsexuality' constitutes a particular qualification of the discrimination ground sex, not an issue which can be translated into double-names and the corresponding determinately reduced non-significance-logic. In other words, we are dealing with the non-significance-logic, but on the basis of a particular qualification of the discrimination ground 'sex'.

The discrimination ground sex - fixated flexibility

It is already clear that the discrimination ground 'sex' is qualified in a number of different ways, more or less implicitly. We are faced with the following discrimination grounds: 'being one sex in contrast to the other sex', 'pregnancy or maternity leave'; 'paternity leave'; 'parental leave'; 'receiving maternity allowance'; 'being married or engaged in lifepartnership'; and transsexuality. Finally, harassment could be mentioned as well (although, as explained in chapter 9, the prohibition against harassment does not amount to a non-discrimination logic since no comparison is involved)⁶⁴⁶. The first-mentioned ground, 'being one sex in contrast to the other sex' constitutes the dominating understanding of the discrimination ground. Seen in the light hereof, the other understandings (which are all based on relations of comparison which cannot be reduced to a man-woman-relation) appears as *additional qualifications* of the discrimination ground. However, when seen in the light of the overall discrimination ground 'sex', we may simply say that all the different qualifications are, in each their way, expressions of this overall discrimination ground. They all bear witness to the richness and the ambiguities of the concept of sex - and to the multiple ways in which sexual distinctions pervade societal institutions.

The fact that the discrimination ground is flexible and rich, that it may multiply into a number of different qualifications of what could be meant by 'sex', corresponding to a

⁶⁴⁵ Recital 3, Dir. 2006/54/EC

⁶⁴⁶ 'Harassment' is included in the definition of discrimination in all the new non-discrimination Directives. But they also entail a prohibition against 'sexual harassment'. 'Sexual harassment' constitutes an instance of discrimination '*where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment*'. Art. 2(1)(d), Dir. 2006/54.

number of different relations of comparison, is a characteristic of non-names. But as we have seen, the flexible understanding of the discrimination ground is being expressed in the form of a number of *specific* qualifications of it and in connection with a number of specific names. In other words, the meaning of the discrimination ground is not kept open, it is *fixated* in an number of different ways. Apart from the dominating fixation ('being one sex in contrast to the other'), most of these ways imply the establishment of names and the manifestation of as-if-logics of rights (or modifications thereof, or pure access rights), - but a non-significance-logic (corresponding to a presumed non-name) is also in play in connection with the issue of transsexuality.

Accordingly, the flexible understanding of the discrimination ground 'sex' underpinning all the different qualifications points in the direction of the logic of non-names without fully realizing this logic. However, the flexibility in itself points to the fact that the discrimination ground 'sex' within the context of EU-law involves an unexploited potential as far as its meaning is concerned.

So, we are confronted with a conglomerate of logics and signifiers.

The logics in play can be summed up as follows: a *determinately reduced non-significance-logic*; a *reversed determinately reduced non-significance-logic*; *as-if-logics* (based on the qualified discrimination grounds 'pregnancy or maternity leave', 'paternity leave' and 'parental leave'); *modified as-if-logics* (based on the qualified discrimination grounds 'receiving maternity allowance' and 'being married or engaged in lifepartnership'); an *access-right-logic*; a *substantial-right-logic*; and finally a *non-significance-logic* (based on the qualified discrimination ground 'transsexuality').

The signifiers in play can be summed up as follows: the double-names '*Man in contrast to being woman*' and '*Woman in contrast to being man*'; the names '*Woman who is pregnant or on maternity leave*', '*Father on paternity leave*', '*Parent on parental leave*', '*Spouses and life-partners of self-employed workers, taking part in the self-employed activity*', '*Female self-employed workers*', '*Female spouses and life-partners of self-employed workers, taking part in the self-employed activity*', '*Spouses or life-partners establishing a company together*'; and finally the non-name '*transsexuality*'.

We shall now examine the case-law with a view to the substances and attributes of these signifiers. Does the case-law develop any explicit or implicit definitions of these signifiers? And how are the logics of rights, as implied in the four Directives, manifested and interpreted in particular cases?

As already mentioned in the Introduction to Part I.3, it has not been possible to find all of the signifiers implied in the four Directives profoundly dealt with in the case-law. I shall be focusing, therefore, on those signifiers which play important parts, namely the double-names '*Man in contrast to being woman*' and '*Woman in contrast to being man*', the maternity-related names '*Woman who is pregnant*', '*Woman on maternity leave*' (or some other variation) and the non-name '*Transsexuality*'. These signifiers do not only represent three different kinds of signifiers (names, non-names and double-names), they will also open the door to a number of different logics of rights, including combinations of different logics of rights.

Chapter 16

The CJEU-established name '*Woman in so far as she is subjected to circumstances which can only affect women*'

We shall begin with the maternity-related names. Three judgments will be analyzed. These judgments both imply conceptualizations relevant to the substances of the names in question, as they imply highly interesting elements seen from the point of view of logics of rights. As far as substances are concerned, we shall see that the CJEU has in fact established a new name on the basis of which the maternity-related names of the Directives are understood: '*Woman in so far as she is subjected to circumstances which can only affect women*'.

For the purposes of the analysis of these judgments, yet another Directive needs to be mentioned, namely *Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*. This Directive is exceptional within the context of EU social rights in that it lays down substantial rights (in contrast to non-discrimination rights) for pregnant workers and workers who have recently given birth. These rights include the right to a continuous period of maternity leave of at least 14 weeks and an adequate allowance at least equivalent to that which the worker would receive in the event of sickness⁶⁴⁷ (rights almost similar to the rights we discussed above, attributed to '*Female self-employed workers*' and '*Female spouses and life-partners of self-employed workers, taking part in the self-employed activity*').

⁶⁴⁷ Art. 8 and art. 11(2-3), Dir. 92/85/EEC

Also, the Directive Directive 92/85/EEC lays down rights with respect to healthy and safe working conditions. And importantly, it specifies that pregnant women and women on maternity leave have a right not to be dismissed during that period and that rights connected to their employment contract shall be ensured.⁶⁴⁸

Since this Directive is not a non-discrimination Directive or a Directive which lays down rights which are closely tied together with non-discrimination rights, we shall not analyze it in details - only take note of the fact that it exists and that some of its provisions are unmistakable (such as the right to maternity leave and the right not to be dismissed) whereas others are more open and fragile and highly dependable on national implementation. However, the provisions regarding dismissal and rights connected to the employment contract are important in relation to the judgments which will be analyzed below. More precisely, these judgments concern the relationship between non-discrimination rights and substantial rights.

Replacements of names and logics

In the Mayr judgment from 2008, the CJEU considers the possibility of applying a substantial right stemming from Directive 92/85/EEC, as well as a non-discrimination right stemming from the Employment Equality Directive.

Ms Mayr had begun a process of *in vitro* fertilization when she was given notice of dismissal. To be technically accurate, at the date Ms Mayr was given notice, the ova taken from her had already been fertilized with her partner's sperm cells and, therefore, *in vitro* fertilized ova already existed. Three days later, two fertilized ova were transferred into her uterus.

The referring court asks whether Directive 92/85/EEC is applicable to the situation of Ms Mayr. According to that Directive, Member States shall take the necessary measures to prohibit the dismissal of pregnant workers from the beginning of their pregnancy⁶⁴⁹. But was Ms Mayr a 'pregnant worker' within the meaning of that Directive⁶⁵⁰ when she was given her notice of dismissal? She was not, the CJEU finds. Since the *in vitro* fertilised ova had not yet been transferred into her uterus, she was not yet pregnant. The CJEU explains that this distinction must be drawn for reasons of legal certainty;

⁶⁴⁸ Art. 3-7, 10, 11, *ibid*

⁶⁴⁹ Art. 10(1), Dir. 92/85/EEC

⁶⁵⁰ A pregnant worker is defined in Article 2(a) of Dir. 92/85/EEC as 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'

fertilized ova may in Austria be kept for a maximum period of 10 years, and in certain other Member States for an indeterminate period.⁶⁵¹

But the CJEU finds that Ms Mayr can instead rely on the Employment Equality Directive. If it can be established that she was dismissed because she was undergoing *in vitro* fertilization treatment, and not for another reason, then the dismissal of her constitutes discrimination on grounds of sex. The essential argument is the following:

The CJEU makes clear that under the principle of non-discrimination in general, and in particular under the Employment Equality Directive, '*dismissal of a female worker on account of pregnancy, or for a reason essentially based on that state, affects only women and therefore constitutes direct discrimination on the grounds of sex*'.⁶⁵² Clearly, the treatment which Ms Mayr was undergoing relates to pregnancy. And just like pregnancy in general 'affects only women', it is also so that '*a follicular puncture and the transfer to the woman's uterus of the ova removed by way of that follicular puncture immediately after their fertilization [...] affects only women*'. Therefore, the dismissal of a female worker '*essentially because she is undergoing that important stage of in vitro fertilization treatment*' constitutes direct discrimination on grounds of sex.⁶⁵³

Now, what logics are implied? First, the applicability of the substantial right contained in Directive 92/85/EEC is being rejected because Ms Mayr cannot claim the relevant *name* in this connection, the name 'Pregnant Worker'. Secondly, the CJEU lays down that Ms Mayr can instead rely on the *discrimination ground sex* since that discrimination ground does not only include pregnancy, but also an initiated process of *in vitro* fertilization.

This is what we have already detected when analyzing the non-discrimination Directives: that pregnancy constitutes a particular qualification of the discrimination ground of sex. The fact that an initiated process of *in vitro* fertilization may also be seen as such a particular qualification of the discrimination ground would not be unreasonable. However, the argument given by the CJEU as far as concerns the inclusion of both of these discrimination grounds under the discrimination ground of sex does not focus on 'grounds' as such, but rather on 'women in comparison to men'. The CJEU argues that those two grounds should be included because pregnancy or *in vitro* fertilization can '*affect only women*'.

⁶⁵¹ Case C-506/06, *Mayr*, par. 41-42

⁶⁵² *ibid*, par. 46.

⁶⁵³ *ibid*, par. 50

In other words, the logic underpinning the inclusion of the two discrimination grounds 'pregnancy' and 'in vitro fertilization' is the determinately reduced non-significance-logic. What is introduced is in fact particular variants of the two double-names, rather than a qualification of the discrimination ground of sex. 'Being pregnant' and 'Undergoing *in vitro* fertilization treatment' must be understood as particular variants of 'Woman in contrast to being man', whereas 'Not being capable of becoming pregnant or undergoing *in vitro* fertilization treatment' must be understood as a particular variant of 'Man in contrast to being woman'.

Thus, it can be said that Ms Mayr's right not to be dismissed has been established by way of a sophisticated replacement of names. She does not satisfy the conditions for being able to claim the name 'Pregnant worker', but is saved by the double-name 'Woman in contrast to being man' on account of the fact that what she is going through can only be experienced by women, in analogy with pregnancy. This 'saving' relies on the silent presumption that the discrimination ground 'sex' means 'being one sex in contrast to the other sex'.

On the other hand, if we ask who Ms Mayr is being compared to as far as the discrimination she suffers, is concerned, it is clear that she is in fact being compared to *herself as-if she had not initiated a process of in vitro fertilization*. The judgment says nothing as to this matter, but there is no other way in which to understand the logic of discrimination at stake. The situation of Ms Mayer is not being compared to the situation of men (f.inst. men working in the same company) for the simple reason that those situations cannot be compared: Ms Mayr is being dismissed because of circumstances which '*can affect only women*'. The problematic of discrimination in this case can be pinned down to this question: Would she have been dismissed if she had not initiated a process of in vitro fertilization?

We see that the logic implied in the judgment is in fact rather complex. More precisely, it consists of two different logics. The overall understanding of the dismissal of Ms Mayr as an instance of discrimination on grounds of sex is saved by the fact that her circumstances are of a kind which '*can affect only women*'. On the other hand, the operating logic, namely the logic which governs the comparison at issue, amounts to an *as-if*-logic implying that Ms Mayr is being compared to an imaginary version of herself; she is granted the right to being treated as-if she had not initiated a process of in vitro fertilization. And this is also due to the fact that Ms Mayr's circumstances are of a kind which '*can affect only women*'.

This appears paradoxical. How can the same fact - that in vitro fertilization '*can affect only women*' - be the cause of both of these logics, different as they are, one implying a comparison between women and men, and another implying a comparison between a woman and an imaginary version of herself? It can, because it installs a substantial asymmetry in the core of the determinately reduced non-significance-logic. By virtue of the particular variant of the double-name 'Woman in contrast to being man', namely the variant 'Undergoing *in vitro* fertilization treatment', a substantial difference between the two double-names have been established. Hereby, the double-name 'Woman in contrast to being man' has become *a name* - a name characterized by that which '*can affect only women*'.

Consequently, we must conclude that the presumed logic of the judgment, the logic of the determinately reduced non-significance-logic is not upheld. The CJEU establishes that the case concerns a fundamental difference between women and men in order to be able to regard the case as an instance of discrimination on grounds of sex. Hereby the court relies on the double-names, but it alters them at the same time by establishing them as characterized by substantial differences. What in fact arises from this alteration is two new names: 'Woman in so far as she is subjected to circumstances which can only affect women', and 'Man in so far as he can never be affected by those circumstances which can only affect women'.

These two general names are no longer double-names although they do depend on comparisons between the two sexes. Crucial is that the very possibility of comparing the situations of men and women has been ruined by the fact that the respective situations of the two sexes are being defined as fundamentally incomparable.

The principle 'special protection of women'

The Danosa-judgment which came 2 years later, in 2010, can be seen as largely parallel to the Mayr-judgment. Also this judgment concerns the dismissal of a woman in relation to pregnancy. And also in this judgment is it discussed whether that woman satisfies the conditions for being a 'pregnant worker' so that she may rely on a substantial right laid down in Directive 92/85/EEC, - and if not, whether she may alternatively rely on the Employment Equality Directive.

In the case of Ms Danosa, there is no doubt that she was pregnant at the time when she was removed from her post. But in order to satisfy the conditions for being a 'pregnant worker' Ms Danosa needs to be a 'worker' as well as being pregnant.

Ms Danosa was appointed as sole member of the Board of Directors of a Latvian capital company. She received remuneration which was set by the supervisory board. No employment contract was concluded, however; the company preferred agency as the basis on which to entrust her with the tasks of a Board Member. The judgment contains a thorough discussion of the relationship between Ms Danosa and the Latvian company seen in the light of the concept of 'worker' in the meaning of EU law in general and Directive 92/85 in particular. The analysis can be summed up as follows:

The CJEU maintains - in accordance with what we saw in Part I.1 - that the concept of 'worker' is a community concept the essential definition of which is the following: *'a person who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration'*. The lack of an employment contract is irrelevant. Ms Danosa certainly receives remuneration. The question is whether *'a relationship of subordination exists'* within the meaning of the definition of the concept of 'worker'⁶⁵⁴

That question can only be answered on the basis of an analysis of *'all the factors and circumstances'* characterizing the relationship at issue in the particular case, says the CJEU. After considering the facts available regarding Ms Danosa's relationship with the capital company, the court concludes that in so far as she *'provides services to that company and is an integral part of it'*, is *'under the direction or control of another body of that company'* and *'can, at any time, be removed from [her] duties without such removal being subject to any restriction'* she is in a relationship of subordination, - and accordingly she satisfies prima facie the criteria for being treated as worker within the meaning of EU-law.⁶⁵⁵

The CJEU does not only consider the general concept of worker within EU-law, but also the particular concept of 'pregnant worker' within the meaning of Directive 92/85/EEC. A 'pregnant worker' is defined in that Directive as *'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'*. The element of 'informing her employer' is thus bound to national procedures, in contrast to the concept of worker as such, and also in contrast to the definition of 'being pregnant' as we saw in the Mayr-judgment. The CJEU makes clear, though, that such national requirements *'cannot divest of its substance the special protection for women provided for'* in Directive 92/85/EEC. They must be in accordance with the *'substance'*,

⁶⁵⁴ Case C-232/09, *Danosa*, par. 39, 40-42, 44

⁶⁵⁵ *Ibid*, par. 46, 51

the '*spirit and purpose*' of that Directive. We may even say that the CJEU undermines the significance of particular national procedures when stating that to the extent that the employer has learned about the pregnancy, whether formally or informally, the woman in question should be considered a 'pregnant worker' and enjoy protection against dismissal.⁶⁵⁶

The judgment strongly indicates that Ms Danosa would in fact be able to satisfy the criteria for being able to claim the name 'Pregnant worker'. However, it is ultimately for the national court to determine whether she does or not, based on an assessment of the facts of the case. Accordingly, the CJEU finds that it is relevant to consider as well whether Ms Danosa may instead rely on her non-discrimination rights with respect to sex.⁶⁵⁷

The CJEU finds that she can indeed. If Ms Danosa will not be able to satisfy the conditions for being a 'Pregnant Worker' she will be saved by the discrimination ground of sex which includes pregnancy. Pregnancy is included because it '*can affect only women*'. In the words of the court: '*the dismissal of a worker on account of pregnancy, or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex*'.⁶⁵⁸ Even if the national court should come to the conclusion that Ms Danosa should be categorized as a self-employed worker, rather than as a worker, she would be able to rely on the Self-employment Equality Directive, instead of the Employment Equality Directive.⁶⁵⁹

We see that the logic implied is practically the same as the one implied in the Mayer-judgment. Ms Danosa is saved by a sophisticated replacement of names. In case she can not claim the name 'Pregnant worker', she can rely on the double name 'Woman in contrast to being man'. The determinately reduced non-significance-logic is presupposed as far as this initial replacement of names is concerned.

But again - like in the Mayr-judgment - another logic is at play. The situation of Ms Danosa is not being compared to the situation of men for the simple reason that those situations cannot be compared: she is being dismissed because of circumstances which '*can affect only women*'. Ms Danosa is being compared to *herself as-if she had not been pregnant*. This as-if-logic is the operating logic, and it is connected to a name, 'Pregnant

⁶⁵⁶ Ibid, par. 55

⁶⁵⁷ Ibid, par. 64

⁶⁵⁸ Ibid, par. 66

⁶⁵⁹ Ibid, par. 70

woman' - which in turn is seen as a variation of a more general name 'Woman in so far as she is subjected to circumstance which can only affect women'.

There is, however, a feature of the Danosa-judgment which distinguishes it from the Mayr-judgment. The CJEU emphasizes strongly the common purpose behind the Non-discrimination Directives and Directive 92/85/EEC. All those Directives are intended to provide for '*special protection for women*' in view of '*the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant [...] including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy*'. This purpose should be seen as so important that its realization should not be dependable on the '*formal categorization of [women's] employment relationship under national law or on the choice made at the time of their appointment between one type of contract and another*.'⁶⁶⁰ In other words, in the light of this purpose, it is less important '*whichever Directive applies*'. What is important is '*to ensure, for the person concerned, the protection granted under EU law to pregnant women in cases where the legal relationship linking her to another person has been severed on account of her pregnancy*'. A conclusion which is '*supported [...] by the principle of equality between men and women enshrined in Article 23 of the Charter of Fundamental Rights*'.⁶⁶¹

In these statements, it is almost indicated that the protection of pregnant women against dismissal constitutes a fundamental principle of EU law the practical implementation of which it is the court's duty to ensure - also in cases in which no particular Directive would apply. Almost, but not quite. The CJEU presupposes that at least one of the Directives will apply; only, it is irrelevant which one. The three Directives in question are seen as carrying the same overall purpose, - and this overall purpose is more crucial than any particularities of the three Directives.

Accordingly, an inherent tension between fundamental principle and particular Directives characterizes the judgment. The argumentation of the judgment can be seen as a kind of double-walking in this respect. It is clear that the peculiar flexible nature of non-discrimination Directives on the basis of which - as we have seen - particular names may come and go, be combined or replaced by each other, supports this double-walking.

⁶⁶⁰ Ibid, par. 60, 67, 68 and 69

⁶⁶¹ Ibid, par. 70-71

‘Substantive, not formal equality’

Also the Sarkatzis Herrero judgment concerns the protection of women for reasons of maternity. In this case it is not the event of pregnancy, but the fact that a woman takes maternity leave which is the cause of discrimination.

Ms Sarkatzis Herrero was employed as a temporary servant, but was appointed to a permanent post as administrative assistant as a result of a competition in which she took part. However, at the time of the appointment she was on maternity leave. Ms Sarkatzis Herrero requested that the period of maternity leave - from her appointment to the end of the leave when she would take up the post - be taken into consideration for the purpose of calculating her seniority. The company did not grant her request.

Again, the CJEU considers the possibilities of applying different Directives, both Directive 92/85 and the Employment Equality Directive. The court finds that Directive 92/85 cannot be applied. This Directive ensures ‘*the rights connected with the employment contract*’ of workers on maternity leave⁶⁶². But since Ms Sarkatzis Herrero did not return to her previous job as a temporary servant but was taking up a new job, and that there was no ‘*legal continuity*’ between the two jobs, those rights are not relevant to the case.⁶⁶³

The Employment Equality Directive, on the other hand, is applicable. The line of argument appears somewhat unclear - partly tautological, partly associative of nature, rather than taking the form of a strict step-by-step-argumentation. Again and again, it is repeated that ‘maternity leave’ should not result in unfavorable treatment, without any clarification of the meaning and logic of ‘unfavorable treatment’ within the context of the case.⁶⁶⁴ For a closer look, however, it becomes clear that the focal point of the argumentation lies in the presumption that ‘*the aim of the directive [...] is to ensure substantive, not formal equality*’⁶⁶⁵. The court emphasizes in this connection the following provision of the Directive: ‘*This directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.*’⁶⁶⁶ But it is clear that it is the aim of the Directive as such and the principle of discrimination around

⁶⁶² Art. 11(2)(a), Dir. 92/85/EEC

⁶⁶³ Case C-294/04, *Sarkatzis Herrero*, par. 31-32

⁶⁶⁴ *Ibid*, par. 37, 38, 39, 41

⁶⁶⁵ *Ibid*, par. 37, 41

⁶⁶⁶ Art. 2(3), Dir. 76/207/EEC (now repealed by Dir. 2006/54/EC); par. 37 of Case C-294/04, *Sarkatzis Herrero*

which it centers, and not just this provision, which is seen as crucial.⁶⁶⁷ That is, the provision on pregnancy and maternity is seen as a manifestation of the overall aim of the Directive, rather than as a provision of a more particular nature. This presumed overall aim - *'to ensure substantive, not formal equality'* - constitutes the horizon within which the principle of non-discrimination is understood in the judgment.

On the basis of this horizon we may begin to make sense of the argumentation, or more precisely the lack of the same. The CJEU simply concludes that the Employment Equality Directive *'must be interpreted as precluding any unfavourable treatment of a female worker on account of maternity leave or in connection with such leave, which aims to protect pregnant women, for which reason 'the deferment of the start of Ms Sarkatzis Herrero's career as an official following her maternity leave constitutes unfavourable treatment for the purposes of [that Directive]'*⁶⁶⁸

It is clear that 'maternity leave' is presupposed as a qualification of the discrimination ground of sex, - just like pregnancy and *in vitro* fertilization were presupposed as particular qualifications in the two previous judgments. In those judgments, the particular qualifications corresponded to particular variants of the double name 'Woman in contrast to being man', ultimately altered into particular variants of the proper name 'Woman in so far as she is subjected to circumstances which can only affect women'.

The Sarkatzis Herrero judgment could be seen in the light of a similar logic. Also Ms Sarkatzis Herrero's maternity leave constitutes an event which could only affect women; and it could also be said that as far as the calculation of seniority is concerned, the CJEU finds that Ms Sarkatzis Herrero should be treated *as-if* she had not been on maternity leave, but had taken up the post right away. Such an interpretation could exist within the established horizon; the idea of substantial and not formal equality would then mean that due to the fact that women are subjected to different circumstances than men, women should be compensated with respect to those circumstances in the sense that they should be treated *as-if* they had not been subjected to those circumstances.

But the Sarkatzis Herrero judgment could also be seen in the light of a slightly different logic - a logic which would comply with the established horizon in a fuller sense.

⁶⁶⁷ Case C- 294/04, *Sarkatzis Herrero*, par. 41.

⁶⁶⁸ Ibid, par. 41 and 45. *'On the basis of the premisses set out in the order for reference'*, the CJEU emphasizes; *'doubt remains'* as to certain facts of the case, see also par. 43-44.

According to this different logic, Ms Sarkatzis Herrero is simply granted the right to special treatment due to the fact that her situation requires special treatment. The idea of substantial and not formal equality means, then, that since women are subjected to different circumstances than men, women should be compensated with respect to those circumstances in the sense that they should be given special treatment.

Seen in this light, Ms Sarkatzis Herrero is granted a substantial right, although it is an indeterminate substantial right. That right simply says: 'Women on maternity leave shall be given special treatment'. It lacks the element of formal comparison which characterizes the *as-if*-logic as well as the non-significance-logic. However, it does not lack the element of comparison all together. It is based on the idea that 'maternity leave' constitutes a situation which is specific for women, and that compensation is required in this respect. The precise content of that compensation must be determined as the result of a 'substantive' and not formal interpretation of the particular case.

As such, both logics rely on the name 'Woman on maternity leave' which may be seen as a particular variant of the name 'Woman in so far as she is subjected to circumstances which can only affect women'. The difference between them lies solely in the fact that the former logic is an *as-if*-logic and therefore implies an element of formal comparison, whereas the latter is an indeterminate substantial right, lacking any formal standards, depending entirely on a substantive interpretation of what is required in a particular case.

Why is the argumentation of the judgment so inadequate - and therefore ambiguous? It is clear that the judgment struggles with the fact that the case concerns the taking up of a new post, and not the continuation of an already existing employment relationship. If the seniority calculation had concerned an already existing employment relationship, then it would have been more simple for the CJEU to conclude that treating Ms Sarkatzis Herrero differently on account of her maternity leave constitutes an instance of discrimination on grounds of sex. That is, the CJEU could have relied on what was already established in the case-law: that 'maternity leave' qualifies the discrimination ground of sex, and that women should be protected in their employment relationships while taking leave.⁶⁶⁹ In that case, the *as-if*-logic would clearly have been the logic implied: A woman on maternity leave shall be treated *as-if* she had not been on leave.

⁶⁶⁹ The judgment refers to such established rights: '*the Court has held that a female worker is protected in her employment relationship against any unfavourable treatment on the ground that she is or has been on maternity leave*' (C-294/04, par. 39); '*taking such statutory protective leave should interrupt neither the employment relationship of the woman concerned nor the application of the rights derived from it*' (ibid, par. 42)

But since the judgment concerns a new event happening in the midst of the period of maternity leave - the taking up of a new post - the application of these established rights - becomes more complicated. Ms Sarkatzis Herrero cannot simply be protected in her employment relationship and be treated *as-if* she had never been away. Or, more precisely: it is still possible to apply that logic, but it functions less intuitively, by means of an additional premise: 'On the condition that Ms Sarkatzis Herrero has acquired a new position while being on leave, she shall be treated *as-if* she had not been on leave'. The CJEU addresses this problematic, but does not really discuss it⁶⁷⁰. The court simply states that '*since the aim of Directive 76/207 is substantive, not formal equality, Articles 2(1) and (3) and 3 of that directive must be interpreted as precluding any unfavourable treatment of a female worker on account of maternity leave [...], and that is so without it being necessary to have regard to whether such treatment affects an existing employment relationship or a new employment relationship*'.⁶⁷¹ In other words, instead of seeking to qualify the established rights - and thereby the *as-if*-logic - with respect to a discontinuous working situation, the CJEU simply relies on the broad idea of 'substantive and not formal equality'. This opens for the possibility of a different logic, a logic which lacks any formal elements and which depends on an in principle unrestricted, case-to-case based consideration.

In conclusion: A powerful mediator of maternity-related names

In all three judgments we saw manifestations of a complementary relationship between the substantial rights laid down in Directive 92/85/EEC and non-discrimination rights. More precisely, we saw that in cases where the former kind of rights fail to apply the latter kind of rights may step in instead.

Both Ms Mayr and Ms Danosa were saved by a sophisticated replacement of names. Ms Mayr would surely not, and Ms Danosa would possibly not, be able to claim the name 'Pregnant worker'; but both were saved by the double name 'Woman in contrast to being man' implied in non-discrimination Directives. That double-name proved to be extremely flexible: not only did it open for particular variations, it also opened for the possibility of its own transformation into a new name. In Ms Sarkatzis Herrero's case, the problem did not lie in the applicability of the relevant name of Directive 92/85/EEC (which would be 'Woman on maternity leave'), but in the application of the

⁶⁷⁰ In par. 40 of C-294/04 the CJEU compares the Sarkatzis Herrero judgment to another judgment, Case C-284/02, Sass, which concerns career advancement (a change in salary grade) within the legal framework of an existing employment relationship

⁶⁷¹ C-294/04, par. 41

substantial right connected to it since that right only secures the protection of a woman on the basis of a continuous employment relationship. Within the context of non-discrimination Directives, however, the question of whether the period of maternity leave would be characterized by continuity or discontinuity with respect to employment relations proved to be irrelevant.

In all three cases we saw the peculiar flexibility of non-discrimination Directives in full bloom. Signifiers and logics were transformed into different signifiers and logics in the course of argument. In all three analyses, we saw how these transformations culminated with a new name, 'Woman in so far as she is subjected to circumstances which can only affect women'. Each judgment displayed a particular variation thereof, 'Pregnant Woman', 'Woman undergoing in vitro fertilization treatment' and 'Woman on maternity leave'. In the Mayer and Danosa judgments, that new name was connected to a formal *as-if*-logic: A 'Woman in so far as she is subjected to circumstances which can only affect women' shall be treated *as-if* s/he had not been subjected to those circumstances. In the Sarkatzis Herrero judgment, it was more ambivalent whether a similar *as-if*-logic was the operating one, or whether Ms Sarkatzis Herrero was granted an indeterminate substantial right.

In all three judgments, the determinately reduced non-significance-logic was left behind due to the fact that a basic asymmetry was inscribed within it: men and women were presupposed to be fundamentally different. Instead, two new names arose: 'Woman in so far as she is subjected to circumstances which can only affect women', and 'Man in so far as he can never be affected by those circumstances which can only affect women' - names which are no longer double-names because the very possibility of comparing the situations of men and women has been ruined by the fact that the respective situations of the two sexes are being defined as fundamentally incomparable. Thus, we are no longer confronted with differences between men and women the significance of which should be *eliminated*; we are confronted with differences the significance of which should be *maintained*.

Also, we were provided with indications as to the overall horizons within which the peculiar flexibility of non-discrimination Directives with respect to sex is played out.

In the Danosa-judgment, the protection of pregnant women against dismissal was *almost* introduced as a fundamental principle of EU law the practical implementation of which it is the court's duty to ensure, independently of particular Directives. The judgment did in fact rely on particular Directives, but it was clear that the overall and

common purpose of those Directives was more important than the question of whether one or the other of those Directives would apply. This kind of ambiguous double-walking indicates the presence of an overall horizon constituted by the idea that the protection of pregnant women amounts to a fundamental principle of EU-law - that is, a horizon which allows for a certain degree of neglect towards the particular features of the existing Directives and for highly flexible patterns of argumentation.

Likewise, in the *Sarkatzis Herrero* judgment, the idea of 'substantive and not formal equality' constituted a horizon which allowed for an ambiguous argumentation, partly silent, oscillating between two different implied logics - both of them, though, dependent on transformations of names and logics similar to those at play in the two other judgments.

As it appears, a new name has been established by the CJEU, even if only implicitly - the name 'Woman in so far as she is subjected to circumstances which can only affect women'. In fact, this implicit name is the central name in all three judgments. It captures all of the other maternity-related names in play while simultaneously mediating between them.

This name is special in the sense that its meaning relies directly on fundamental assumptions regarding the differences between men and women. But as such, it is historically changeable. The judgments displayed to us that fundamental differences would somehow circulate around the issues of pregnancy and maternity. But since these issues are subjected to historical reinterpretation, it was kept open exactly which aspects related to pregnancy or maternity would constitute 'circumstances which can only affect women'.

Due to this dynamical approach to the fundamental question of what 'can affect only women', we may say that the name is precise and highly flexible at the same time. Even if it circulates around maternity and pregnancy, it could in principle capture a number of different situations. It captures all of the maternity-related names appearing in the Directives. But it also goes beyond the limitations of the concepts of 'maternity' and 'pregnancy', extending the meaning of the discrimination ground so that it does not only include those concepts, but any circumstances which can be said to affect only women.

In the three judgments, we saw the equilibristic capabilities of this name. Not only is it fundamental and historical, precise and open at the same time, it also proved to function as a mediator between other signifiers. Because of this name, different

signifiers were combined and substituted for each other in the course of argument which meant that situations which would otherwise not be covered by the Directives in question could now be captured. Such combinations and replacements do obviously not only strengthen the different signifiers involved from the perspective of substance, but also from the point of view of attributes. A variety of different logics of rights was brought into play - a variety enhancing the strength of non-discrimination rights by making them more flexible, enhancing their resistance against erosion.

However, not only the logical equilibristic capabilities of the name 'Woman in so far as she is subjected to circumstances which can only affect women' made it into a powerful name as far as attributes are concerned. Also the fundamental status of the purpose of 'special protection of women' in relation to pregnancy and maternity and the idea of 'substantive and not formal equality' are crucial in this respect. All three features mean that the limitations of non-discrimination rights - as laid down in legislation - can be circumvented. Non-discrimination rights become extremely flexible. They are still formal rights and not substantial rights, - but they are rights which can be logically adjusted to a particular case.

Chapter 17

The signifier 'Transsexuality' - non-name or double-name?

In the Employment Equality Directive, the issue of 'transsexuality' was presented as a particular qualification of the discrimination ground and not as an issue which could be understood on the basis of the determinately reduced non-significance-logic. That is, 'transsexuality' cannot be reduced to the issue of 'being one sex in contrast to the other sex'. This means that a logic of non-names was in fact implied, a non-significance-logic. However, the P-judgment which we analyzed in chapter 13 was based on the presumption that the issue of transsexuality does in fact concern the issue of 'being one sex in contrast to the other sex'. Within the context of chapter 13, we simply took note of the fact that the P-judgment did not presuppose a logic of non-names. We also noted, however, that even if that was accepted, the argumentation of the judgment was still inconsistent when compared to the Grant-judgment.⁶⁷²

⁶⁷² Case C-249/96, *Grant* (in which it was laid down that homosexuals are not covered by the discrimination ground sex). In chapter 13, a comparative analysis of the P and the Grant judgments was carried out

We shall now revisit the P-judgment and analyze two later judgments also dealing with the issue of transsexuality. In particular, we shall pay attention to the tension between non-names and double-names. In other words: is 'transsexuality treated as a *ground* of discrimination, or as a particular variant of a double-name?

Recalling the P.-judgment: Translation into double-name

Let us begin by recalling the P-judgment. The judgment which was delivered in 1996 was the first judgment dealing with the issue of transsexuality. It concerned the dismissal of Mr. P who was undergoing a process of becoming a woman, beginning with a 'life test', followed by surgical operations. The CJEU found that the case was indeed an instance of discrimination on the grounds of sex. More precisely, it was covered by the Employment Non-discrimination Directive.⁶⁷³

As a result of the analysis in chapter 13, I concluded that the P-judgment was based on an understanding of non-discrimination rights according to which they apply to '*particular categories of persons*', characterized by particular modi of the discrimination ground in question. The discrimination ground sex would apply to 'men' and 'women'. But it would also, the CJEU found, apply to transsexuals who might be victims of discrimination based '*essentially if not exclusively, on the sex of the person concerned*'.⁶⁷⁴

Now, when approaching the P-judgment from the perspective of the discrimination ground 'sex', it is clear that it presupposes the determinately reduced non-significance-logic. Transsexuals are regarded as potential right-holders in the sense that they may be victims of discrimination because they belong to one sex and not the other. Furthermore, and crucially: the comparison which would be established would be a comparison between the two sexes. This is stated explicitly: '*Such discrimination is based, essentially if not exclusively, on the sex of the person concerned [...] he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.*'⁶⁷⁵ In other words, 'transsexuals' can be said to constitute a particular group of right-holders. But they are right-holders because the situations of discrimination which they encounter can be translated into a logic of double-names, a 'Man-versus-Woman' logic.

⁶⁷³ Case C-13/94, *P v S*, par. 20-24

⁶⁷⁴ Ibid, par. 16 and 21

⁶⁷⁵ Case C-13/94, *P v S*, par. 20-21

So, to the extent that this translation is accepted, and to the extent that we consider the P-judgment alone (and do not compare it to the Grant-judgment), the logic of the judgment appears reasonable. Unfortunately, the matter is more complicated than that - as we shall see when examining the following cases.

Translation rendered impossible

The K.B.-judgment, delivered in 2004, concerns the pension rights of a British couple, K.B. who is a woman, and R. who was born as a woman, but had become a man through surgical gender reassignment. The couple had been living together in the United Kingdom for a number of years. Since it had not been possible for R. to amend his birth-certificate and be recognized officially as a man, K.B. and R. had not been able to marry. Instead, they had celebrated their union and exchanged vows in an adapted church ceremony.

As a result of her employment relationship, K.B. had earned the right to a pension. The Pension Agency informed her that since she and R. were not married, R. would not be able to receive a widower's pension in case she died before him. According to national rules, only a surviving spouse could receive such a pension. K.B. found that those national rules amounted to discrimination on grounds of sex.

The CJEU does not agree with her. The decision to restrict certain benefits to married couples is a matter for national law, the court makes clear. Excluding non-married persons from being the beneficiaries of a survivor's pension does not in itself constitute discrimination on grounds of sex, *'since for the purposes of awarding the survivor's pension it is irrelevant whether the claimant is a man or a woman'*.⁶⁷⁶ In other words, discrimination on grounds of not being married does not constitute discrimination on grounds of sex. We see that the CJEU makes use of the determinately reduced version non-significance logic (*'it is irrelevant whether the claimant is a man or a woman'*).

But this does not mean that the CJEU does not find that discrimination on grounds of sex is at stake. Only not for the reason that K.B. brings forward. The rules regarding survivors pensions are not in themselves problematic. The problem lies elsewhere, the CJEU finds, namely in the fact that K.B. and R. have not been able to marry: *'the inequality of treatment does not relate to the award of a widower's pension but to a necessary precondition for the grant of such a pension: namely, the capacity to marry.'* As far as this precondition for the grant of a widower's pension is concerned, the CJEU compares the

⁶⁷⁶ Case C-117/01, K.B., par. 28-29

couple with *'a heterosexual couple where neither partner's identity is the result of gender reassignment surgery and the couple are therefore able to marry and, as the case may be, have the benefit of a survivor's pension which forms part of the pay of one of them'*.⁶⁷⁷

In accordance herewith, the main argument presented by the CJEU can be pinned down as follows: The fact that K.B. and R. have not been able to marry constitutes, in principle, discrimination on grounds of sex within the scope of the Treaty's article on equal pay and the Employment Equality Directive⁶⁷⁸, because the capacity to marriage is a *condition* for the grant of a widower's pension.

But the CJEU also emphasizes that according to the European Court of Human Rights *'the fact that it is impossible for a transsexual to marry a person of the sex to which he or she belonged prior to gender reassignment surgery, which arises because, for the purposes of the registers of civil status, they belong to the same sex'* is a breach of the right to marry under the European Convention of Human Rights.⁶⁷⁹

Now, what role does this indication of a breach of the human right to marry play within the judgment as such? Is it simply an additional argument, - emphasizing that not only does the fact that K.B. and R. have not been able to marry constitute discrimination on grounds of sex within the scope of the Treaty's article on equal pay, it also constitutes a breach of the right to marry under the European Convention of Human Rights?

It is more than that. The CJEU ties the breach of the right to marry under the Convention closely together with the main argument: *'Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.'*⁶⁸⁰ We may in fact say that the CJEU presents the breach of the right to marry under the Convention as a part of the main argument, as a necessary element within it.

Why would it not be enough to argue that since the capacity to marriage is a *condition* for the grant of a widower's pension, denying K.B. and R. the right to marry constitutes discrimination in relation to that pension? The problem is of course that the laws of

⁶⁷⁷ Ibid, par. 30-31

⁶⁷⁸ Directive 75/117/EEC (now amended) which makes out the basis of chapter 1 of Dir. 2006/54/EC. It is undisputed that the pension in question constitutes pay, see par. 25-26 of Case C-117/01, *K.B*

⁶⁷⁹ Case C-117/01, *K.B*, par. 33

⁶⁸⁰ Ibid, par. 34

marriage do not fall under the scope of Community law. So even though it can be argued that those laws are highly relevant to the pension right in question, it would be problematic to include them. For this reason, the CJEU relies on the ECtHR and *another* fundamental right, namely the right to marry.

The logic implied is already familiar to us, though. It is yet another example of the '*condition for being able to enjoy the right logic*'.⁶⁸¹ Also in the previous cases we encountered in which this logic was manifested, fundamental rights played a significant part. However, it is not necessarily entirely clear exactly how the two parts of the argumentation play together. That was not clear in the Carpenter-judgment, and it is not clear in the K.B-judgment. We shall return to both judgments in chapter 33 with a view to this question.

Finally, it should be mentioned that the CJEU modifies its finding regarding the existence of discrimination in an important way. This modification has everything to do with multiple levels of discrimination as well. The CJEU makes clear that although the national rules which prevent K.B. and R. from fulfilling the marriage requirement do, in principle, constitute discrimination under the scope of the Treaty article on equal pay, '*it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person in R.'s situation*'⁶⁸². The discrimination at issue actually manifests itself on three levels: the level which K.B. brings forward, the level of the pension rights; the level of the right to marry; and finally the level of legal recognition of the new gender of a person who has changed gender. The CJEU connects the two first-mentioned levels by the help of the ECtHR, but leaves the last-mentioned level to the decisions of the member states. Almost, that is. The CJEU does not say that it is for the member states to decide whether the new gender of transsexuals should be legally recognized; the court only says that it is for the member states to decide the conditions under which such recognition is given. In the particular case of R., it is for the national court to determine whether he can be recognized as a man under British law. And only if he can, his partner, K.B., will be able to rely on non-discrimination rights under EU-law.

⁶⁸¹ We saw examples of the use of this logic when analyzing the Zambrano and Carpenter judgments in chapter 5

⁶⁸² Case C-117/01, *K.B.*, par. 35

Now, which of the two logics outlined above are presupposed in the argumentation of the K.B.-judgment? Does the issue of transsexuality appear as a ground of discrimination, or rather in the shape of a double-name?

As a first step, the CJEU clarified that the pension rules at issue are not in themselves discriminatory. The CJEU argued on the basis of the determinately reduced non-significance-logic: *'[...] for the purposes of awarding the survivor's pension it is irrelevant whether the claimant is a man or a woman'*. It should be noted though, that the argument could also have been carried out on the basis of a reference to discrimination grounds. The CJEU could have argued that discrimination on grounds of sex and discrimination on grounds of being unmarried are two different things. Accordingly, the first step of the argumentation articulates a logic of double-names, but is not dependent on it.

Moving on to the CJEU's determination of where discrimination has, in principle, taken place, namely in the act of preventing K.B. and R. from fulfilling the marriage requirement. Is transsexuality presupposed as a ground of discrimination or as a double-name in this part of the argumentation - the crucial part? In this connection, we need to consider who is the victim of discrimination.

K.B. is the claimant. She is the one who has earned a pension through her employment relationship and who has been denied a survivor's pension for her partner, R. Strictly speaking, she is the victim of discrimination. If she is the victim of discrimination, then the judgment presupposes transsexuality as a ground of discrimination and not as a double-name. The discrimination at issue does not arise from the sex of K.B.

However, in parts of the judgment, the CJEU seems to presuppose that the victim of discrimination is the couple. The CJEU compares the situation of the couple, K.B. and R., with the situation of *'a heterosexual couple where neither partner's identity is the result of gender reassignment surgery'*. If we choose to see the victim of discrimination as the couple, then we are also faced with transsexuality as a ground of discrimination rather than a double-name. K.B. and R. constitute a heterosexual couple which is compared to any other heterosexual couple. The discrimination they suffer does not arise from the sex of either of them. It arises from the fact that one of them used to belong to a different sex.

Finally, we may choose to see R. as the victim of discrimination. Indirectly, he is, at least. He is the one who will be denied the survivor's pension. The discrimination at issue certainly concerns his sex. But again, it does not arise from the fact that he is now a man. It arises from the fact that he used to be a woman. Thus, if he is the victim of

discrimination, then he is discriminated against in comparison to other men, not in comparison to women. He is discriminated against in comparison to people belonging to the same sex as he does. No opposition of the two sexes can be established with respect to the discrimination suffered by R. - unlike in the P.-case in which the CJEU was able to conclude that P was *'treated unfavourably by comparison with persons of the sex to which [...] she was deemed to belong before undergoing gender reassignment'*.

Accordingly, no matter whether we choose to see K.B., the couple or R. as the victim of discrimination, we are confronted with the issue of transsexuality as a particular ground of discrimination, or more precisely, as a particular qualification of the discrimination ground of sex. There is no way in which it could be argued that the discrimination at issue in the K.B.-case concerns the fact that the victim of discrimination belongs to one sex and not the other.

This is what we can conclude on the basis of an analysis of the underlying logics of the judgment, of course. In the course of the main argument, the CJEU does not say anything as to this matter. In the initial step of the argumentation, however, a logic of double-names was indicated - although this was not necessary at all.

A silent logic of non-names?

The last judgment concerns Ms Richards who has undergone male-to-female gender reassignment surgery. Due to the fact that the British Authorities did not recognize the new sex of Ms Richards, she was refused a retirement pension by the age of 60, the normal retirement age for women in the United Kingdom. She would have to wait until she had reached the age of 65 - the normal retirement age for men.

The judgment which was delivered in 2006, two years after the K.B.-judgment, relies to a great extent on the results of the K.B.-judgment⁶⁸³. It deals with a similar problematic of discrimination, namely that of the recognition of the new sex of a transsexual person as a condition for the grant of a pension right. Only, the Richards-judgment is less complicated since it does not involve a couple, but a single person, and since the discrimination at issue is only manifested on two, and not three levels: the level of the pension right; and the level of legal recognition of the new sex of a transsexual person.

Apart from the fact that the Richards-judgment is less complicated, the main argument of it is similar to that of the K.B.-judgment. The CJEU finds that the discrimination at issue does not concern the national pension rules as such, but *'is based on Ms Richards'*

⁶⁸³ Case C-423/04, *Richards*. The judgment refers explicitly to the K.B.-judgment, par. 21 and 31.

inability to have the new gender which she acquired following surgery recognised with a view to the application of the Pensions Act 1995'; that is, it concerns '*one of the conditions of eligibility for that pension, in this case that relating to retirement age*'. The CJEU concludes that the fact that the new sex of Ms Richards is not recognized in connection with the application of the Pension Act constitutes discrimination on grounds of sex under the the Social Security Equality Directive. The same modification applies, though, as in the K.B.-judgment. It is for the member states to decide the conditions under which the new sex of a transsexual person may be legally recognized.⁶⁸⁴

In this case, the CJEU compares the situation of Ms Richards with the situation of other women: '*Unlike women whose gender is not the result of gender reassignment surgery and who may receive a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of eligibility for that pension[...]*'.⁶⁸⁵

Just like in the K.B.-judgment, we must conclude that the issue of transsexuality appears as a ground of discrimination, and not in the shape of a double-name. In the Richards-case, there is no doubt as to who is the victim of discrimination. That is Ms Richards. And the CJEU makes clear that Ms Richards is discriminated against in comparison to other women, that is, she is discriminated against in comparison to people belonging to the same sex as she does. The CJEU could not have argued otherwise. No opposition of the two sexes could have been established with respect to the discrimination suffered by Ms Richards.

The CJEU even emphasizes, when concluding that Ms Richards has been the victim of discrimination, that that discrimination '*arises from her gender reassignment*'⁶⁸⁶. That is, it does not arise from the fact that she belongs to one or the other sex, but from the fact that she has changed her gender.

In Conclusion: A powerful and flexible signifier - in spite of logical confusions

In overall, when looking at all three judgments as well as the way in which the issue of transsexuality is presented in the Employment Equality Directive, we must say that a certain confusion reigns as far as the distinction between the two different logics of non-discrimination is concerned.

⁶⁸⁴ Ibid, par. 28-30, 21

⁶⁸⁵ Ibid, par. 29

⁶⁸⁶ Ibid, par. 30

It appears as if the CJEU attempts to follow, whenever possible, the determinately reduced non-significance-logic. That was possible in the first part of the examination in the K.B-judgment, and it was possible in the P-judgment. But as far as concerns the main arguments of the K.B. and Richards judgments, it was no longer possible. In both of these cases it was clear that the discrimination at issue concerned transsexuality as a discrimination ground and not the fact that the victim of discrimination belonged to one sex in comparison to the other - either because it was not the sex of the victim of discrimination which was at issue, or because the comparisons involved were comparisons between the situation of the transsexual and the situation of people belonging to the *same sex* as the transsexual, and not to the opposite sex.

Discrimination against transsexuals may sometimes take a form in which the sex of the transsexual is confronted with the sex to which he or she *used to belong*, whereas in other cases, the sex of the transsexual is confronted with the sex to which he or she *presently belongs*. In the former kind of cases - such as the P-case - it will be possible to establish a double-name, that is, a name based on the opposition between the two sexes. In the latter kind of cases - such as the K.B. and Richards cases - that will not be possible. However, we might ask whether it would not be more sensible *in any case* to approach the issue of transsexuality as a discrimination ground, rather than as a kind of discrimination which concerns the sex of the victim of discrimination in contrast to the opposite sex. In any case, the crucial issue of concern is the fact that a transformation of sex has taken place. P was dismissed because she had undergone a transformation from man to woman, not because she was a woman in contrast to being a man.

The reader might recall that the P-judgment made clear that discrimination on grounds of sex does not simply mean '*discrimination based on the fact that a person is of one or other sex*', it also includes '*discrimination arising from the gender reassignment of the person concerned*'⁶⁸⁷. In isolation, those statements certainly presented transsexuality as a ground of discrimination, rather than in the shape of a relational name with respect to sex. But within the context of the entire argumentation of the P-judgment, those statements were undermined. The CJEU held that the discrimination at issue was based '*essentially if not exclusively, on the sex of the person concerned*'.⁶⁸⁸

⁶⁸⁷ Case C-13/94, *P v S*, par. 20

⁶⁸⁸ *Ibid*, par. 16 and 21

In other words, the confusion is present already in the P-judgment. The CJEU dealt with a case of dismissal because of gender reassignment. And the court made clear that the discrimination at issue arose from this gender reassignment. And yet, an argumentation was produced the purpose of which was to establish transsexuals as a particular group of right-holders characterized by their sex in contrast to the opposite sex.

So why is it that the CJEU attempts to follow, where ever possible, the determinately reduced non-significance-logic? Obviously, this logic forms part of the historical foundation of non-discrimination rights with respect to sex. In the 1970's and 80's such Directives were drafted solely with the purpose of combatting discrimination of women in comparison to men. Due to the massive existence of positive discrimination of women within the national systems, non-discrimination rights for men in comparison to women were also immediately relevant. Non-discrimination rights with respect to sex did not initially embrace the full meaning of the discrimination ground 'sex', or more precisely, all the potential meanings this discrimination ground might if given free as a discrimination ground, as a non-name.

If the CJEU would choose to open up for the full (possible) meaning of the discrimination ground 'sex', it would open up for a range of new issues, one way or another related to sex. First and foremost, issues of homosexuality, heterosexuality and bisexuality. We saw that the CJEU excluded those issues from the scope of the principle of non-discrimination on grounds of sex. But it could only do that on the basis of the determinately reduced non-significance-logic. In stead of opening up completely for the full meaning of the discrimination ground, the CJEU has opened up partly. We have been able to detect that in our analysis of the newer non-discrimination Directives. A number of additional qualifications of the meaning of the discrimination ground has arisen.

Also the qualified discrimination ground 'transsexuality' gives rise to combinations and replacements of signifiers and logics. Basically, they function like the combinations and replacements we were witnessing in connection with the maternity-related judgments. Firstly, a particular case is interpreted as an instance of the logic of the double-names 'Man' and 'Woman' (so that it can be grasped as an instance of discrimination on grounds of sex); secondly, the inclusion of the case under the scope of the non-discrimination Directives gives rise to an extended understanding of the discrimination ground sex. The only difference is that the judgments concerning

transsexuality are unfolded without any mediating name. Also, no other signifiers are involved in the replacements. The judgments concerning transsexuality are dominated purely by a logical tension between double-names and a free discrimination ground.

In spite of the logical confusion characterizing these judgments, we must conclude that the logical flexibility displayed by the CJEU serves to strengthen non-discrimination rights with respect to issues of transsexuality.

But also in another way did we see the CJEU demonstrate a will to stretch the reach of non-discrimination rights as far as possible. In the K.B.-case, we were confronted with multiple layers of discrimination in the sense that the pension rights in question depended on the possibility of being able to marry. The CJEU found that the couple's right to marry should be protected by non-discrimination law on grounds of sex and provided a double argument: firstly, the capacity to marriage should be seen as a *precondition* for the grant of the pension in question and would therefore be covered by the Treaty's article on equal pay; secondly, the right to marry constitutes a human right under the European Convention of Human Rights.

If we recall the Maruko and Römer judgments concerning same-sex life-partnerships⁶⁸⁹, the problematic was exactly the same. The fact that those same-sex couples had not been able to marry had implications for their pension rights. But in those judgments, the CJEU neither made use of 'the condition for being able to enjoy the right logic', nor the 'human rights'-argument.

There is a limitation to the flexibility, though. The CJEU did not follow the road of multiple layers of discrimination to the very end. It is implied that legal recognition of the new sex of a person following gender reassignment should be given, but it is emphasized that it is for the member states to determine the conditions under which that may happen.

So, a great will to flexible interpretation - by way of replacements of signifiers and logics and by way of human rights - is displayed by the CJEU in connection with the issue of transsexuality. Accordingly, those rights are relatively strong. However, as far as concerns the last and crucial element of discrimination in relation to transsexuals, that of legal recognition, non-discrimination rights are left in the hands of the member states.

⁶⁸⁹ Analyzed in chapter 13

Chapter 18

The double-names ‘Man in contrast to being woman’ and ‘Woman in contrast to being man’

We shall now turn to the most dominating signifiers as far as the discrimination ground ‘sex’ is concerned, the double-names ‘Man in contrast to being woman’ and ‘Woman in contrast to being man’. From our analyses of the Directives, we learned that these two signifiers are given no general definition, but that, none the less, fundamental differences between the sexes are presupposed. But these differences are abstract differences. More precisely, it is presupposed that ‘the difference as such’ between the sexes is significant. But it is left open to what extent this ‘difference as such’ might be historically changeable, or whether it will always be significant and only the particular manifestations of it will be historically changeable.

From chapter 16, regarding the maternity-related names, we learned that men and women are fundamentally different in the sense that there are circumstances which ‘can only affect women’ and these circumstances would circulate around pregnancy and maternity. However, for the purposes of this chapter, the maternity-related names are not relevant, exactly because they are established as names in their own right, names which are not followed by a shadow-name representing the opposite sex.

In this chapter, we shall examine those non-discrimination rights which function on the basis of a comparison between the situations of men and women. That is, in the cases we are going to meet, the situations of men and women are seen as comparable.

The case-law is enormous. Accordingly, the following analysis is far from exhaustive. I have selected the cases according to four cross-cutting problematics: *temporary discrimination*; *indirect discrimination*; *positive discrimination* and *justification of discrimination by reference to occupational requirements*. By virtue of these four problematics, we shall be able to discuss a number of important aspects as far as both substances and attributes are concerned. All of these problematics relate to exemptions from the principle of discrimination or to justification of discrimination, only under different perspectives. We shall both encounter cases in which women are the victims of discrimination and cases in which men are the victims. In this connection, we shall seek to establish whether the criteria used by the CJEU are the same or not. We shall be aware of whether any fundamental characteristics of women or men are laid down (or

presumed). We shall also be able to study different logics of rights, most notably the logic of positive discrimination.

Temporary discrimination

In the Social Security Equality Directive, a number of dynamical exemptions are laid down - exemptions meant to be periodically reexamined and eventually eliminated entirely. Thus, *temporary discrimination* is accepted with respect to a number of national benefit schemes. The exemptions center on pensionable ages, derivative pension rights of a wife and the acquisition of benefit entitlements in connection with interruption of employment due to the bringing up of children.

It is clear that to a large extent, the exemptions in question will cover instances of positive discrimination of women within national systems - national provisions meant to compensate women with respect to the fact that they have generally spend fewer years in the labour market than men. This means on the other hand that the exemptions in question will be potentially discriminatory towards men.

We shall examine three judgments which all discuss the nature and application of one of the exclusions laid down in the Social Security Non-discrimination Directive, namely the following: *'This Directive shall be without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'*.⁶⁹⁰

In all three judgments, we find interpretations of the overall purpose of this dynamical exclusion. The Directive itself does not say anything as to the overall purpose; but the CJEU clearly finds that the establishment of purpose *behind the provision* is necessary in order for the court to apply the provision. According to the Bougard judgment, it *'is apparent from the nature of the exceptions contained in Article 7(1) of Directive 79/7 that the Community legislature intended to permit Member States temporarily to retain the advantages afforded to women in relation to retirement pensions, so that States could progressively modify their pension systems in that regard without disturbing their complex financial equilibrium'*.⁶⁹¹

The Taylor and Haackert judgments from 1999 and 2004 present a slightly different formulation of the overall purpose of the exclusion, but clearly compatible with the formulation of the Bougard judgment. According to these judgments, the purpose of

⁶⁹⁰ Art. 7(1)(a), Dir. 79/7

⁶⁹¹ Case C-172/02, Bougard, par. 29

the exclusion is *'to avoid disrupting the financial equilibrium of the social security system or to ensure consistency between the retirement pension scheme and the other benefit scheme[s]'*.⁶⁹²

In other words, the CJEU makes clear that the exclusion concerns *'advantages accorded to women'*, more specifically related to the fact that in many national systems women are granted a retirement-pension at an earlier age than men. Furthermore, it makes clear that the purpose of the exclusion is to give the national systems time to adapt to a future situation characterized by non-discrimination with respect to sex, and that the *financial* aspect as well as the aspect of *consistency* within the benefit system as such are to be taken into account as far this gradual adaption is concerned.

As we shall see, this establishment of a purpose behind the provision in question is important because it provides the court with criteria for the application of it. The provision refers to *'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'*. Not only may the member states determine a different pensionable age for men and women for the purpose of granting pensions, the different pensionable ages may have *'consequences'* for other benefits as well - which will then also be excluded from the material scope of the Directive. In order to apply the provision the court will need criteria on the basis of which it may interpret the meaning of *'consequences'*. How far into a given national system may the *'consequences'* of a different retirement age for men and women reach? With the establishment of a purpose behind the provision circulating on *'financial equilibrium'* and *'consistency between the retirement pension scheme and the other benefit schemes'*, the court has simultaneously established two criteria for evaluating whether a particular discriminatory benefit may be said to constitute a *'consequence'* of different retirement ages for men and women, or not.

The CJEU has hereby established a horizon of interpretation which focuses on what we may call *the internal needs of the national benefit systems*, financially and in terms of consistency, rather than on the situation of the right-holders. Naturally, the wording of the provision implies that a connection between pensionable age and different kinds of benefits must be established, but it does not imply that only the internal needs of the national benefit systems should be taken into account. In fact, by recognizing that the exclusion concerns *'advantages accorded to women'*, the CJEU does in fact open a door leading into another possible path of interpretation, focusing on the original meaning behind the existence of different retirement ages for women and men, namely to

⁶⁹² Case C-382/98, *Taylor*, par. 28. Practically the same formulation in Case C-303/02, *Haackert*, par. 30

compensate women for other sorts of discrimination which they suffer. But the CJEU chooses not to go through that door.

It should be mentioned as well that the CJEU introduces the notion of ‘a necessary and objective link’ in stead of the notion of ‘consequence’ which appears in the provision: Only those forms of discrimination which are ‘*necessarily and objectively linked to the difference in retirement ages*’⁶⁹³ will be excluded from the material scope of the Directive. ‘Link’ is obviously logically weaker than ‘consequence’, while on the other hand ‘necessary and objective’ seems to strengthen the requirement. As such, the introduction of this notion in stead of ‘consequence’ enhances the flexibility available to the court, while simultaneously strengthening the requirement in a substantial, and not just formal sense.

In other words, by establishing a purpose behind the provision circulating on ‘*financial equilibrium*’ and ‘*consistency between the retirement pension scheme and the other benefit schemes*’, and by replacing ‘consequence’ with ‘*necessary and objective link*’, the court has laid the ground for a flexible path of interpretation, focusing on the internal needs of the national social security systems.

I shall now briefly go through the three judgments in order to examine how the court treads this path and applies the criteria of ‘*financial equilibrium*’ and ‘*consistency*’.

The Bourgard judgment concerns discrimination against men in relation to the calculation of retirement pensions. Mr. Bougard, a Belgian self-employed worker, wished to retire 5 years before the normal retirement age which in Belgium is 65 for self-employed men and 60 for self-employed women. He was awarded a pension which was reduced by 5% for each year the pension was drawn in advance of the normal retirement age. That is, at the age of 60, he was awarded a pension which was reduced by 25%. In comparison, a 60 year old self-employed woman would be eligible for a non-reduced pension.

There is no doubt that the Belgian legislation discriminates between men and woman with respect to the calculation of retirement pensions for self-employed workers. But does the exclusion discussed above apply? The CJEU finds that it does. The argumentation proceeds as follows. First, the CJEU emphasizes that the Belgian legislation is under gradual transformation, moving towards a situation in which the retirement age for men and women will be the same, namely 65, and both sexes will

⁶⁹³ Case C-172/02, *Bougard*, par. 28; Case C-303/02; *Haackert*, par. 30; Case C-382/98, *Taylor*, par. 28

have the possibility of taking a retirement pension from the age of 60, reduced with 5% for each year it is drawn in advance. Already now (at the time of the proceedings), the option for women to take an early retirement pension before the age of 60 has been abolished.⁶⁹⁴ On the basis of a presentation of the amendments in the Belgian legislation the purpose of which is to achieve a uniform retirement age for both men and women, the court concludes: *'There is, therefore, a relationship of interdependence between the fact that men can choose to retire early and the associated early retirement reduction and the fact that a difference in retirement ages according to sex has been retained.'*⁶⁹⁵

This *'relationship of interdependence'* concerns in other words the *gradual process of adapting the systems* towards a uniform retirement age. It is important to note that from a synchronous point of view, on the other hand, there is clearly not a relationship of interdependence: Men and women may retire at different ages, but only men may retire 5 years before that age with a reduced pension.

The court continues: *'It is undeniable that the early drawing of retirement benefits has financial repercussions on the pension system concerned as a result of the reduction in the income received from social security contributions and the increase in the expenditure incurred by way of the additional pensions payable. An arrangement consisting of an early retirement reduction would seem conducive to offsetting that financial impact. The calculations and other information provided by the Belgian Government indicate that the arrangement could not be abolished without compromising the financial equilibrium of the pensions system in issue.'*⁶⁹⁶

This is in fact a different argument, stating that reductions in early drawn pensions are generally justifiable, and in the case of the Belgian pension system necessary, seen from the point of view of the financial equilibrium of that system. But in this argument, the connection to the discrimination at issue has disappeared.

Finally, the court takes up the question of another kind of discrimination which can be detected in the Belgian pension system, namely discrimination of self-employed workers compared to employed workers, - but finds that it does not affect the argumentation outlined above: *'Those considerations are not undermined by the fact that the early retirement reduction has been abolished, in full or in part, in other Belgian pensions arrangements, in particular in the arrangements for employed workers. As is apparent from the response of the Belgian Government [...] differences between the two systems in terms of their*

⁶⁹⁴ Case C-172/02, *Bougard*, par. 31 and 40

⁶⁹⁵ *Ibid*, par. 41

⁶⁹⁶ *ibid*, par. 42

*extent and the resources available to them account for the differences in the reduction provisions.'*⁶⁹⁷

One might ask: why does the court at all address the discrimination which self-employed workers are subjected to, compared to employed workers? The case concerns discrimination on the grounds of sex, not on the grounds of being self-employed. The reason for addressing it is of course that the fact that employed workers will not have their pensions reduced as a result of early retirement might undermine the argument that reductions in early drawn pensions are generally justifiable, and in the case of the Belgian pension system necessary.

When analyzing the argumentation as a whole, we see that it is two-fold. But only the first argument is an argument for the existence of '*an objective and necessary link*' between the particular discrimination at issue and the different retirement age for men and women. Such a link can be established on account of the gradual process of adapting the Belgian pension system to a non-discriminatory system with respect to sex. The discrimination at issue constitutes an element in this process, a step on the way, - halfway between a discriminatory and a non-discriminatory system. The second argument, in contrast, does in fact not at all relate to the issue of discrimination on the grounds of sex. This argument simply concerns the justifiability of reductions in early drawn pensions, in general as well as in the particular case. We may in fact call it a pseudo-argument: it does not establish any link between the discrimination at issue and the different retirement ages for men and women. This second argument addresses, however, another kind of discrimination taking place in the Belgian pension system, the discrimination towards self-employed workers. Both parts of the second argument are resting on financial considerations centering on the notion '*financial equilibrium of the pensions system*'.

We see in other words that the CJEU argues for the justifiability of something which it has not been asked to consider, something which is beyond the issue of discrimination on the grounds of sex and which concern other issues, - the issue of reducing pensions, and the issue of discriminating between employed and self-employed workers. The establishment of an '*objective and necessary link*' between the particular discrimination at issue and the different retirement age for men and women depends solely on a processual consideration, an acknowledgement of the process which the Belgian pensions system will need to go through in order to become a non-discriminatory

⁶⁹⁷ *ibid*, par. 45

system with respect to sex. But the CJEU chooses to argue for the justifiability of other elements within this Belgian pensions system as well. Strictly speaking, the second argument is a pseudo-argument. However, we may see it as a way of deepening the first argument by taking into account the regulatory context as such.

The Haackert-judgment concerns an Austrian worker, Mr. Haackert, who was refused an early old-age pension on account of unemployment. According to the Austrian system, such a pension was eligible to women at the age of 56 years and six months, but to men only 5 years later, at the age of 61 years and six months. And Mr. Haackert had only passed the age criterium which applied to women.

Like in the Bougard-judgment, the CJEU finds that there is an '*objective and necessary link*' between the discrimination in question and the differences in the normal retirement ages laid down for women and men in Austria. The normal retirement age was 60 years for women and 65 for men.

In this case, however, the discrimination at issue is considered to have no impact on the '*financial equilibrium*' of the national social security system, since '*the percentage of early old-age pensions on account of unemployment paid in December 2001 in relation to the total of old-age pensions and early old-age pensions represented barely 1.2%*'.⁶⁹⁸ But from the point of view of '*preserving coherence*' within the Austrian pension system, the court finds that a link can be established: '*[...] the retirement age fixed for the benefit at issue in the main proceedings and the normal retirement age are objectively linked, not only because the old-age pension is substituted for the early old-age pension on account of unemployment where the persons concerned attain the normal retirement age, but also because the age at which that benefit may be claimed is the same for men as for women, namely three and a half years before the normal retirement age.*' The court explains in this connection that the early old-age pension on account of unemployment is '*designed to assure an income to a person who is no longer capable of being reintegrated into the employment market before attaining the age entitling him or her to an old-age pension*'.⁶⁹⁹

This argumentation is more straightforward than that of the Bougard-judgment: The pension at issue is meant to substitute the normal old-age pension, and the discriminatory rules by which it is granted corresponds to the discriminatory rules by which the normal retirement pension is granted. As such, the discrimination at issue is

⁶⁹⁸ Case C-302/02, *Haackert*, par. 31-32

⁶⁹⁹ *Ibid*, par. 34, 36

linked to the differences in the normal retirement ages for men and women, and serves to preserve coherence within the Austrian pensions system.

In the Taylor-judgment, in contrast, the CJEU finds that no '*objective and necessary link*' can be established.

Mr. Taylor who had been employed by the British Post Office received by the age of 62 a Post Office Pension. Had he been a woman, he would have been in receipt of a State retirement pension. Also, he would have been in receipt of a winter fuelpayment of £20. According to British regulations, such a payment was granted to women aged 60 or over and to men aged 65 or over who were entitled to certain benefits, including the State retirement pension.

Is a winter fuelpayment of that kind excluded by the material scope of the Social Security Non-discrimination Directive? The CJEU makes use, again, of the '*financial equilibrium*' and the '*consistency*' criteria. But the court finds that no '*objective and necessary link*' can be established on the basis of either of those criteria:

'As regards, first of all, the condition concerning preservation of the financial equilibrium of the social security system, it should be borne in mind that the Court has already held that the grant of benefits under non-contributory schemes [...] has no direct influence on the financial equilibrium of contributory pension schemes.' Only benefits which are earned through contributions may be excluded as a consequence of the '*financial equilibrium*'-criteria. And the winter fuelpayment is not.⁷⁰⁰ As regards the second criterium, the '*consistency*'-criterium, the CJEU simply finds that although the winter fuelpayment '*is designed to provide protection against the risk of old age and must, therefore, be paid only to those above a certain age, it does not follow that that age must necessarily coincide with the statutory age of retirement and, as a result, be different for men and women.*'

In other words: the winter fuel payment does not form part of the contributory pension system, and although it is granted to people above a certain age and is linked to the State retirement pension, it is seen as a benefit in its own right, and not as a benefit which is woven together with the pension system as such. Consequently, it cannot be excluded from the scope of the Directive; Great Britain will be obliged to eliminate the discrimination which it manifests.

The three judgments tell us that the CJEU places the internal needs of the national social security systems at the center when interpreting the derogation provided for in

⁷⁰⁰ Case C-382/98, *Taylor*, par. 29-31

the Social Security Equality Directive. More specifically, the court makes use of two criteria, the '*financial equilibrium*' criterium and the '*consistency*' criterium.

In two of the judgments, those criteria were applied rather strictly. The '*financial equilibrium*' criterium would only be satisfied if the benefit under dispute could be said to have real financial impact on the pension system as such, and the consistency criterium would require that the benefit under dispute was in fact related to the national old age pension instead of constituting a scheme in its own right (leaving it slightly open, though, when two schemes can be said to be '*related*' and when they can not). In one of the judgments, however, the Bougard-judgment, the '*financial equilibrium*' criterium was applied less strictly (and the consistency criterium was not applied at all). It was not being related to the benefit under dispute, but served as a justifying argumentation for other elements within the pension system, that is, for the regulatory context as such. In this judgment, only the historical process of gradually adapting the systems to a non-discriminatory future could account for a link between the discrimination at issue and the different retirement ages.

On the basis of all three judgments, we may conclude that the establishment by the CJEU of the notion '*objective and necessary link*' is crucial. This notion replaces the notion of '*consequences*' and provides the court with a flexible interpretative tool, making it possible to consider the internal needs of the national systems not only according to clear criteria, but also in a substantial and contextualized way.

In other words: when seen in the light of the dynamical exemptions of the Social Security Equality Directive, non-discrimination rights are not strong. The internal needs of the national systems are given priority - and not only on the basis of strict criteria, but also on the basis of evaluations of the regulatory contexts as such. It is noteworthy that the original purpose behind the existence of different retirement ages for women and men in the member states is not at all taken into account, that is, the purpose of compensating women. The implications for the rights-holders of a given discriminatory benefit with respect to its possible compensatory nature vis-a-vis its discriminatory nature does not play a role in the argumentations what so ever. As mentioned, due to the nature of the exemptions, this is likely to harm men more than women, but women may be affected as well (possibly even by positive discrimination which does not serve its purpose).

As mentioned in chapter 15, in connection with the discussion of the ambiguous borders between the four Directives as far as concerns their material scopes, it may

very well be crucial to the outcome of a judgment whether the case in question falls under one or the other of the Directives. We have just seen why this is so. If a case falls under the scope of the Social Security Equality Directive, serious exemptions apply - and in the light of those exemptions, the needs of the national systems prevail over non-discrimination rights.

In this connection, it should be mentioned, however, that it is not only the concepts of 'pay' and 'services' which have colonizing capacities. There are also other concepts which are capable of 'dragging' a particular case away from the scope of the Social Security Equality Directive. More precisely, the concepts 'working conditions' and 'conditions governing dismissal' are capable of moving particular instances of discrimination from a border area into the scope of the Employment Non-discrimination Directive.'

In the Kleist judgment, for instance, the CJEU ruled that '*the term 'dismissal' [...] must be given a wide meaning*'; so as to cover an age limit set for the compulsory dismissal of workers, even if the dismissal involves the grant of a retirement pension.⁷⁰¹

In the Vergani judgment, a tax advantage granted to older workers in order to encourage them to take voluntary redundancy, was seen as '*a condition governing dismissal*'.⁷⁰²

And in the Kutz-Bauer judgment, a part-time scheme was seen as related to 'working conditions' in spite of the fact that the scheme, according to its purpose, was closely related to the national pension system.⁷⁰³

Had these three cases - all clearly belonging in a border area between the Social Security Equality Directive and the Employment Equality Directive - been considered under the scope of the former Directive instead of the latter, it is highly possible that the respective outcomes of those judgments would have been very different.

Indirect discrimination

The introduction of a concept such as 'indirect discrimination' could, potentially, have radical consequences with respect to the range of issues which could become issues of discrimination. It opens for all sorts of considerations as to the effects of laws and human conduct in general. As regards the discrimination ground sex, such

⁷⁰¹ Case C-356/09, *Kleist*, par. 26

⁷⁰² Case C-207/04, *Vergani*, par. 28-29

⁷⁰³ Case C- 187/00, *Kutz-Bauer*, par. 44-46

considerations could in principle be illimitable, due to the deep and multi-layered nature of this kind of discrimination - pervading our social institutions formally as well as informally.

However, the CJEU solves these problems in a simple manner by making use of statistical data.⁷⁰⁴ We may say that the court avoids all the difficulties arising in the swells of the concept of indirect discrimination by simply not really opening the complexities of the concept. Or at least, by keeping it on a tight leash.

This means that the interesting discussions with respect to indirect discrimination concerns not so much the way in which this concept is operated in itself, as it concerns the possibilities of justifying indirect discrimination. The definition of indirect discrimination - as it appears in all newer non-discrimination Directives, and applying to the older Directives as well - reads as follows: *'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'*.⁷⁰⁵ This means that indirect discrimination may always be justified, no matter what other provisions regarding justification of discrimination are to be found in a given non-discrimination Directive. What is required is a *'legitimate aim'* and *'appropriate and necessary means'*.

In four judgments, we shall examine how the CJEU evaluates different attempts by national courts or authorities to justify indirect discrimination, with the purpose of detecting the criteria and concerns which govern the court in this matter. Three of the judgments relate to the Employment Equality Directive, one relates to the Social Security Equality Directive, and the last one deals with the Self-employment Equality Directive.

We shall begin with the Kutz-Bauer-judgment which was briefly mentioned just above. This judgment concerns a scheme of part-time work for older employees which applies only until the date on which the person concerned becomes eligible for a full retirement pension.

⁷⁰⁴ Previously, in chapter 12, we have encountered judgments in which the existence of indirect discrimination was established on the basis of a consideration of whether a given rule was 'more likely to affect' certain people than other people - that is, without the use of statistical data. However, in any case, the interpretation of the meaning of indirect discrimination is basically the same.

⁷⁰⁵ See any of the newer non-discrimination Directives, f.inst. art. 2(1)(b) of Dir. 2006/54/EC

Since ‘the class of persons entitled to receive a full retirement pension at the age of 60 under the statutory old-age insurance scheme consists almost exclusively of women while the class of persons eligible for such a pension only from the age of 65 consists almost exclusively of men’, the CJEU finds that the scheme of part-time work constitutes, in principle, indirect discrimination. From the age of 60, ‘the great majority of workers entitled to benefit from the scheme’ are male⁷⁰⁶. But may such indirect discrimination be justified?

The CJEU considers carefully the justification suggested by the German Government: ‘[...] one of the aims pursued [...] is to combat unemployment by offering the maximum incentives for workers who are not yet eligible to retire to do so and thus making posts available. To allow a worker who has already acquired entitlement to a retirement pension at the full rate to benefit from the scheme of part-time work for older employees implies, first, that a post which the scheme intends to allocate to an unemployed person would continue to be occupied and, second, that the social security scheme would bear the additional costs, which would divert certain resources from other objectives.’⁷⁰⁷ The justification offered by the German Government involves two ‘aims’: an aim concerning recruitment and another aim focusing on financial resources.

The CJEU considers these two aims one at a time. With respect to the first aim, the court states that ‘it cannot be disputed that the encouragement of recruitment constitutes a legitimate aim of social policy’. But the CJEU does not find that the German Government has argued sufficiently for the appropriateness of the means, and emphasizes that ‘mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed provisions is unrelated to any discrimination based on sex’. The second aim is outright rejected by the court: [...] although budgetary considerations may underlie a Member State’s choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes’.⁷⁰⁸ An aim focusing on budget and resources will never constitute a legitimate aim. The court reinforces this conclusion with a highly interesting argument seen from a fundamental rights perspective: ‘Moreover, to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application

⁷⁰⁶ Case C-187/00, *Kutz-Bauer*, par. 48-49

⁷⁰⁷ *Ibid*, par. 54

⁷⁰⁸ *Ibid*, par. 56, 58, 59

*and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States.*⁷⁰⁹

In the Rinke-judgment, delivered in 2003, the CJEU finds that the justification offered by the national authorities is acceptable, in contrast to the what we saw in the Kutz-Bauer judgment.

Ms Rinke who is a doctor carried out one year of training in general medicine on a part-time basis. When applying for a certificate and the right to use the title General Medical Practitioner, she was rejected on the ground that the prescribed training had to be carried out for at least six months on a full-time basis. Ms Rinke found that she had been the victim of discrimination on grounds of sex.

The CJEU acknowledges that it *'is clear from the statistical data [...] that the percentage of women working part-time is much higher than that of men working on a part-time basis. That fact, which can be explained in particular by the unequal division of domestic tasks between women and men, shows that a much higher percentage of women than men wishing to train in general medicine have difficulties in working full-time during part of their training. Thus, such a requirement does in fact place women at a particular disadvantage as compared with men.'*⁷¹⁰ That is, in principle, the requirement of 6 months of full-time training might constitute indirect discrimination. But is the requirement justifiable?

Interestingly, what clashes here is not only EU non-discrimination rights and national legislation. EU non-discrimination rights are colliding with an EU requirement as to the exercise of general medical practice in the member states, laid down in two Directives, *Directive 86/457/EEC on specific training in general medical practice* and *Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications*. What is at stake is a potential conflict within EU-law.

The CJEU begins the analysis of this conflict by stating that the two before-mentioned Directives are meant to serve two overall objectives within the EU, namely *"facilitating the free movement of doctors"* and *"a high level of public health protection in the Community."* When pursuing those objectives, the Directives should *'be allowed a wide margin of discretion'*, but this should not *'render meaningless the implementation of a fundamental*

⁷⁰⁹ Ibid, par. 60. Case C-77/02, *Steinicke*, is very similar to the Kutz-Bauer-judgment; all the same general points are being made, including the last one. See in particular par. 62, 64, 66, 67

⁷¹⁰ Case C-25/02, *Rinke*, par. 35

principle of Community law such as the elimination of indirect discrimination on grounds of sex'.⁷¹¹

The considerations which follow have the purpose of establishing whether the requirement laid down in the two Directives concerning general medical practice *'exceed what is necessary'* in order to achieve those overall objectives. The CJEU finds that this is not the case. The Directives simply state that *'adequate preparation for the effective exercise of general medical practice requires a certain number of periods of full-time training'*. The CJEU finds that it *'was reasonable for the legislature to take the view that that requirement enables doctors to acquire the experience necessary, by following patients' pathological conditions as they may evolve over time, and to obtain sufficient experience in the various situations likely to arise more particularly in general medical practice.'*⁷¹²

Since the two Directives do not exceed what is necessary when requiring that *'a certain number of periods of full-time training'* should be carried out in connection with general medical practice in the member states, no violation of non-discrimination rights on the grounds of sex has occurred, the CJEU concludes.⁷¹³

It should be noted that the entire argumentation rests on the two overall objectives established at the outset: that of *'facilitating the free movement of doctors'* and that of *'contributing to a high level of public health protection in the Community'*. Those objectives are never in dispute. Only the ways of pursuing them in the two Directives are in dispute. From the point of view of the logic of the argumentation, therefore, these two objectives are given a higher priority than non-discrimination rights.

Of course, this is not what the court says. The court says that a fundamental principle such as the elimination of indirect discrimination on grounds of sex should not be *'rendered meaningless'*. But more precisely, it should not be rendered meaningless due to the particular ways in which the overall objectives are pursued in the two Directives.

In addition, it should be noted that the examination carried out by the CJEU consists in evaluating the relevant provisions of the two Directives in the view of the two overall objectives in order to determine whether or not they *'exceed what is necessary'*. So not only are the two overall objectives given an indisputable status from the outset, the examination which takes place does not even involve the principle of non-

⁷¹¹ Ibid, par. 38-39

⁷¹² Ibid, par. 40

⁷¹³ Ibid, par. 41-42

discrimination. Only the relationship between the overall objectives and the requirement laid down in the two Directives is being considered.

In a sense, this should not surprise us. We have already seen in the previous judgment (as well as throughout Part. I.2) that ‘justification’ does not imply a balancing exercise. ‘Justification’ concerns solely the question of whether the existence of *‘legitimate aims’* and *‘appropriate and necessary means’* can be established or not. Non-discrimination rights are never taken into account with respect to this examination. The Rinke-judgment is only special in that it concerns a potential clash between different EU-Directives.

At an earlier stage of the judgment the CJEU answers a question raised by the referring court as to the status of non-discrimination rights vis-a-vis other legislative acts of the Community. Are non-discrimination-rights on grounds of sex so fundamental that they could in principle override any conflicting rule in secondary Community legislation?, the referring court asks.⁷¹⁴ The CJEU answers that *‘the elimination of discrimination on grounds of sex forms part of the fundamental rights’* of Community Law and that *‘the respect of fundamental rights is a condition of the legality of Community acts’*. For this reason *‘a provision of a directive adopted by the Council in disregard of the principle of equal treatment for men and women is vitiated by illegality’*.⁷¹⁵

Certainly, the legality of the provision in question is being examined. But it is not being examined from the point of view of its consequences for non-discrimination rights. It is being examined solely from the point of view of the two overall objectives in connection with the margin of discretion which the Community legislature enjoys. Strictly speaking, the examination has not considered the question of whether the provision in question *‘disregards the principle of equal treatment for men and women’* or not. So what does this mean? It means that non-discrimination rights - the fundamental status of which is being emphasized by the CJEU over and over again - may not only be overridden by other objectives, it may be overridden without an examination of the essential conflict at issue.

The next judgment, the Brachner-judgment, concerns indirect discrimination in relation to the Social Security Equality Directive.

Ms Brachner is the receiver of a minimum statutory old-age pension. In accordance with the rules of an annual pension adjustment scheme, her pension was increased

⁷¹⁴ Ibid, par. 22, question 2(b)

⁷¹⁵ Ibid, par. 25-27

with the general adjustment factor of that year, 1.017%. However, had she been the holder of a higher pension, she would have been eligible for an exceptional increase.

When considering whether Ms Brachner might be the victim of indirect discrimination, the CJEU needs to establish whether *'a significantly greater number of women than men'* are receivers of minimum pensions and therefore excluded from being eligible for the exceptional increase. According to the statistical data presented by the referring court, 57% of all female pensioners receiving a pension pursuant to the General Law on social security are receivers of minimum pensions, whereas the corresponding percentage for male pensioners is only 25%. *'Such a disparity is large enough to constitute a significant indication capable of justifying the conclusion [...] that the exclusion of minimum pensions from the exceptional increase [...] in fact places at a disadvantage a significantly higher percentage of female pensioners than male pensioners'*⁷¹⁶, the CJEU concludes. In principle, indirect discrimination is at stake.

The next step concerns justification. The referring court has presented three possible paths of justification. Firstly, the referring court asks whether *'a disadvantage for female pensioners arising from the annual increase in their pensions [may] be justified by the earlier age at which they become entitled to a pension'*? Since women generally become entitled to a pension at an earlier age than men, they have also generally contributed less than men to the pension system. May that justify the disadvantage they suffer? It may not, says the CJEU, building its argumentation on the declared purpose of the adjustment scheme, namely *'to maintain the purchasing power of the pension in the light of consumer price developments'*. On the basis of this purpose, the CJEU infers that *'it is obvious that that adjustment is not a benefit which represents consideration for the contributions paid'*. Therefore, a justification argument focusing on the contributions paid by women is simply not relevant to the case.⁷¹⁷

Secondly, the referring court asks whether the disadvantage for female pensioners may be justified by *'the longer period during which they receive a pension'*? That suggestion is met by the CJEU in exactly the same manner as the first one. It relates to the balance which must exist between contributions and received benefits in a contributory pension system. But since the purpose of the adjustment scheme at issue is not at all related to such a balance, the suggested justification ground cannot be accepted.⁷¹⁸

⁷¹⁶ Case C-123/10, *Brachner*, par. 63 (and 59-62)

⁷¹⁷ *Ibid*, par. 38, question 3, and par. 78-80 (the CJEU's answer)

⁷¹⁸ *Ibid*, par. 38, question 3, and par. 82-86 (the CJEU's answer)

The third and last justification ground suggested by the referring court concerns another benefit which applies to pensioners with minimum pensions, namely a compensatory supplement calculated on the basis of a standard rate for a minimum income. This standard rate has been '*disproportionately increased*', the referring court explains, where the payment of the compensatory supplement require account to be taken of the pensioners other income as well as the income of the spouse. The referring court suggest, in other words, that this increase in the compensatory supplement as far as pensioners subjected to a condition of aggregation of income is concerned might compensate for the fact that pensioners with minimum pensions are excluded from the exceptional increase at issue in the case.⁷¹⁹

Also this justification ground is rejected emphatically by the CJEU. The main argument is basically the same as in the case of the first and the second suggestion. Again, the CJEU recalls that the purpose of the adjustment scheme in question is '*to maintain the purchasing power of the pensions in the light of consumer price developments*'. The compensatory supplement must be seen in the light of the income aggregation rule by which it is regulated. Since there is '*no relationship between that rule on aggregation of income and the specific objective of that adjustment scheme*', the increase in the compensatory supplement cannot be relied on as a justification ground.⁷²⁰

The CJEU elaborates on this main argument in a noteworthy way. There is no reason why minimum pensions '*should not, in the same way as higher-level pensions, benefit from the exceptional increase in order to ensure the purchasing power of those pensions*', the court emphasizes. '*The argument that is it not necessary to grant an exceptional increase in cases where pension holders and their spouses enjoy sufficient aggregate resources as not to fall below the social minimum cannot be relied on as objective justification [...]*'.⁷²¹ In these statements - which on the surface appear to have a merely explanatory nature in the light of the main argument - the court introduces a new ground of discrimination, namely the ground of poverty. What the court actually says is that the adjustment scheme at issue discriminates against poor pensioners, and that this may not be justified by the fact that these poor pensioners are not so poor as to fall below the social minimum.

Accordingly, what we see is that the court - almost unnoticeably - evaluates a matter which it has not been asked to consider, namely whether discrimination against poor

⁷¹⁹ Ibid, par. 38, question 3

⁷²⁰ Ibid, par. 94-95

⁷²¹ Ibid, par. 96-97

pensioners may be justified, and on what grounds. This is not the first time it happens that the CJEU discusses another kind of discrimination than discrimination on grounds of sex. In the *Bourgard*-judgment, analyzed in the last section, the court discussed whether a pension system which discriminates against self-employed workers in comparison to employed workers with respect to reductions in early drawn pensions, was justifiable.

The *Brachner*-case is different from the *Bougard*-judgment in that it concerns indirect, and not direct, discrimination. As far as indirect discrimination is concerned, it is far more difficult to distinguish between discrimination on the ground of sex and other aspects of the rule or scheme under consideration. The CJEU has to take seriously the distinctions which are specified by that rule or scheme. And these distinctions do not concern sex. Only their effects concern sex. In the *Brachner*-case, the distinctions which are specified concern minimum versus higher pensions, that is, they concern poor pensioners versus pensioners with higher incomes. The third justification ground suggested by the referring court addresses this issue explicitly; the suggestion is that as long as the poor pensioners do not fall below the social minimum, discrimination against them may be justified. Accordingly, the CJEU has in fact no other choice than entering a discussion of the justifiability of discrimination on the ground of poverty - although this was not what the court was meant to do. In contrast, the first and the second suggestion of the referring court as to possible justification grounds concerned the *effects* of the adjustment scheme, namely the effects for women in comparison to men, and not the issue of minimum versus higher pensions.

The last judgment concerns a Danish self-employed worker, Ms Jørgensen, a specialized medical practitioner.

The case concerns national regulations for full-time and part-time-practices, respectively. By national Agreement, a uniform ceiling for turnover of part-time practices in respect of fees paid by the social security body had been fixed at 500.000 DKK per year. However, practices previously regarded as full-time practices which in 1989 achieved a turnover between 400.000 and 500.000 DKK would remain full-time practices and accordingly not be subject to the annual ceiling. But in case of sale, they would be converted to part-time practices.

Ms. Jørgensen's practice which had been a full-time-practice before the Agreement had achieved a turnover of 424.016 DKK in 1989. According to the Agreement, it could remain a full-time practice, but would be converted in the event of sale. Ms Jørgensen

found that indirect discrimination on the ground of sex was at stake. She explained that her turn-over was not higher because she had had to devote part of her time to her family commitments when her children were young.

This case falls under the Self-employment Non-discrimination Directive⁷²². It concerns conditions under which Ms Jørgensen may sell her own practice. The CJEU is not convinced that the provision governing these conditions in the national Agreement constitute indirect discrimination against women. According to the facts provided by the referring court, its application affected 4.6% of the female and 0.7% of the male specialized medical practitioners. *'It seems doubtful that such data could be treated as significant'*⁷²³, the court notes, but leaves the determination thereof to the referring court.

Then, the CJEU considers the question of justification. The referring court asks whether *'considerations relating to budgetary stringency, savings and medical practice planning'* may serve to justify the disadvantage suffered by women - in case it will be established that such a disadvantage exists. The CJEU repeats itself with respect to the status of *'budgetary considerations'* in connection with justification of indirect discrimination on the ground of sex. *'Budgetary considerations'* cannot in themselves constitute a legitimate aim; if they could, non-discrimination rights with respect to sex would become dependent on the varying financial situations of the different member states.⁷²⁴

But after these general remarks, the CJEU throws out a lifeline to the referring court - and to the contested provision. The CJEU makes clear that if the provision is *'intended to ensure sound management of public expenditure on specialized medical care and to guarantee people's access to such care'* it could be justified. Such an aim would be a legitimate aim of social policy, and to the extent that the provision could be demonstrated to be appropriate and necessary as well, it would not be contrary to non-discrimination rights.⁷²⁵

Accordingly, the CJEU offers to the referring court a possible way of rephrasing its own suggestion. Instead of *'budgetary stringency, savings and medical practice planning'* the referring court could use the phrase *'sound management of public expenditure on specialized medical care and guaranteeing people's access to such care'*. In the latter phrase, budgetary

⁷²² Dir. 86/613/EEC (now amended by Dir. 2010/41/EU)

⁷²³ Case C-226/98, *Jørgensen* par. 34

⁷²⁴ *Ibid*, par. 22, question 2, par. 39 (the CJEU's answer)

⁷²⁵ *Ibid*, par. 40-42

considerations have been transformed into '*sound management*', and they are being connected with people's rights to health care.

Apart from offering this possibility of reformulation, it is noteworthy that the CJEU does not produce a critical analysis as to the question of the appropriateness and necessity of the provision in question with respect to the suggested aim. It could for instance have been argued that the fixing of a ceiling for the turnover of part-time practices constituted an appropriate and necessary measure in the light of the suggested aim, in that it addresses a problem described by the referring court, namely that '*many doctors who in theory worked principally in a hospital and part-time in their practice were criticized for neglecting their hospital work and working chiefly with a view to ensuring the turnover of their practice*'⁷²⁶. But would that in itself make the rule which affects Ms Jørgensen - that only full-time practices with a turnover higher than the amount fixed by the ceiling could remain full-time practices in event of sale - appropriate and necessary? Or could the implications for full-time practices of the fixing of a ceiling for part-time-practices be justified in some other way? The CJEU does not raise any questions of this kind. The judgment contains no critical analysis of the suggested justification ground on the basis of the facts presented by that court.

In the Jørgensen-judgment, the CJEU treats the justification suggestion from the referring court far more graciously than how it treated justification suggestions involving budgetary considerations in the Kutz-Bauer judgment. How come this difference?⁷²⁷

The reformulation of the aim of the contested provision, suggested by the CJEU, is noteworthy. This reformulation emphasizes that the case concerns public health care. We have seen once before, in the Rinke-judgment that '*public health protection*' is given the status of an indisputable objective. In that judgment, the means by which this objective was pursued in two Directives were considered, but hardly analyzed. In the Jørgensen-judgment, there is no discussion of means whatsoever. The two judgments resemble each other in the sense that they both demonstrate an uncritical approach with respect to rules governing the conditions under which doctors may perform their medical activities.

⁷²⁶ Ibid, par. 14

⁷²⁷ The Jørgensen-judgment is 3 years older than the Kutz-Bauer-judgment (from 2003). This is hardly crucial. There are much older judgments in which budgetary considerations are being rejected straight out as a possible justification ground. See f.inst. C-343/92, *De Weerd and Others*, par. 35-38

In four judgments we have studied the patterns of argumentation of the CJEU in so far as 'legitimate aims' and 'appropriate and necessary means' are concerned. The judgments were particularly interesting due to the fact that the idea of 'the fundamental status of non-discrimination rights' were brought forward again and again. And surely, in contrast to what we saw in connection with the applications of the dynamical exemptions of the Social Security Equality Directive, the CJEU approaches the justification suggestions provided by the national authorities in strict and critical ways. Budgetary considerations within the field of employment policy are rejected as irrelevant as such, and as far as the pursuit of recruitment policy aims are concerned, we learn that '*mere generalizations are not enough*'. In addition, the CJEU displays a sensitive approach towards other kinds of discrimination, such as discrimination on grounds of poverty, which may be intertwined with discrimination on grounds of sex.

Only aims and means related to public health protection were accepted. That in itself is not surprising. But it is noteworthy that in both of the judgments in question - the Rinke and Jørgensen judgments, both concerning requirements specified for doctors - the existence of the aim of public health protection appeared to be enough; the appropriateness and necessity of the means were not critically analyzed.

Apart from that, the fundamental status given to non-discrimination rights may be problematized for two reasons. Firstly, the logic of 'justification' implies that discrimination rights may be overridden in *any case*, as long as the aim at stake is considered legitimate and the ways of pursuing it appropriate and necessary. 'Justification' does not involve any balancing exercises; the examination concerns only the elements of justification (the aim and the means), not the non-discrimination rights which are at stake and the consequences of disregarding them. How can a right be fundamental if it may always be overridden without examination of the consequences thereof?

Secondly, the CJEU implies that 'fundamental status' is opposed to 'varying in time and place'. More precisely, non-discrimination rights should not '*vary in time and place according to the state of the public finances of Member States*'. But this raises the question of how we should generally understand the relationship between 'fundamental status' and 'variations in time and place'. Due to the huge discretion granted to member states with respect to the choice of means (when pursuing the aims which are seen as legitimate by the court), non-discrimination rights vary enormously in time and place.

Will the fundamental status of non-discrimination rights be saved solely by the fact that those rights do not vary *'according to the state of the public finances of Member States'*?

Even if that was granted, we are confronted with a muddy picture. In the last section, we saw that as far as concerns the dynamical exemptions provided for in the Social Security Equality Directive, 'financial considerations' could certainly serve as an argument for disregarding non-discrimination rights.

All four judgments are dealing with indirect discrimination against women. But we have no reason to assume that the patterns of argumentation would have been any different had the cases concerned discrimination against men. Crucial is however the deep-lying and unresolved tension reflected throughout all judgments: On the one hand, non-discrimination rights are granted a fundamental status and in accordance herewith a strict and critical approach is adopted by the court; on the other hand, this fundamental status is undermined from the outset - due to the basic argumentative structure which all 'justifications' of discrimination have to follow, and due to the margin of discretion granted to the member states with respect to the ways in which they choose to pursue the policy aims which are accepted as 'legitimate' by the CJEU.

Positive discrimination

'Positive discrimination' constitutes a reversal of the determinately reduced non-significance logic, implying that 'there shall be discrimination between women and men'.

Crucially, we must be aware that 'positive discrimination' presupposes that the situations of men and women are formally comparable. If they were not, then it would not be possible to treat one sex favorably in contrast to the other sex. In this sense, 'positive discrimination' is logically different from 'special protection of women' in relation to maternity and pregnancy, as dealt with in chapter 16. Such 'special protection' presupposes, as we saw, that the situations of men and women are seen as fundamentally incomparable.

Positive discrimination could in principle be applied to both women and men (due to the name 'The Underrepresented Sex'). It is indicated in legislation, though, that positive discrimination will most often be relevant in relation to women. The two judgments we shall analyze both concern positive discrimination of women - which simultaneously means that they concern discrimination against men.

The Briheche judgment concerns positive discrimination of widows compared to widowers.

Mr. Briheche, a widower who had not remarried and with one dependent child, applied to sit various competitive examinations with the purpose of being recruited by the French public administration. His application was rejected on the ground that he had passed the age limit of 45 years laid down for entry to those examinations.

Certain categories of women were exempted from the age limit, though, among them ‘widows who have not remarried who are obliged to work’. But the same exemption did not apply to widowers in the same situation, for which reason Mr Briheche found that he had been the victim of discrimination on grounds of sex.

The CJEU agrees with him. No doubt, the rules regarding the age limit discriminate between men and women in comparable situations. The question is, however, whether such discrimination may be allowed under a provision of the Employment Equality Directive regarding positive discrimination. The provision in question states that the Directive ‘*shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities [...]*’.⁷²⁸

The consideration which follows is based on two aspects: an interpretation of the purpose of the provision, and the establishment of certain restrictions with respect to the ways in which to that purpose may be pursued.

As to the purpose, the CJEU brings forward the same idea as it did in connection with the maternity-judgments analyzed in the previous section: ‘*The aim of that provision is to achieve substantive, rather than formal, equality*’. The court elaborates on this idea by expressions such as ‘*to eliminate or reduce actual instances of inequality which may exist in the reality of social life*’ and ‘*to prevent or compensate for disadvantages in the professional career of the persons concerned*’. That is, ‘*substantive*’ in contrast to ‘*formal*’ means ‘*actual*’ and ‘*in reality*’. And measures of positive discrimination are supposed to ‘*prevent*’ or ‘*compensate*’ for such ‘*actual*’ or ‘*real*’ inequality. The CJEU also notes that measures of positive discrimination are ‘*discriminatory in appearance*’⁷²⁹.

As to the means in which to pursue the purpose, the CJEU brings in the principle of proportionality according to which ‘*derogations must remain within the limits of what is*

⁷²⁸ Case C-319/03, *Briheche* par. 20-21. (Article 2(4) of Dir. 76/207/EEC (now amended by Dir. 2006/54/EC))

⁷²⁹ *Ibid*, par 22 and 25

appropriate and necessary'.⁷³⁰ It is noteworthy that in connection with a discussion of the means, the CJEU calls positive discrimination '*a derogation*' from the principle of equal treatment between men and women, whereas, from the point of view of the purpose it serves, positive discrimination was referred to as merely discriminatory '*in appearance*'. This discrepancy accords, however, with the paradoxical nature of positive discrimination: Positive discrimination is meant to serve the principle of non-discrimination, but according to its operating logic it constitutes a direct reversal of the principle of non-discrimination and must be characterized as discrimination.

Laying down the principle of proportionality means laying down restrictions with respect to the application of positive discrimination. More precisely, the CJEU clarifies that measures which '*automatically and unconditionally give priority to women when women and men are equally qualified*' are not permitted. In order for positive discrimination measures to be permitted, '*an objective assessment which takes account of the specific personal situations of all candidates*' is required.⁷³¹

In the particular case, the CJEU finds that the rules regarding the age limit do in fact '*automatically and unconditionally*' give '*priority to the candidatures of certain categories of women*'. For this reason, they cannot be permitted.⁷³² That is, it is not the purpose defined by the French Government, to '*reduc[e] actual instances of inequality between men and women*' and '*facilitat[e] the integration of women into work*' which is rejected, but the automatic way of pursuing it, without differentiation according to personal situation. The CJEU does not specify which criteria should guide an assessment of the '*personal situations*' involved. Would for instance the fact that Mr. Briheche has a dependent child, his financial situation, or his previous working history constitute relevant factors in this connection?

Notwithstanding the silence of the CJEU in this respect, the overall argument stands clear: Positive discrimination must be seen as a derogation from the fundamental principle of equal treatment between men and women, and as such it cannot be accepted unconditionally. Positive discrimination measures must be justified not only with respect to their purposes, but also with respect to their means. Differentiation on the level of individual situations is required; automatic rules will not be acceptable.

⁷³⁰ Ibid, par. 24

⁷³¹ Ibid, par. 23

⁷³² Ibid, par. 27

The Álvarez-judgment, delivered 6 years later, in 2010, confirms the overall argument of the Briheche-judgment. Simultaneously, it develops further the criteria by which the application of positive discrimination is restricted.

Mr. Álvarez, the father of a new-born child requested his employer that he be granted the right to take leave for a nine-months period. He was denied the leave on the ground that it was reserved to mothers who were employees. Subsequently, the national court clarified that fathers may be entitled to the leave in place of the mother, but only if the mother is employed. Since the mother of Mr. Álvarez's child was self-employed, that clarification did not help Mr. Álvarez.

Does a national measure which provides that mothers with the status of employees are entitled to take leave, whereas fathers with the same status are not entitled to the same leave unless the child's mother is also an employed person, constitute discrimination on grounds of sex? It does, says the CJEU, since the situations at stake are comparable, not only with respect to having the status of employee, but also with respect to the possible need of a parent *'to reduce [...] daily working time in order to look after [his or her] child'*.⁷³³

So again, the question as to the possible justification of such discrimination arises? The CJEU considers the applicability of two different provisions contained in the Employment Equality Directive. The first is the provision we encountered in connection with the maternity-judgments: *'This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'*. The second is the provision we encountered a little while ago, in connection with the Briheche-judgment: *'This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities'*.⁷³⁴ As explained above, only the second concerns positive discrimination.

The CJEU finds that the provision which grants special protection for women in relation to maternity is not applicable. According to settled caselaw, that provision *'recognises the legitimacy [...] 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'*.⁷³⁵ But on the basis of the informations

⁷³³ Case C-104/09, *Álvarez*, par. 23-25

⁷³⁴ Art. 2(3) and 2(4) of Dir. 76/207/EEC

⁷³⁵ Case C-104/09, *Álvarez*, par. 27

provided by the national court, the CJEU concludes that the leave under dispute neither has the purpose of *'protecting a woman's biological condition'*, nor the purpose of *'protecting the special relationship between a woman and her child'*. According to the national court, the leave was originally instituted to facilitate breastfeeding by the mother. But over time, due to amendments and to national case-law, the leave has been detached from *'the biological fact of breastfeeding, so that it can be considered as time purely devoted to the child and as a measure which reconciles family life and work following maternity leave'*. The evolution of the legislation and its interpretation also meant that fathers could be granted the leave in the place of the mother. The CJEU finds that this development within national law implies that *'feeding and devoting time to the child can be carried out just as well by the father as by the mother'*. The leave in question is *'accorded to workers in their capacity as parents of the child'*.⁷³⁶

The applicability of the other provision - the provision which simply permits positive discrimination and emphasizes the opportunities of women - is rejected as well. The court brings forward, again, the idea of *'substantive, rather than formal, equality'* and explains that the purpose of the provision is *'to authorize measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in society'*. More specifically, the provision may authorize measures which *'give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men'*.⁷³⁷

According to the Spanish Government, the purpose behind the leave at issue is to compensate for the disadvantages suffered by women, in comparison to men, in keeping their jobs following the birth of a child. The CJEU accepts that the leave - which makes it possible for mothers to reduce their working hours or to be absent during the day - could certainly have the effect of putting women at an advantage.⁷³⁸ But the CJEU does not accept that the discriminatory aspects of the leave serves women. In contrast, the fact that fathers are not granted the same right *'is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties'*. In the case of the mother of Mr. Álvarez's child, the discriminatory rules could mean that she *'would*

⁷³⁶ Ibid, par. 28, 31

⁷³⁷ Ibid, par. 33-34

⁷³⁸ Ibid, par. 32, 35

have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden'.⁷³⁹

We see that measures granting special advantages to women may not only be rejected from the point of view of discrimination against men. They may also be rejected on the ground that such special advantages to women do not serve women.

Whereas the Briheche-judgment demanded that national measures granting special advantages to women should take into account the personal situations of men as well as women, the Álvarez-judgment implies that the likely social effects of such measures should be considered. If a national measure has the likely effect of maintaining a traditional pattern of family roles, then it is irrelevant that it from a formal point of view treats women more favorably than men. National measures granting special advantages to women shall not only comply with the purposes of EU non-discrimination law, and not only realize those purposes in a differentiated and non-automatic manner, they shall also anticipate their own likely social effects.

In overall, two features stand out. Firstly, we learn from the two judgments that national measures which 'automatically and unconditionally favor one or the other sex' are not acceptable. No carte blanche to positive discrimination is given; positive discrimination should be carried out in a modified and differentiated manner. Secondly, we encountered, again, the idea of 'substantive and not formal equality'. The two features are of course connected. Since positive discrimination constitutes a formal break with the principle of non-discrimination, it can only be accepted under certain circumstances, and the evaluations as to whether it can be accepted in particular cases must rely on a 'substantive' rather than a formal principle of evaluation.

On the basis of our analyses, we can identify the core elements of a 'substantive' evaluation: a differentiated and contextualized consideration on the level of personal situations; a dynamical approach to law according to which the purpose of a national measure may have changed over time so as to suit the historical situation better; a dynamical approach to family patterns and the respective roles of women and men; and finally a contextualized consideration as to the likely social effects of a given national measure. Accordingly, past, present and future are involved in 'substantial' evaluations, as are the situations of individuals, and society patterns at large.

⁷³⁹ Ibid, par. 36-37

In the Briheche- as well as in the Álvarez-judgment, the CJEU found that particular instances of positive discrimination towards women could not be permitted. In the latter judgment, the court even found that the national measure in question was counter-productive. It was meant to favor women, but in fact it would serve to maintain traditional family patterns and hereby - when considered from the point of view of its 'social effects' - it would work to the disadvantage of women.

The approach of the CJEU towards 'positive discrimination' is all in all rather strict - strict according to a deeply contextualized standard of evaluation, that is, and not according to formal criteria. In general that will strengthen the rights of those who are not subjected to positive discrimination; it will strengthen the attributes of 'Man' rather than 'Woman'. But due to the complexity pointed out by the court - that positive discrimination may harm the women it is intended to favor - the strict approach of the CJEU can also be said to strengthen the attributes of 'Woman'.

Justification of discrimination by reference to occupational requirements

The last problematic we shall consider is also a 'justification of discrimination' problematic. The Employment Equality Directive entails, just like the non-discrimination Directives we have examined in connection with non-names, an 'occupational-requirement-provision'. According to this provision, discrimination on grounds of sex will be justified if it can be established that '*a characteristic related to sex*' constitutes '*a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate*'.⁷⁴⁰

There are not that many judgments dealing with the occupational-requirement-provision in relation to the discrimination ground sex. Accordingly, we shall need to go back in time. We shall examine two older judgments (from the 1980's) and two more recent judgments (from around year 2000). These judgments will provide us with crucial material regarding the question of whether fundamental differences between the sexes are presupposed or not.

It should be noted that the judgments all relate to the now amended Directive 76/207/EEC (which makes out the basis of chapter 3 in the new recast, Directive 2006/54/EC). The provision in question was formulated slightly differently in the old Directive. It did not demand '*a legitimate objective*' and '*proportionate*' ways of pursuing it. It used the

⁷⁴⁰ Art. 14(2), Dir. 2006/54/EC

expression *'the sex of the worker'* instead of *'a characteristic related to sex'*. And finally, it does not emphasize that only *'particular'* occupational activities may be excluded from the scope of the Directive - hereby opening for the possibility that a whole occupational area may be excluded.⁷⁴¹

The old Directive also entailed a dynamical provision relating to the *'occupational-requirement-provision'*: *'Member States shall periodically assess the occupational activities referred to in Article 2 (2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.'*⁷⁴²

As we shall see, this dynamical provision which has now disappeared certainly plays a role for the oldest judgment, along with the old wording of the *'occupational-requirement-provision'* - whereas the other three judgments can be said to lay the foundation for the present formulation of the provision.

In a judgment from 1983, the Commission charges the United Kingdom with only partly implementing the Employment Non-discrimination Directive. The Commission's complaints relate to three points of which we shall deal with two⁷⁴³.

Firstly, the Commission complains about the fact that British law excludes *'employment in a private household'*, and small-scale undertakings *'where the number of persons employed by an employer does not exceed five'*, from the scope of the Principle of Non-discrimination. According to the United Kingdom, those exclusions are justified by art. 2(2) on occupational requirements.

In its defense, the United Kingdom emphasizes that the provision provides for *'two separate and independent reasons'* for excluding occupational activities from the scope of the Directive, namely *'the nature of the activities'* and *'the context in which they are carried out'*. This means, according to the British interpretation, that an exclusion may not only be admitted *'for reasons of authenticity'*. In addition, the United Kingdom finds that due to art. 9(2) according to which the excluded occupational activities should be subjected

⁷⁴¹ The old formulation (Art. 2(2), Dir. 76/207/EEC) reads as follows: *'This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.'*

⁷⁴² Art. 9(2), Dir. 76/207/EEC

⁷⁴³ Case C-165/82, *Commission v United Kingdom*, par. 3. We shall be dealing with point b) and c), referred to in the judgment as the second and third complaint.

to periodical assessment, those exclusions should generally *'be judged in the light of social developments.'*

In other words, the United Kingdom excludes occupational activities in private households and in small undertakings from the scope of the Principle of Non-discrimination because of *'the context in which they are carried out'*. *'The kind of employment in question frequently involves very close personal relationships between employer and employee by reason of the fact that the latter often lives in the household and may, for example, concern resident companions or personal maids'*, the United Kingdom explains. And it is implied that it is for contemporary social reasons, rather than for fundamental reasons that the sex of the worker within such *'contexts'* of work may be seen as a determining factor.⁷⁴⁴

The Commission, in contrast, states that a justification relying on the existence of *'close personal relationships'* within certain contexts of work cannot be recognized. In addition, the Commission finds that the concept of *'employment for the purposes of private household'* is imprecise, and that the figure of five persons is entirely arbitrary.⁷⁴⁵

The CJEU mainly agrees with the Commission. The exclusion provided for in British law is too general. The CJEU accepts that as regards *'employment in a private household'*, the fundamental principle of respect for private life should be taken into account. For *'certain kinds of employment in private households'* considerations as to the *'reconciliation of [...] the principle of equality of treatment with the principle of respect for private life'* may be decisive, says the court. It is not specified, however, which kinds of employment in a private household it would be possible to exclude from the scope of the Directive. As regards the exclusion of employment in undertakings with five employees or less, the CJEU finds that the United Kingdom has provided no justification ground whatsoever.⁷⁴⁶

That is, the main argument of the CJEU is that the exclusion provided for in British law is formulated in too general terms. Exclusions must be more specific, point to particular kinds of occupational activities. On the other hand, it is not denied, that the *'the context'* in which an occupational activity is carried out may be decisive. The expression of *'close personal relationships'* is clearly too general, but the concept of *'private life'* would be legitimate when used in connection with *'private household'*. Nothing is said as to the

⁷⁴⁴ *ibid*, III (Submissions and arguments of the parties), page 3438-3439

⁷⁴⁵ *ibid*, III (Submissions and arguments of the parties), page 3437

⁷⁴⁶ *Ibid*, par. 13-16

meaning of the concept, though. And how 'private life' would relate to the broader framework of 'social developments' introduced by article 9(2) is not addressed by the court either.

Secondly, the Commission complains about the fact that British law excludes '*the employment, promotion and training of midwives*' from the scope of the Directive. Men are granted access to that occupation and training '*only in certain specific places*'.

The argument of the United Kingdom is based entirely on cultural considerations. The United Kingdom argues explicitly that '*whether the sex of the worker is a determining factor will depend on all the circumstances, including any relevant social developments*'. And under the current social circumstances, restrictions with respect to men's possibilities of pursuing a career as midwife are necessary. The '*sensitivities and beliefs*' of the people living in the United Kingdom should be respected. The risk is that '*women, particularly women from the number of ethnic minorities living in the United Kingdom, may put themselves and their new-born children at risk by refusing professional attention*'. The United Kingdom distinguishes between the role of a midwife and that of a gynaecologist: '*the difference in the roles, or occupational activities, lies in the antenatal and postnatal periods and in the intimate personal procedures often carried out in the patient's home, which are the preserve of the midwife*.' None the less, the sex of gynaecologists is not unproblematic either, for which reason the sex of midwives becomes even more important: '*despite the fact that there are many male gynaecologists many women will choose a female doctor and where no woman doctor is available, will refuse medical attention and rely on the services of a midwife*'.⁷⁴⁷

We see that the argumentation contains two aspects: respect for the sensitivity of the patient; and avoiding that some women will end up without help at all because they will refuse to be helped by a man. It is clear that both the nature of the occupational activity as a midwife and the context in which it is carried out, are at stake. As far as the context is concerned, the private 'home' figures once again.

The United Kingdom makes clear that the present legislation should only be in force for a transitional period. In other words, it is presupposed that the British multicultural society will undergo gradual transformations with respect to this matter. Accordingly, it is the intention to '*introduce the concept of male midwives gradually, having regard to the sensitivities and beliefs of the peoples with different cultural backgrounds who live in the United*

⁷⁴⁷ Ibid, III (Submissions and arguments of the parties), page 3439-3440, 3442; IV (Questions submitted to the parties) page 3444

Kingdom.' It is indicated, though, that even after the transitional period has ended, a woman should have the possibility of choosing a midwife of the sex she wishes.⁷⁴⁸

The Commission, on its part, argues that the profession of gynaecologist has not given rise to similar problems, and does not see any basic difference between the role of a gynaecologist and that of a midwife, '*as the former is also quite likely to be alone with his patient*'. Most importantly, the Commission finds that article 9(2) of the Directive is not relevant. This means that the dynamical perspective is rejected as far as the occupational activities as a midwife is concerned. The role of a midwife should not be seen in the light of social developments. By rejecting the dynamical perspective, the Commission undermines the legitimacy of the cultural considerations on which the United Kingdom has based its argumentation.

This time, the CJEU agrees with the United Kingdom: '*It must however be recognized that at the present time personal sensitivities may play an important role in relations between midwife and patient. In those circumstances, [...] 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.*'⁷⁴⁹ The cultural and dynamical considerations presented by the United Kingdom are accepted by the CJEU. Exclusions of particular occupations may indeed be seen in the light of '*social developments*'. Simultaneously, it is clear that the occupational activities of a midwife could not permanently be excluded from the scope of the Directive.

What is interesting about the Commission v United Kingdom judgment from our point of view is the tension between the fundamental right to respect for private life, on the one hand, and cultural-dynamical considerations, on the other, which is underlying both of the discussions presented above.

In the discussion concerning employment in private households and small undertakings, the '*fundamental principle of respect for private life*' is explicitly introduced by the CJEU in connection with '*private household*'. The United Kingdom, however, has specified, that exclusions of occupational activities should '*be judged in the light of social developments*'. But since the CJEU does not take up this point, it remains unclear whether the '*fundamental principle of respect for private life*' - to the extent that it could in fact justify the exclusion of certain activities carried out in the private home - should be interpreted in the light of social developments, or whether there would be certain activities which would always, or at least on a more permanent basis, constitute

⁷⁴⁸ Ibid, III (Submissions and arguments of the parties), page 3439-3440

⁷⁴⁹ ibid, par. 20

activities falling within the realm of '*private life*'. In any case, it is clear that the existence of '*close personal relationships*' is not in itself enough in order for the border to the realm of private life to be crossed.

In the other discussion, concerning the occupation as a midwife, the cultural-dynamical considerations dominate. It is for contemporary social reasons, and not for fundamental reasons, that the CJEU accepts the exclusion concerning midwives laid down in British law. On the other hand, the United Kingdom argues that the fact that the services of a midwife may be carried out in a person's home constitutes a significant aspect, and implies that also after the transitional period has ended, regard should still be taken '*to the sensitivities and beliefs of the peoples with different cultural backgrounds*' living in the United Kingdom. The CJEU does not address those aspects of the argumentation.

Neither of the discussions appear to presuppose particular fundamental differences between women and men. Rather, it is the difference *as such* between the sexes which is significant; in the private realm, the presence of the other sex qua other sex may be a violating factor. Furthermore, the private home is being closely connected to the private sphere, both by the United Kingdom and the CJEU, and even to some extent by the Commission. Whereas the particular activities which make out the private sphere are being seen, at least by the United Kingdom and the CJEU, as historically changeable.

Accordingly, the principle of '*private life*' is being upheld as a fundamental principle. As such, it is being intimately connected with the '*private home*' and with the difference between the sexes as such. And it is vaguely characterized as something which concern and protect '*personal sensibilities*'. However, what constitutes the content of the private sphere is being seen as a matter of cultural patterns changeable over time.

In the Johnston judgment delivered three years later, in 1986, it is discussed whether occupational activities involving the handling and use of firearms, and the training leading thereto, should be excluded from the scope of the principle of non-discrimination with respect to sex?

Ms Johnson had worked 6 years in the Irish police force, carrying out normal police duties, when she was informed that her contract could not be renewed. The Chief Constable had found that the assassination of a substantial number of police officers in Northern Ireland had made it impossible to continue what was otherwise general practice in the United Kingdom, namely that police officers carrying out normal police

duties did not carry firearms. In the light of the new practice, the Chief Constable found that female officers should no longer be allowed to carry out normal police duties in Northern Ireland.

The reasons given for excluding women from normal police activities which would now involve the handling and use of firearms were the following three: *'if female officers were armed, it would increase the risk that they might become targets for assassination'*; *'armed women officers would be less effective in certain areas for which women are better suited, in particular welfare type work which involves dealing with families and children'*; and finally *'if women as well as men were to carry fire-arms in the regular course of their duties, it would be regarded by the public as a much greater departure from the ideal of an unarmed police force'*.⁷⁵⁰

The national court refers a range of questions to the CJEU - questions implying different ways of justifying the exclusion at issue, on the basis of the Treaty as well as the Directive. We shall be dealing with two of the suggested ways of justifying the exclusion.⁷⁵¹

First and foremost: justification on the basis of article 2(2) on occupational requirements. The CJEU begins by clarifying that in this case it is the *'context'* in which the occupational activities are carried out which is relevant, and not the nature of these activities.⁷⁵² In other words: none of the parties are indicating that women are not capable of handling and using firearms. The CJEU mentions all three reasons provided by the Chief Constable, but discusses only the first one. The court finds in this regard that it *'cannot be excluded that in a situation 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 requirements of public safety'*. On the basis hereof, the court concludes that in a *'context'* of that kind, the sex of a police officer may indeed constitute a determining factor for which reason the exclusion of female officers from the police duties in question may be maintained.⁷⁵³ The court makes clear, though, that the principle of proportionality should be observed. The refusal to renew Ms Johnston's contract could possibly be avoided by allocating duties to women which could be performed without fire-arms.⁷⁵⁴ But that does not change the fact that discrimination on

⁷⁵⁰ Case C-222/84, *Johnston*, I (Facts and written procedure), A, point 2

⁷⁵¹ Corresponding to question 2-3, and question 4-5, *ibid*, par. 10

⁷⁵² *Ibid*, par. 34-35

⁷⁵³ *Ibid*, par. 36-37

⁷⁵⁴ *Ibid*, par. 38-39

grounds of sex is permitted with respect to the range of ordinary police duties which now imply the carrying of firearms.

The CJEU also considers whether the exclusion may be justified from the point of view of the protection of women. This justification possibility springs from the provision on regarding maternity which we have dealt with earlier: *'This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'*⁷⁵⁵ The CJEU rejects complete the possibility of justifying the exclusion on the ground of a concern to protect women. Crucial is that pregnancy and maternity concerns women's *'specific needs of protection'*, whereas the risk at issue in the Johnston-case is *'not specific to women'*, but *'affect men and women in the same way'*. In the view of the CJEU, *'[it] does not appear that the risks and dangers to which women are exposed when performing their duties in the police force in a situation such as exists in Northern Ireland are different from those to which any man is also exposed when performing the same duties.'*

However, this statement is not consistent with the conclusion which the court had just reached in connection with the discussion of the application of article 2(2) on occupational requirements. As we just saw, the court found that in a situation such as the Northern Irish situation, *'the carrying of fire-arms by policewomen might create additional risks of their being assassinated'*. According to the Chief Constable, women are more likely to become targets of assassination than men, and that assessment was accepted by the CJEU.

The CJEU obviously contradicts itself. We can only see the contradiction as the testimony of a difficult balancing act being sought by the CJEU. On the one hand, the court does not wish to establish that certain fundamental differences between women and men exist, apart from those related to pregnancy and maternity. On the other hand, it is accepted that situations might exist in which women are more exposed to danger than men.

It is interesting as well that the CJEU does not at all discuss why women are presumed to be more likely victims of assassination than men. Would there be physical reasons for this, psychological, social or ideological? Not to mention that the court could have requested some kind of evidence with respect to this presumption.

Finally, it is noteworthy that the CJEU does not at all discuss the other reasons given by the Chief Constable for excluding women from normal police activities involving the handling and use of firearms, namely *'armed women officers would be less effective in*

⁷⁵⁵ Art. 2(3), Dir. 76/207/EEC. Art. 3(2)(c) also refers to *'the concern for protection'*

certain areas for which women are better suited, in particular welfare type work which involves dealing with families and children' and 'if women as well as men were to carry fire-arms in the regular course of their duties, it would be regarded by the public as a much greater departure from the ideal of an unarmed police force'. Both of those reasons have strong ideological implications. The former indicates that women are suited for work involving family matters and children, and the latter indicates that the image of an armed woman is much more harmful to public ideals than the image of an armed man.

Why the inconsistencies, and why the reluctance to discuss thoroughly the reasons given by the Chief Constable? Is the CJEU being cautious because national security are at stake? Or might there be certain aspects of the traditional roles of the sexes which are not so easily eliminated, more precisely, the aspects of violence and war?

In the judgment analyzed above, *Commission vs United Kingdom*, it was clear that no particular fundamental differences between the sexes were claimed or presupposed. What was at stake was culturally based sensitivities and beliefs. Only the difference between the sexes *as such* was maintained as an issue of fundamental significance. In the Johnston-judgment, in contrast, it is completely obscure whether the difference which is being recognized by the CJEU (that women would be more likely victims of assassination than men) is due to fundamental differences between women and men or to cultural circumstances. Likewise, the CJEU does not discuss the reasons given by the Chief Constable with respect to their implications as to this matter.

In any case, it appears that the connection between women and violence constitutes a particularly sensitive issue. We shall pursue this connection further in the following two judgments.

We shall now take a jump forward in time, to the *The Sirdar*-judgment, which was delivered in 1999, 13 years later than the Johnston-judgment. Ms Sirdar had been in the British Army for 11 years of which she had served 4 years as a chef in a commando regiment of the Royal Artillery. She was made redundant for economic reasons, but received an offer of transfer to the Royal Marines. It was specified that, in order to transfer, she would be required to pass an initial selection board and follow a commando training course. But the offer was withdrawn when the responsible authorities in the Royal Marines became aware that she was a woman.

The withdrawal of the offer was due to a general policy of the Royal Marines of excluding women on the ground that their presence was seen as incompatible with the requirement of *'interoperability, that is to say, the need for every Marine, irrespective of his*

*specialization, to be capable of fighting in a commando unit'. The general policy was presumed to be in accordance with the British Sex Discrimination Act 1975 which provided that '[nothing] in this Act shall render unlawful an act done for the purpose of ensuring the combat effectiveness of the naval, military or air forces.'*⁷⁵⁶

May the exclusion of women from service in combat units such as the Royal Marines be justified under Article 2(2) of the Employment Non-discrimination Directive?, the British court asks. As far as the interpretation of article 2(2) is concerned, the CJEU refers to the Johnston judgment. The CJEU recalls that the provision '*must be interpreted strictly*', the member states should '*assess periodically the activities concerned in order to decide whether, in the light of social developments, the derogation from the general scheme of the Directive may still be maintained*', and the principle of proportionality should be observed.⁷⁵⁷ The premise which turns out to be the crucial one is, however, not derived from the Johnston-judgments, and is the following: '*[...] 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.*'⁷⁵⁸

According to the CJEU, the crucial question which arises in the present case is whether '*the measures taken by the national authorities, in the exercise of the discretion which they are recognized to enjoy, do in fact have the purpose of guaranteeing public security and whether they are appropriate and necessary to achieve that aim*'.⁷⁵⁹

In this respect, the court finds that the Royal Marines '*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, that all members of the corps are engaged and trained for that purpose*'. The CJEU concludes that '*[in] such circumstances, the competent authorities were entitled, in the exercise of their discretion [...] to come to the view that the specific conditions for deployment of the assault units of which the Royal Marines are composed, and in particular the rule of interoperability to which they are subject, justified their composition remaining exclusively male.*' In this connection, it is being emphasized that the authorities should exercise their discretion '*in the light of social developments, and without abusing the principle of proportionality*'.⁷⁶⁰ But it is never discussed whether

⁷⁵⁶ Case C-273/97, *Sirdar*, par. 6-9

⁷⁵⁷ *Ibid*, par. 23, 24, 26

⁷⁵⁸ *Ibid*, par. 27. Here, the CJEU does not refer to the Johnston-judgment, but to Case C-83/94, *Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf, Otto Hölzer*, par. 35

⁷⁵⁹ *Ibid*, par. 28

⁷⁶⁰ *Ibid*, par. 30-31

excluding women from the force constitutes an appropriate and necessary measure with respect to the overall aim of guaranteeing public security. Only the rule of interoperability is being discussed and accepted - that is, the rule requiring all members of the corps to serve as front-line commandos, and to be trained for that purpose.

In other words, no argument is being presented and no question is being raised with respect to the exclusion of women. All members of the force are required to pass an initial selection board and to follow a commando training course; no one are being accepted easily. Why could women not be granted access to the initial selection process and to the subsequent training? Why could women not be trained for the purpose of serving as front-line-commandos? The judgment is completely silent with respect to the core issue of the case - the exclusion of women.

In fact, the Sirdar-judgment is even more silent than the Johnston-judgment. The Johnston-judgment did at least discuss whether there could be reasons for excluding women from carrying fire-arms. Only, the discussion was inconsistent and insufficient. The Sirdar-judgment does not even raise the question as to what reasons there might be for excluding women. Ultimately, the only argument given is that of the discretion granted to the member states in matters of public security.

We must conclude, therefore, that the Sirdar-judgment leaves us in even greater obscurity than the Johnston-judgment regarding the nature of the reasons for excluding women. Is the CJEU's acceptance of the exclusion of women due to a presumption of fundamental differences between women and men, or to a presumption of certain cultural circumstances which may or should change over time? Or is the relationship between women and violence simply so delicate that it belongs to the border areas of the principle of non-discrimination - and must be left to the discretion of the member states?

Lastly, the Kreil-judgment, delivered one year later than the Sidar-judgment also concerns the relationship between women and violence.

Tanja Kreil, who had been trained in electronics, applied for voluntary service in the Bundeswehr, requesting duties in weapon electronics maintenance. Her application was rejected by the Bundeswehr on the ground that she was a woman. According to German law, women were excluded from serving in military positions involving the use of arms.

Again, the question is whether article 2(2) of the Employment Non-discrimination Directive may justify the exclusion? The CJEU provides a listing of premisses almost identical to the listing given in the Sidar judgment.⁷⁶¹

But in the Kreil-case, the principle of proportionality turns out to weigh heavier than the discretion granted to the member states. Two concerns are brought forward in this respect. Firstly, the very general scope of the exclusion is seen as problematic: *'such an exclusion, which applies to almost all military posts in the Bundeswehr, cannot be [...] justified'*. It is namely so that *'the derogations provided for in Article 2(2) of the Directive can apply only to specific activities.'* Secondly, *'women'* and *'arms'* do not in themselves exclude one another: *'the fact that persons serving in those forces may be called on to use arms cannot in itself justify the exclusion of women from access to military posts'*. And the CJEU emphasizes that in the Bundeswehr, basic training in the use of arms is provided.⁷⁶²

In contrast to what we saw in the Sirdar-judgment, it is actually discussed whether the exclusion of women constitutes an appropriate and necessary measure with respect to guaranteeing public security. And it is concluded that it does not. However, the first argument provided - that only specific activities may be excluded - still leaves open whether the possibility that women may be excluded from access to military posts in a range of specific cases. In this sense, the Kreil judgment is not inconsistent with the Sidar judgment. The second argument - that *'women'* and *'arms'* do not in themselves exclude one another - is obviously significant from our point of view. But when seen in light of the first argument, it is clear that this is only so *in general*. There might be specific activities with regard to which it would be justifiable to avoid the combination of *'women'* and *'arms'*.

When seen, retrospectively, in the light of the Kreil judgment, the Johnston- and Sirdar-judgments appear somewhat clearer: *'Women'* and *'arms'* do not in general exclude one another, but there might be special activities, and special contexts, with respect to which it may be legitimately argued that they do, - and that would be activities and contexts characterized by the actual or potential presence of great violence and danger. Such an establishment of a common foundation for the understanding of all three judgments does still not, however, help us with respect to the fundamental question of

⁷⁶¹ The provision *'must be interpreted strictly'*, the member states should *'assess periodically the activities concerned in order to decide whether, in the light of social developments, the derogation from the general scheme of the Directive may still be maintained'*, and the principle of proportionality should be observed. In addition, the degree of discretion granted to the member states is emphasized. Case C-285/98, *Kreil*, par. 20, 22, 23, 24

⁷⁶² *Ibid*, par. 27-28

why it would be legitimate to exclude women from occupational activities and contexts implying the risk of great violence and danger.

In four judgments - the oldest stemming from 1983, the youngest from 2000 - we have examined how and when discrimination on grounds of sex may be justified with reference to 'occupational requirements'.

In most cases, the CJEU accepts that discrimination on grounds of sex can be justified. It is justifiable, under certain circumstances, to reserve the role as a midwife to women. Likewise, it is justifiable to reserve certain posts within the police and the army to men. In the first part of the oldest judgment, however, the court is reluctant to accept that discrimination in small scale undertakings would be justified for reasons of 'private life'. But discrimination in private households might very well be justified, as long as the national law in question is sufficiently precise. And in the most recent judgment (the Kreil-judgment) it is clarified that women should not be excluded from *all* activities which involve the carrying and handling of firearms; presumably, they should only be excluded from activities which are deemed to be particularly dangerous.

We were particularly occupied with the nature of the reasons given by the CJEU for accepting an exclusion of either women or men in relation to particular occupational activities. Were such exclusions regarded as justifiable on the basis of assumptions concerning fundamental differences between women and men, or rather on the basis of historical-cultural considerations? Throughout all four judgments, the relationship between the two remained unclear. In fact, the more recent judgments left us in even greater obscurity than the oldest ones. In the Commission vs UK judgment it was emphasized that the exclusion of men from certain activities as a midwife was founded in contemporary cultural considerations focusing on the multicultural nature of the British society. Hereby it was implied that although the idea of private life as such was granted a fundamental status, the particular content of the private sphere, that is, the particular activities which make out that sphere, would be historically changeable. In the other three judgments, it was completely obscure why women would be unsuited for police- and army-activities involving firearms and general danger. The Johnston-judgment did entail some considerations as to the matter, but they were evidently inconsistent. The Sidar judgment, in turn, was completely silent as to the matter. So was the Kreil judgment, apart from clarifying that 'women' and 'arms' do not *in general* exclude one another.

As to the three judgments dealing with issues of women and violence, we concluded that certain differences between women and men are doubtlessly implied, but that their content and nature remain obscure. Would they be physical or psychological differences, or differences related to the relations between the sexes? Fundamental or culturally changeable? In fact, they appeared to be neither fundamental *nor* culturally changeable. They appeared as ambiguous and silent differences, presumed without being stated.

In the Commission vs UK judgment, in contrast, a dynamical provision played an important role. This provision which only appears in an older version of the Employment Non-discrimination Directive requires that the member states periodically assess the occupational activities which they have excluded from the principle of non-discrimination in order to decide '*in the light of social developments*' whether the exclusions can still be justified. On the basis of this dynamical provision, the Commission vs UK judgment established a tension between a fundamental right, the right to private life, on the one hand, and a historical interpretation of this right. But the implication of this tension was that temporary discrimination would be allowed. The three other judgments all mention the provision in question, but it does not play any argumentative role in them. Hereby, they avoid allowing for temporary discrimination. But simultaneously, the nature of the differences between men and women, presumed by the judgments, is tabooed.

Considering all four judgments, the attributes of the respective right-holders, 'Man in contrast to being woman' and 'Woman in contrast to being man' are not very powerful. In the Commission vs UK judgment, the non-discrimination rights of 'Man in contrast to being woman' are overridden by contemporary cultural considerations. But at least the reasons for disregarding non-discrimination rights are made clear. What is not made clear, however, is for how long and to what extent temporary discrimination will be necessary. In the other three judgments, the non-discrimination rights of 'Woman in contrast to being man' are disregarded for reasons which are entirely obscure - reasons which are barely articulable since their nature appear to be neither fundamental nor cultural.

**In Conclusion: Double-names marked by ambiguous ‘fundamental differences’
and unfolded on the basis of various criteria**

We have now reached the end of the analysis of the two dominating signifiers, the double-names ‘Man in contrast to being woman’ and ‘Woman in contrast to being man’. They have been seen through four problematics, *temporary discrimination*, *indirect discrimination*, *positive discrimination* and *justification of discrimination by reference to occupational requirements* - all of which, in each their way, concern exemptions from the principle of discrimination or to justification of discrimination.

Notwithstanding that the analysis have only covered a small part of the existing case-law material which would be relevant to an analysis of the double-names, we have gained crucial insights, both in so far as substances and attributes are concerned.

First, as to the substances of the double-names, the lastly analyzed judgments (under the problematic *justification of discrimination by reference to occupational requirements*) have revealed to us that differences are indeed presumed to underpin the double-names, only the nature of those differences is highly unclear. Are we to understand them as cultural or fundamental differences? In truth, they appeared to be tabooed, floating ambiguously in the tension between being presumed and not claimed.

Faced with these ambiguously floating differences, it is worth recalling our reflexions on ‘fundamental differences’ which emanated from an analysis of certain provisions of the preamble of the Goods and Services Directive (in chapter 15).

We found that intimate connections between the concepts of ‘sex’, ‘privacy’ and ‘decency’ were established and that these connections presupposed the existence of fundamental differences between men and women - but differences of a kind which are not reducible to specific characteristics of the respective sexes. *Something else* - which may be related to physical differences, but which cannot be explained by physical differences as such - was presupposed. And this *something else* was seen as potentially dangerous, and not just in a physical sense, but in the sense that simply by its presence, it could violate something which is precious for a person, namely privacy and decency. This *something else* concerns the relationship between the two sexes as such, and ‘sexuality’ in the sense of attractions between the sexes obviously forms a huge part of it.

On the basis of a broader reflexion on the conceptual figurations within which we had otherwise encountered ‘privacy’ and ‘decency’, we concluded that the uncapturable

aspects at stake in the constellation of 'sex', 'privacy' and 'decency' concerned the possibility of *being a self*: *Being a self* relies on the possibility of being one sex *in contrast to the other* - which means *in separation from the other*, in certain situations. No particular differences, but the idea of a difference *as such* between the sexes, was crucial to the constellation.

Our analysis of the preamble could not tell us whether the intimate connections between sex, privacy and decency were being presupposed as culturally changeable, or permanent. We could only say that they were presented without modification, as if obvious. We concluded that the idea of a crucial difference *as such* between the sexes - linking the issue of *being a self* and *being one or the other sex* - was presupposed in the preamble of the Goods and Services Directive, whether culturally changeable or not.

Clearly, our analysis of the *Commission vs United Kingdom* judgment above shows great similarities with these reflections. In this judgment, we found that it was not particular differences, but the difference *as such* between the sexes which was significant - and that this difference was presumed to be a potentially violating factor in the private realm. We also found that the principle of 'private life' was being upheld as a fundamental principle and as such, it was intimately connected with the idea of a difference between the sexes as such. On the other hand, what constitutes the content of the private sphere in the form of particular activities was seen as a matter of cultural patterns changeable over time. That is, the judgment relies on a distinction between a difference *as such* between the sexes - granted fundamental status - and different *historical manifestations* of this difference, not only in the sense of the characteristics attributed to the respective sexes, but also in the sense of what kind of activities should be particularly protected with respect to this uncapturable, potentially dangerous '*something else*' which is at stake between the sexes.

But also the problematics of the Johnston-, Sirdar- and Kreil-judgments - springing from the ambiguously floating, presumed, but not claimed differences - may be related to the reflexions above. Certain unqualified presumptions regarding the relationship between women and violence seem to run through these three judgments; neither fundamental, nor cultural arguments are provided. Those presumptions might not be so different from the presumption of a difference *as such* between the sexes, as one should think. Just like the latter presumption relies on something uncapturable which cannot be reduced to any particular characteristics, also the presumptions regarding a somehow problematic relationship between women and violence relies on something

which is not qualified in the form of particular characteristics, whether physical, psychological or social.⁷⁶³

Regarding attributes, we have also gained important insights.

With respect to the question of the respective strengths of the double-names, we cannot conclude that the one is given higher priority by the court than the other. Under the first perspective, temporary discrimination, men were most likely to be victims of discrimination. The analysis demonstrated that non-discrimination rights are not very powerful to the extent that the dynamic exemptions laid down in the Social Security Equality Directive apply. On the other hand, also under the third perspective, positive discrimination, men would be the most likely victims of discrimination - but here we found the approach of the CJEU to be quite strict and demanding - and accordingly to serve non-discrimination rights of men. Likewise, as far as concerns the other two perspectives under which women appeared as the most likely victims of discrimination, we cannot draw any unequivocal conclusions. In connection with indirect discrimination, the court generally displays a both strict and sensitive approach towards the possibility of 'justification of discrimination - hereby serving non-discrimination rights of women - whereas non-discrimination rights are severely challenged when confronted with 'occupational requirements'. And to make the ambiguity complete: the court demonstrated that positive discrimination of women may also work to the disadvantage of women; and the occupational-requirement-provision may also be used to the disadvantage of men.

Accordingly, the attributes of the name seems to depend more on the respective perspectives under which they are analyzed - or more precisely the criteria established by the CJEU in relation to different kinds of justification-possibilities - than on the two double-names themselves. So, what did we learn about these criteria?

As concerns temporary discrimination, we learned that the internal needs of the national systems are given priority - and not only on the basis of strict criteria, but also on the basis of evaluations of the regulatory contexts as such. In this connection,

⁷⁶³ Naturally, it should be underlined that the conclusions regarding the relationship between women and violence are drawn on the basis of judgments from 1986, 1999 and 2000, respectively. It could be that the CJEU would judge differently today if confronted with a case concerning the relationship between women and violence. So far, however, the Johnston-, Sirdar- and Kreil-judgments make out the caselaw that exists. Because of their contradictory, insufficient or even missing argumentation, they point to the existence of a tabooed problematic within EU non-discrimination law.

financial considerations could certainly prove to be stronger than non-discrimination rights.

With respect to indirect discrimination, the court underlined, in contrast, that budgetary considerations could not constitute a legitimate aim in relation to justification of discrimination. In general, we saw the CJEU approach the justification suggestions provided by the national authorities in strict, critical and even sensitive ways - with awareness as to the often multilayered nature of discrimination and the connections between different kinds of discrimination, such as connections between discrimination on grounds of sex and discrimination on grounds of poverty. Only aims and means related to public health protection were accepted uncritically.

A strict, critical and nuanced approach was also to be found in connection with positive discrimination. The argumentations of the CJEU implied differentiated and contextualized considerations with respect to personal situations as well as society patterns at large, and a dynamical and historical approach to law.

Finally, under the last perspective concerning occupational requirements, we found that non-discrimination rights were easily overridden. They are either disregarded for cultural reasons or for reasons which are entirely obscure - reasons which are barely articulable in fact since their nature appear to be neither fundamental nor cultural.

The analyses of this chapter also revealed an unresolved tension in the approach of the CJEU towards the status of non-discrimination-rights, more precisely with respect to the meaning of the notion of 'fundamental status' in relation to 'variations in time and place' and in relation to the priority granted to other aims. This unresolved tension came to light as a consequence of the logic of justification examined under the second perspective, but we must say, retrospectively, that it has been in play all along - in relation to all discrimination cases in which 'justification of discrimination' plays a significant role. In this connection, it should be noted that the logic of 'justification' implies that discrimination rights may be overridden in *any case*, as long as the aim at stake is considered legitimate and the ways of pursuing it appropriate and necessary. 'Justification' does not involve any balancing exercises; the examination concerns only the elements of justification (the aim and the means), not the non-discrimination rights which are at stake and the consequences of disregarding them.

Finally, it is worth noticing that the principle 'substantive and not formal equality' also plays a crucial role in relation to double-names. By virtue of this principle, the CJEU may move beyond any formal logic of non-discrimination.

