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Christiane Mossin

INTERZONES OF LAW AND METAPHYSICS

PART 2

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

PART II

Political-philosophical Construction

PART II.1: THE PRESUMED ORDER

We shall now embark on a political-philosophical construction of a social order on the basis of the analyses carried out in Part I - a social order which can be said to be *implied* in the law we have analyzed, that is, implied in the double sense that it can be said to be inherent in the empirical material itself, but also springs from creations or decisions which are not determined by that material although they rely on it.

As unfolded in chapter 2 and 3, this order will be referred to as the ideal order. The ideal order, however, stands in a tensional relationship to a presumed order. As argued in chapter 3, 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. The presumed order, on the other hand, is the order which is presumed to exist prior to the law. The ideal order intervenes in the presumed order with the intention of changing it. It is crucial to underline that the tensional relationship between the ideal order and the presumed order will continue to exist as long as a given law regime is in force. It is *not* so that the ideal order replaces the presumed order 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.

The presumed order should not only be seen as something which the law is intended to break with. Any historical law builds on already existing orders. 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. In Part II.1, we shall analyze the presumed order both from the *negative* perspective that the presumed order is an order which the ideal order is meant to break with and from the *positive* perspective that the presumed order is an order which the ideal order builds on. We shall begin with the negative perspective.

Chapter 19

A deeply discriminating world

The social rights we have encountered all presuppose a world which is deeply and comprehensively characterized by discrimination and which hereby determines the possibilities and impossibilities, fortunes and misfortunes, of human beings.

It is a discrimination which pervades the area of social rights in the deepest and broadest sense. It pervades the formal national systems, state systems as well as private systems and systems which involve elements of both. It pervades the informal practices within those systems as well as outside them. It pervades, ultimately the ideas and emotions of human being. It does so directly as well as indirectly. In obvious ways and in ways which are hardly visible or graspable.

It is clear that the discrimination pervading the area of social rights is presupposed to reach far beyond it; discrimination within this area may be conditioned by discrimination in other areas of law, like family law, immigration law or education law. Not to mention informal patterns of discrimination permeating a variety of life spheres in general. Also, it is presumed to manifest itself in highly complex forms; entwined with all kinds of conceptual distinctions - whether those distinctions are understood as discrimination or not.

So, the law we have dealt with presupposes a discriminating world in this deep and pervading sense. Not only the complex definitions of discrimination, the designations of material scope and the specification of additional procedural elements, including policy-related elements, within legislation bear witness to that. Also the fine-grained logical analyses carried out by the CJEU demonstrates that a deep concern for the complex intermingling of a variety of conceptual distinctions underpins the court's understanding of non-discrimination law. Just like informal observations and even ideological concerns underpins the court's understanding: concepts which are vaguely defined, or even entangled in inconsistencies, but which are powerful in an associational sense in that they point to dominant contemporary ideas, form part of the argumentations of the court.

A discriminating world. But what kind of discrimination? Let us take another look at the discrimination grounds we have been dealing with - and consider the nature of the distinctions on which they are based.

Historically deep-rooted discrimination grounds

The discrimination ground 'nationality' is obviously based on the establishment of distinctions of a historical and societal nature, - distinctions which have been crucial to European social order for centuries, and still are. National citizenship has been the anchor for individual rights since the development of the modern European state. And in a broader sense, the distinction between belonging to a particular political unit - may it be a state, a city, or an Empire - and not belonging to it, has much deeper historical roots.

Some of the other discrimination grounds, namely 'sex', 'age', 'disability' and 'sexual orientation' may appear to be based on distinctions of a transhistorical nature. Some would say that these discrimination grounds are based on 'biological' or 'natural' differences.

It should be recalled, though, that when conceptualizing these latter discrimination grounds - implicitly as well as explicitly - in connection with particular cases, the CJEU builds extensively on conceptual distinctions which are significant to contemporarily dominant forms of social order. We saw how the significance of the discrimination ground 'age' was largely dependent on 'pensionable ages' in the different member states, or on the ages at which a person is expected to have entered the labour market or to have made a career choice. 'Disability' was given a purely functional and labour market dependent definition by the court: disability meant 'being hindered in professional life'. The discrimination ground 'sexual orientation' referred to much more than sexuality in the sense of sexual attractions and physical intercourse, but was applied in connection with homosexual couples being 'life partners'. Finally, the discrimination ground 'sex' includes the issue of transsexuality. And in addition, we saw that it was extremely ambiguous to what extent and in what sense fundamental differences between the sexes were presupposed at all.

Simultaneously, it cannot be denied that the discrimination grounds 'sex', 'age', 'disability' and 'sexual orientation' are so old that they almost transcend particular historical tracing; their particular origin seems to be lost beyond known human history. However, whether originally established by historical societies or not, they have been immensely historically significant. They have been crucial to the building of social order throughout the political history of Europe, - just like the distinction between belonging to a particular political unit and not belonging to it.

The discrimination ground 'race or ethnic origin' would seem to build on distinctions of a biological *and* historical nature. We saw, however, how the concept 'race' was stripped of any biological meaning. In fact, it was stripped of any substantial meaning what so ever. The meaning of 'ethnic origin', on its part, was left open and ambiguous. Together, the concepts of 'race' and 'ethnic origin' were dealt with as associational concepts hinting partly at ideological ideas, partly at established knowledge on the existence of marginalized communities in Europe today. The discrimination ground 'race or ethnic origin' proved to build on the idea of 'the stranger as such', rather than on particular distinctions concerning skin color, family relations, history, culture or nationality. As such, it is, however, as old as the other discrimination grounds. Certainly, the idea of 'the stranger as such' and everything it brings, politically, legally, practically and psychologically constitute historical deep rooted features of European civilization.

Also the last discrimination ground, 'religion or belief', carries a long history. Distinctions between different religions as well as distinctions between religion and atheism have been crucial to European political history. Significantly, political order has been built on, coincided with, or at least been dependent on religious order, or reversely on declared - or on ideologically declared non-religious order. The modern European democracies, in contrast, are build on the idea of religious and ideological pluralism. Particular religious and ideological distinctions are no longer supposed to be constitutive in a political sense.

Yet, such distinctions are still highly important. Religions and beliefs are still dominant markers of social differentiations. And they still confront each other violently. But in addition to that: there is a widespread fear of religion, a fear that it may regain its former power. Simultaneously, the existence (or establishment) of certain 'fundamental values' of democratic societies are regarded as hugely important.

Today, the crucial question is not only which religion or belief should be seen as the true one, but also how we may understand the nature of 'pluralism': should 'pluralism' be understood as a distinct belief itself; or as a belief made up of all the existing beliefs which it embraces, possibly even denoting an overall reflexion of all of those beliefs; or is pluralism rather to be understood as pure neutrality, as an empty shell around all those beliefs? Accordingly, religious and ideological differences are as important as they have been throughout European history, but the conditions for the discrimination ground 'religion or belief' have been partly reversed.

It is noteworthy as well that this discrimination ground is the only one which explicitly presupposes a spiritual human nature. Implicitly, they all do, of course. All the discrimination grounds depend on conceptual distinctions by which human beings have understood, created and legitimized social order. But the discrimination ground 'religion or belief' is the only one which explicitly points to a spiritual foundation for the lives of human beings.

So, common for all those discrimination grounds are their historical deep-rootedness. They do not merely correspond to contemporary distinctions and forms of discrimination.

Also, all the discrimination grounds are based on distinctions which have been crucial for social and political order. These are not distinctions established by criminals, anarchists or marginalized people; they are established, grasped or developed by those in power. They have been constitutive for order, not disorder; for the normal, not the deranged. And they still are, to a large extent. But the conditions for their manifestation have also changed.

Destiny character or social coercion

The discrimination grounds share something else as well. Most of them concern differences which have destiny character.

A person cannot choose his or her sex, age, disability or sexual orientation. The sex may be changed through an operation, though. But a transsexual would generally see the operation as the physical realization of what had always been his or her 'true sex'; the transsexual was merely born with the wrong body. Seen from this perspective, the sex which the transsexual always felt was the 'true sex' would constitute the sexual destiny of that person no less than the sex of a non-transsexual person. Some might also argue that 'sexual orientation' amounts to a free choice. Yet, even if that is so, it is a free choice also made on the basis of feelings of necessity, of the desire to be and become what one essentially is.

Also the discrimination ground 'racial or ethnic origin' concern differences which have destiny character. A person does not choose to be associated with the idea of 'the stranger as such', or to belong to marginalized communities. In some cases it could be said that certain life decisions and life forms might influence the extent to which a person is alienated. Yet, that does not change the fact that alienation has destiny

character for the person to whom it occurs when it occurs. It happens - beyond the will of a person.

Crucially, it should be noted that since these discrimination are exactly *grounds*, and not categories for a particular characterization of a person, the differences which they concern could, in principle, mark a person in many different ways. The victim of discrimination might not him- or herself be disabled, or be of a certain age which is the cause of dispute, or represent him or herself the idea of 'the stranger as such'. The victim of discrimination might also be closely associated with someone who could be characterized on the basis of one of the discrimination grounds. In the CJEU-case-law, we have seen an example of that In the Coleman-case, Ms Coleman was seen as a victim of discrimination on grounds of 'disability' due to the fact that *her child* was disabled, and not herself. In principle, we could imagine that a victim of discrimination might also merely be associated with *the issue* of sex, age, disability, sexual orientation or racial or ethnic origin, one way or the other.

Naturally, the looser the association, the weaker the destiny character for the person in question, that is, the potential victim of discrimination. But as we have seen, it is rare that a discrimination-case concern victims of discrimination who are not themselves characterized by the differences implied in the discrimination ground. And even in those cases, it is still so that those differences are - as such - markers of destiny for someone - if not for the victim of discrimination, then for other people due to which the victim is associated with the issue of of sex, age, disability, sexual orientation or racial or ethnic origin.

The discrimination ground 'nationality' is different. The differences which it concerns do not have destiny character. It is possible to acquire a new nationality - through marriage, through time spend in a particular nation, through work, economic means and the passing of national citizenship tests. Yet, we are also largely determined by the nationality with which we are born - or the statelessness with which we are born. Changing or acquiring new citizenship is difficult. Thus, we may say that although national differences do not have destiny character, they weigh heavily on human beings.

Finally, the discrimination ground 'religion or belief' is the most complex of them all as far as concerns the issue of destiny (or high degrees of social determination) versus forms of freedom. Believing in something is, in principle, an act of freedom. When believing, a person realizes him- or herself as a spiritual human being, that is, as

something which is not merely determined by the immediate circumstances. When believing, a person rises above that which is immediately present, and establishes norms and hopes and visions beyond that. Believing depends on a distinction between how the world is, and how it ought to be; or, alternatively, between how the world appears to be, and how it truly is. Also a belief in natural science, for instance, implies that there is a hidden truth behind the world as it immediately appears. Even the belief that 'there is nothing else but what we see and experience' depends on such a distinction, in that also that belief depends on an initial distancing oneself from the world as it immediately appears, and a subsequent reflection as to whether or not 'there is something else'.

Freedom depends on believing. Freedom may be conceptualized in many ways. But freedom is unthinkable if not connected to an act of distancing oneself to the world as it immediately appears - in order to seek something beyond that, or possibly something *in* that - may it be love, goodness, God's revenge, natural laws or structures of power - but something which must exactly be looked for in order to be found.

Could such an act of distancing oneself to the world as it immediately appears not be possible without believing in something? I cannot answer that.⁷⁶⁴ For the purposes of the present consideration, however, this is not crucial. The crucial point to be made is merely that since believing is essentially connected to an act of distancing oneself to the world as it immediately appears, and since such an act constitutes the hallmark of freedom, believing should, in principle, be seen as an act of freedom.

On the other hand, religious and ideological distinctions might also be seen from the perspective of determination or necessity. Firstly, it is clear that our beliefs largely depend on our upbringing and cultural horizon. Some environments are ideologically heavier than others, and some are more pluralistic than others. But in any case, we will have to develop our beliefs within the cultural and conceptual horizons known to us.

But secondly, there is an intrinsic element of necessity to consider as well. If a belief is seriously meant, if it is truly believed, then it is also experienced, by the believer, as a necessary belief. In principle, the believer could believe otherwise. But if the belief is believed to be true, turning against it would be equal to rejecting or even ridiculing what is true. In this sense, the choice of believing in something has a destiny character, and may be compared to the choice of a transsexual who, by the means of an operation,

⁷⁶⁴ Even the purely negative critical approaches - like Adorno's for instance, rely on the possibility of hope, even if they do not articulate that hope in any positive way. One may think of Derrida's concept of 'justice' as well. To a large extent, chapter 1 revolves around this issue.

becomes the sex which was always the 'true sex'. The believer chooses to believe what is true.

However, most beliefs are accompanied by doubt. This is not least due to the fact that the believer rises above the world as it immediately appears and establishes norms, hopes and visions beyond that world. It is an essential feature of many beliefs that believing in them is difficult. For this reason, the intrinsic element of necessity will often be counteracted by a feeling of choice: I could believe in this, but I could also believe otherwise.

Finally, it should be noted that beliefs can be held in a more pragmatic manner, for reasons of convenience or comfort or tradition, out of respect for a particular community, or connected to aesthetical aspects of personal character building. Such beliefs are not truly beliefs, however substantial the reasons involved. Strictly speaking, the believers in question believe in something else than the belief which they claim to adhere to. They believe in comfort or tradition, in the community or in the possibility of aesthetical self-creation. Or beliefs can be pragmatic in the sense that adherence to a particular belief may be a condition for social acceptance and in extreme cases even a condition for survival. Pragmatic beliefs - of all kinds - form an important part of the world today - and should thus be seen as reflected as well by the discrimination ground 'religion and belief'.

As the reflection has demonstrated, the discrimination ground 'religion or belief' is highly complex with respect to the issue of destiny (or high degrees of social determination) versus forms of freedom. Beliefs which are truly beliefs are acts of freedom in that they depend on an act of distancing oneself to the world as it immediately appears. But they are also determined by cultural horizons, and they imply an intrinsic element of necessity by which they gain a certain destiny character - a destiny character contained, though, by the freedom which ultimately defines a belief, and by the continuous possibility, opened by the cultural horizon in question, of believing in something different. Pragmatic beliefs, on the other hand, are more accurately understood within the tension of arbitrary choices, substantial translation of beliefs (so that the claimed belief is in fact a mask covering another belief) and forces of social determination.

Accordingly, most of the discrimination grounds we have dealt with have destiny character, and if they do not, they are connected to high degrees of social force. The discrimination grounds concern, in other words, differences which lie beyond the will

and control of the people marked by those differences, or they are very difficult to control.

Only the discrimination ground 'religion or belief' concerns differences which are, in principle, expressions of freedom. But also those differences imply elements of necessity, and forces of social determination.

Presumptions as to the flexible and changeable nature of discrimination

The law we have dealt with presupposes a discriminating world in a deep and all-permeating sense.

It is a world which discriminates according to distinctions which have been crucial to European social and political order for centuries and - when looked at from the point of view of their underlying problematics - throughout European civilization. Some of them are so old that they even escape particular historical tracing. Also, most of these distinctions have destiny character in the sense that the categorizations which they imply are inescapable. And if they are not inescapable, they are only altered with great difficulty.

In other words, the law we have dealt with presupposes a highly stabile world. Those distinctions which are crucial to today's forms of discrimination have been crucial to forms of discrimination throughout European Civilization. And in addition, this stabile world discriminates according to human conditions which lie beyond the control of human beings. That is, it is not only a stabile world in terms of its forms of discrimination, it is also a world which imprisons human beings; it discriminates them according to categorizations from which they cannot escape.

But at the same time, it is important to note that the law we have dealt with presupposes a certain flexibility of the world as well. It does so in two ways:

Firstly, the non-significance-logic - both in its pure and in its reduced form - implies that the victims of discrimination, 'the persons concerned', do not make out particular groups of people which can be identified once and for all. Men as well as women, old as well as young, atheists as well as muslims or Christians, heterosexuals as well as homosexuals may be victims of discrimination. Not to mention the ambiguous discrimination ground 'racial or ethnic origin' which opens for wide and associational interpretation, and accordingly for many different kinds of right holders. The non-significance-logic opens as well for the possibility that the victims of discrimination could also merely be associated with the discrimination ground, as discussed above.

In other words, although the conceptual distinctions on which the discrimination grounds are based constitute old and stable distinctions as far as discrimination is concerned, the nature of the victims of discrimination are not presupposed to be stable. As discussed in chapter 15, a tension between flexibility and fixation can be detected in the non-discrimination Directives. The non-significance-logic itself implies radical flexibility with respect to the nature of the right holders. But the ambiguous notion of 'the persons concerned' together with the role granted to organizations as knowledge providers, disseminators and recommenders of conduct and practices, imply that we already know, or could know, who the potential victims of discrimination would be. However, that knowledge would be a contemporary knowledge and would imply only a relative, contemporary stability. That is, even when the tension between radical flexibility and relative, contemporary stability is taken into account, we are confronted with Directives which presuppose that the nature of the victims of discrimination may change over time and vary according to place. The conceptual distinctions at stake may be stable, but victims of discrimination come in ever new clothing.

Secondly, flexibility is presupposed for the important reason that non-discrimination law itself depends on it. Non-discrimination law is intended to eliminate discrimination based on the discrimination grounds in question - that is, within the areas designated, and with the different exceptions which apply. Non-discrimination law is, in other words, intended to prevent the manifestation of those old and stable forms of discrimination. If the world was not presupposed to be capable of change with regard to those old forms of discrimination, non-discrimination law as such would be obsolete.

In the non-discrimination Directives with respect to sex it was even implied that some kinds of discrimination are expected to disappear completely. We found that a distinction between changeable forms of discrimination, on the one hand, and permanent forms of discrimination, on the other, was presupposed in those directives. But apart from the fact that certain measures of positive discrimination towards women within the national systems are expected to gradually disappear along with a gradual transformation of those systems, it was unclear exactly where the changeable forms would end, and the permanent forms begin. We can only say that nothing in those Directives - or in the case-law for that matter - indicated that non-discrimination law with respect to sex would one day no longer be necessary.

Neither was it indicated in any of the other non-discrimination Directives that non-discrimination law with respect to the discrimination grounds 'age', 'disability', 'sexual orientation', 'racial or ethnic origin' and 'religion' would one day cease to be necessary. In the words of those Directives themselves, their purpose is to '*combat*' discrimination. This wording implies that the phenomena of discrimination is not likely to disappear. But most importantly, non-discrimination rights are given the status of fundamental rights; that is, they apply to a fundamental problematic.

In those Directives, just like in the the non-discrimination Directives with respect to sex, it is in fact strongly indicated that changing the discrimination forms at issue is very difficult. Non-discrimination rights are not considered to be enough; additional judicial elements, such as rules concerning the burden of proof and victimization are regarded as necessary, along with the enforcement of the role of organizations with respect to knowledge provision and dissemination, monitoring and establishment of best practices.

Non-discrimination rights in relation to nationality, in their turn, are supported by a range of substantial rights, including fundamental rights. That in itself bears witness to the existence of a deep concern that discrimination on grounds of nationality is not easily altered either. However, in this case, preventing discrimination is not presented as being equal to a battle, but rather as a highly complicated legal problem-field.

The tension between permanence on the one hand, and the possibility of change and flexibility, on the other, belongs of course to any law. This tension is but an aspect of the particular normative-temporal tension between presumed and ideal order underpinning any historical human law. Any law must presuppose the possibility of change. Otherwise the law would constitute a hopeless endeavor. On the other hand, a law which presumes that the change represented by it could be realized once and for all, would scarcely be a law. It would be a temporary measure, unnecessary after a short while.

When that is said, it is clear that there are great differences between laws. Some laws are conservative in the sense that they merely confirm norms and arrangements which are already well established. Still, if it was believed that those norms and arrangements would reign the world by themselves, without the law, the law would be unnecessary. Other laws are progressive or even revolutionary in the sense that they break with what is well established. Finally, some laws are of a more temporary nature than others.

The non-discrimination law we have dealt with presupposes a tension between an existing, discriminating world, on the one hand, and the possibility of change and flexibility with respect to those existing forms of discrimination, on the other - either in the form of a difficult 'combat' the weapons of which are multiple, or in the form of a new rights regime. We may call this law progressive - and not conservative - in that it seeks to break with well-established and historically deep-rooted forms of discrimination. It is not revolutionary, though, since it is, at least to some extent, based on alterations within these forms of discrimination which were already under way. In addition, the law is full of exceptions: it does not only break with the forms of discrimination in question, it also upholds them to in some respects. Finally, and crucially, it is based on *other* norms and arrangements which we may certainly call well-established. We shall return to that in a short while.

As far as the changing capacities of the law is concerned, the non-discrimination law we have dealt with presupposes that change will be difficult, although more difficult in the case of the forms of discrimination based on destiny-like distinctions, than in the case of those forms connected with powerful forces of social determination. 'Religion or belief' - which constitutes the complicated exception in this respect - as it comprises freedom, necessity and social determination - is among those discriminations grounds with respect to which change is presumed to be very difficult.

Chapter 20

Anchors of order according to their basic logics

As already indicated, the law we have dealt is based on other presumptions than those discussed above.

Clearly, we are not only faced with the presumption of a stably discriminating world, imprisoning human beings according to distinctions which are either destiny-like or connected to strong forces of social determination. And the presumption that although those distinctions will stand, flexibility and change with respect to forms of discrimination based on those distinctions will be possible. And the tension between the two.

We are also faced with presumptions concerning certain anchors of order. Hereby I mean institutions which are fundamental in the sense that each of them constitute the

basis for other institutions, and that each of them are characterizable by their own logic or logics. As such, each of them serves as final anchors of justification. They do not need any justification themselves. They *are*, - that is enough.

On the basis of the analyses of this work, I will argue that the law presupposes the following anchors of order: 'the national labour market'; 'the national welfare systems'; 'the employment relationship'; the internal market'; 'the family' and 'the state *as one*'. In the following section, I shall introduce them one by one with their basic logics. But before doing that, let me explain more precisely what I mean by anchors of order and on what premisses I believe they can be derived.

Clarifications: presumed orders and presumed basic logics

First, it could certainly be questioned whether such fundamental anchors of order exist. My claim is merely that the law we have dealt with presupposes the existence of such anchors of order. And it also presupposes that each of them is characterized by certain basic logics (not necessarily just one logic). Those logics are sometimes stated explicitly, other times they are merely implied - in case-law or legislation. In any case, these logics are not discussed or justified. It may be discussed by the court whether a particular aspect of a case should be seen as an instance of one of those logics, or not. Or it may be discussed whether a particular law can be justified when considered in the light of one of those logics. In many cases, however, the logics in question appear as assumptions underpinning the particular argumentations of the court, or the distinctions on which the legislation is based.

Also, it is crucial to differentiate between the orders which are presumed to exist, and those which the law is meant to make possible, realize or create.

Accordingly, by anchors of order presupposed by the law, I do not mean the fundamental principles and rights laid down by the law. Like for instance the principle of non-discrimination. This principle is exactly manifested by the law, it is meant to be realized through and because of the law. By anchors of order presupposed by the law I mean orders presupposed as existing prior to, or independently from, the law itself.

Naturally, that distinction is not easily made. Laws are based on institutional orders made possible by other laws. Most notably, the law we have been dealing with presupposes the existence of the internal market, made possible by other EU-laws. But the internal market is also continuously being manifested and realized through the law we have discussed. The same is, in principle, the case with respect to the other anchors

of order which I shall present below. They may be partly independent from the law we have dealt with, but they are also upheld by that law.

Likewise, with respect to the basic logics of the anchors of order, we encounter a similar problematic. Certain anchors of order, corresponding to certain basic logics, are presupposed as a foundation for the principles and rights laid down by the law. When applying and interpreting those principles and rights, the CJEU (or other courts, or actors) will need to qualify the nature of the institutional foundation in more particular ways. As indicated above, in some cases, it will be necessary to consider whether a particular situation should be seen as belonging to one or the other of those institutional orders. In other cases, it will be necessary to consider whether a particular law is in conflict with certain principles attributed to one of those orders. Finally, there will be cases in which the internal relations between the different institutional orders will come into question. - But sometimes, a definition of the basic logic of an institutional order does not exist prior to the more particular qualifications of that order. Sometimes the basic logic is only developed together with the more particular qualifications. And even if the basic logic can be said exist already, it may be difficult to say exactly where the basic definition ends, and where the more particular qualification begins. In other words, a clear and indisputable distinction between the basic logic, on the one hand, and the more particular qualifications of the institutional which serve the applications of the principles and rights laid down by the law, cannot be made.

In spite of these problems, I shall stick to the distinction between orders which are presumed to exist prior to the law, and those which the law is meant to make possible, realize or create. I do that for the same reason that I, in the previous sections, developed a tension between the presumption of stably discriminating world, and the presumption of the existence of a certain flexibility by which the presumed discrimination could be changed. The tension between the world as it is (or is presumed to be) and the world as it ought to be, is fundamental to any law, as argued above.

Only, in the previous sections, it was easier to distinguish between the two factors. A discriminating world was confronted with an aspiration to prevent - or combat - that discrimination. The distinction was muddled, though, by the fact that the discrimination grounds, as such, are upheld by the law.

Now, it is much more difficult. Now, we are dealing with orders which serve the law as foundations, not orders which the law is meant to fight against. But the law is not

merely based upon these orders. It must necessarily qualify them in connection with applying and interpreting the principles and rights it lays down. Hereby, they become part of the ideal order (the world as it ought to be) represented by those rights and principles. In other words, that ideal order is not merely represented by the rights and principles laid down by the law, it is also represented by particular understandings of the institutional orders within which the law is supposed to be implemented. Qualifications of those institutional orders - necessary for the application of the rights and principles - become more than qualifications of the presupposed, preexisting order; they become ideal institutional definitions themselves - the institutional order as it ought to be, not just as it is presumed to be.

As stated above, within the law itself we cannot distinguish clearly and indisputably between the two: the institutional order as it is presumed to be, and the ideal interpretation of it. Often they will be developed simultaneously. And often they will be woven together within the same statement, or even within the same concept, or in assumptions underpinning particular argumentations. An explicit definition, or an implicit assumption, of what 'the family' is, f.inst., might very well appear to be real and ideal at the same time: If the family is characterized by 'internal dependencies' and 'dignity', does that mean then that these are presumed to be the basic features of families, as they exist, and that the purpose of the law is merely to protect these features, and to help families with respect to those features? Or does it mean that these are ideal features which are to be created through the law?

However, the lack of clear means of distinguishing between the two 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.

The analytical gaze can maintain the tension. Only, it must be kept in mind that it only exists as a dynamical tension within the law. That is, conceptualizations of how the world is presumed to be and conceptualizations of how it ought to be will influence each other mutually, for which reason the analysis can always only draw the distinction in a tentative way.

Accordingly, when presenting below the five anchors of order, as I see them, I will attempt to present only the most basic aspects of their corresponding logics. The more

particular qualifications which I see as constituting a part of the ideal order represented by the rights and principles laid down by the law will be dealt with in Part II.3. It may certainly be disputed whether some of the 'basic aspects' which I present below, should rather be seen as 'ideal aspects'. As I have said, the line between the two cannot be drawn in an indisputable way. It is a tentative line. But the drawing of a line as such is justified for the reasons I have given above. It cannot be disputed that the pre-existence of certain institutional orders are presupposed by the law, as a foundation for the rights and principles it lays down. In the case of the law we have dealt with, I will argue that this institutional foundation comes in shape of certain fundamental anchors of order.

Finally, it should be emphasized that the anchors of order I shall present below are not completely separable and self-reliant orders. To some extent, we will find logics which resemble each other, although they are not quite the same. And to some extent, logics of one order will rely on logics of other orders as a part of their own manifestation. Yet, it is meaningful to present them separately: each of them appear, in the law, as orders which serve as final anchors of justification, with each their own logics.

On the basis of the premises clarified above, I shall now present the six anchors of order - 'the national labour market'; 'the national welfare systems'; 'the employment relationship'; 'the internal market'; 'the family' and 'the state *as one*'- with their corresponding basic logics.

National labour markets: *politically created natural balances and integrators into life*

The national labour markets constitute the institutional orders within which the transnational working access rights and workers's rights are to be implemented. But they also constitute crucial institutional horizons for the transnational mobility and residence rights. Likewise, the national labour markets constitute the institutional orders within which all the other non-discrimination rights regarding working access and working conditions are to be implemented. Also a large number of social security rights are implemented through the parties of the labour market.

In addition, we saw that the national labour markets play an immensely important role in connection with justification of discrimination. More precisely, according to legislation as well as case-law, discrimination may be justified if it serves the needs of the labour market. Such means of justification could be conceptualized in the shape of 'occupational requirements' regarding particular activities, or it could come in the

shape of 'the needs of the national labour market as such', presupposing national labour markets as grand organizational unities.

It was especially in connection with the latter kinds of justifications (and most notably in connection with the non-name 'Age') that we encountered some basic presumptions concerning the nature of national labour markets. National labour markets were conceptualized as 'balances'. More precisely, they were understood to be grand organizational units consisting of divergent interests, and as such grand units they were to be understood as 'balances'.

Now, I will argue that a conceptual ambiguity is inherent in this understanding: these 'balances' are understood as natural balances, created as such through internal processes of continuous adjustments, but they are also seen as natural balances created as such by means of state decisions.

First: the national labour markets are presumed to be natural balances. Why natural? I will argue that the concept of 'balance' itself implies the idea of nature. Different interests may be balanced against each other in order to find *a compromise*, but if it is presumed that the results of such balancing exercises will always constitute a 'balance', and not just a compromise, then it is presumed that a true or natural equilibrium will always be reached.

And this is exactly what is presumed. From the case-law concerning discrimination on grounds of age I derived the agreement-flexibility-balance-triad. This figure was meant to capture the analytical result that ultimately, 'balance' means nothing but a process, a process consisting of continuous flexible adjustments on the basis of the existent power relations. 'Balance' plays the double role of 'aim' and 'mean', but in both roles it means a process. As such, it does not constitute an ideal one should strive for, it represents something which can be possessed and known; it is nothing but the existence of the process itself, whatever the outcomes of it.

In other words: The national labour markets are seen as natural balances simply by virtue of the fact that they are processes of continuous flexible adjustments on the basis of the existent power relations between its parties. They are created continuously as nature through the adjustments made by their own parties. They remain natural balances whatever the results of those adjustments.

Simultaneously, however, it is implied that the labour markets may be in need of state regulation. As such, they are understood as natural balances which must be created as

such through state intervention. In order for the natural needs of the labour markets to be satisfied, external regulation may be necessary.

Both of these understandings involve contradictions. According to the first, aims and means become the same. Nature (the balance) constitutes the aim, but that aim is nothing but the continuous manifestation of the means. Nature (the balance) becomes the expression of a tautological relationship between aims and means. Bluntly put: nature is simply that which continuously unfolds, but as such it is seen as an aim. The second understanding involves a contradiction between nature and political intervention. Here, nature (the balance) constitutes something which needs to be taken care of by human beings. It is not simply that which unfolds. The balance may be disturbed in which case adjustments are necessary. In other words, nature requires human intervention in order to be nature.

National labour markets are not only conceptualized as ‘balances’. They are also seen as those institutional orders within which ‘economic, cultural and social life’ essentially takes place as well as those institutional orders within which human beings ‘realize their potential’ and enhance their ‘quality of life’. They are *life integrators*. By ‘participating in’ the national labour markets, human beings participate in life, in a qualified sense. Naturally, this does not exclude the possibility of a socially and individually satisfying life outside of the labour market. But the labour market constitutes *the* institutional order within which life develops in a qualified sense, socially and individually.

This presumption is articulated directly in the case-law concerning discrimination on grounds of age, but it also permeates the judgments concerning the social rights of unemployed people residing in another member state than their own. In those judgments, the crucial factor proved to be the establishment of ‘a real link’ between the national labour market and the person in question. The CJEU indicated that multiple factors might be taken into account in this respect, also factors which concern the social integration of the person in a broader sense. Accordingly, we must conclude that the national labour markets are not delimited by clearly defined borders. Where a national labour market ends, and ‘the rest of society’ begins, is ambiguous.

By analogy, the highly complicated concept of worker within EU law confirms this understanding. We found that the border areas of that concept are characterized by huge grey zones. With respect to unemployed people, it was extremely ambiguous where the zone of workers would end, and the zone of the excluded begin.

In other words: the national labour market constitutes *the* institutional order within which life develops in a qualified sense, socially and individually. But it is not an institutional order characterized by clear borders. It extends towards society in general. Thus, it is not only so that social life in general is defined by work (social life in a qualified sense relates to work). Also, work is defined by social life (one qualifies for participation in the labour force by being socially integrated in a broader sense). The labour market and society in general melts together to a high degree.

Though not completely. There is life outside of this institutional order as well. Sometimes it is defined. In the case-law concerning discrimination on grounds of age that life would be 'retired life'. Although retired people are still seen as part of 'the working population' due to the fact that they have a working history on the basis of which they have earned social rights, they no longer participate in the labour market. Obviously, children and adolescents are also not part of the labour market - not yet.

Retired life and the life of children and adolescents is still life which relates to the institutional order of the labour market, though - as past life and future life. Also seen from the perspective of the labour market as balances, it is clear that young life and retired life is part of the overall balance in a negative sense. It is life which must constantly be calculated with, for the sake of the balance.

The same can be said of those who cannot, and never will, be able to work. The unemployed, on the other hand, belong to the balance on the condition that they are 'linked' to the labour market in the broad and ambiguous sense which implies social integration as well.

Accordingly, the national labour markets are presumed to be anchors of order characterized by the following basic logics:

They are presumed to be natural balances. That is, natural balances which are politically created as such, but in two different ways. Either as processes of continuous flexible adjustments on the basis of the existent power relations between the parties of the labour markets. In this case, 'natural balance' and 'political creation' becomes the same thing; the 'natural balance' is defined as the process of adjustments itself. Or, they are created through state intervention. In this case, 'natural balance' and 'political creation' are not the same thing. Nature requires human intervention in order to be nature.

Furthermore, national labour markets are presumed to be life integrators. Their relationship to 'society in general' is ambiguous though. To a large extent, social integration and labour market integration melt together.

Three different ghosts appear from these basic logics, disturbing their proper functioning.

The first ghost asks: if we are caught in a tautological circle of means and ends in which nothing exists but the process itself and the continuous outcomes of it, then the 'natural balance' as such will be characterized by no overall guiding ideals or principles, distinct from the process itself. How may labour markets, then, be conceived of as belonging to any ideal social order at all?

The second ghost asks: how can a natural balance be created by means of state intervention?

What is it that it lacks by itself for which reason external interference is necessary?

The third ghost simply asks whether life outside of the labour market can be qualified in any way?

The national welfare systems:

systems of rights and duties; integrators into membership

The welfare systems of the member states are essential to practically all the non-discrimination rights we have encountered, except for working access rights (although even they are connected to the national systems). Statutory social security and social assistance rights as well as social security rights springing from the employment relationship are all organized in national systems.

But the national systems also play an important role in connection with justifications of discrimination. In some cases, discrimination may be justified if it serves the national welfare systems. We saw that in particular in chapter 18, in connection with justification of temporary forms of discrimination on grounds of sex. The welfare systems of a particular member state are not conceptualized under one heading, as *the* systems (or even the system) of a particular member state. Rather, they are conceptualized as different systems, like for instance 'the pension system' or 'the public health system' of a particular member state. That is, national welfare systems are not, like the national labour markets, understood as grand organizational unities, but rather as a number of organizational unities, corresponding to different types of benefits.

National welfare systems are not seen as natural balances like the labour markets. To some extent, they are seen as balances, though. We encountered for instance the expression 'financial equilibrium' in connection with particular systems of benefit. But it is clear that the balances in question are understood as balances which must continuously be sought on the basis of certain political criteria. They are not natural balances which has needs of their own, they are politically constructed balances.

I will argue that the crucial presumption concerning the nature of the national welfare systems is inherent in the distinction between social security rights and social assistance rights. Those two concepts and not least the distinction between them have been defined by the CJEU in a number of judgments. Later, we shall discuss those definitions. Here, it is merely important to take note of the significance of the distinction as such, and the basic characteristics of the two kinds of rights.

Social security rights are rights which are granted to 'insured persons'. This is the premise of the Social Security Coordination Regulation. They may be contributory rights as well as non-contributory rights. In any case, however, they presuppose the idea of 'insurance'. The historical background for this connection between social rights and the idea of insurance is the attempt to free social rights from mercy and charity and the humiliations and uncertainties which follow. Social rights should exactly be rights, not something which an individual in need should receive on the basis of humiliating gratitude. And they should be secure rights, they should be 'social security', not the subject of mere chance. The historical attempt succeeded. It succeeded by the means of the establishment of insurance schemes based on membership and contributions by the members. In other words, an intimate connection between rights and duties was established in order to establish the idea and reality of social *rights*.

Today, social security systems are not necessarily organized on the basis of member-contributions, but are paid by the state. Yet, even to the extent that social security rights are granted 'for free', some kinds of criteria are still connected to them, - it could be that a certain number of years of residence in the state in question is required, or that national citizenship was required. Social security rights are still, in principle, rights granted in exchange for duties, even if duties have, in some cases, become more general, or, in other cases, correspond to expectations, rather than explicit requirements.

In other words, social security rights are rights corresponding to an intimate relationship between rights and duties. Social security rights are rights which are

earned, somehow or the other. Social assistance rights, on the other hand, constitutes a kind of residual. Social assistance rights are for those who are not insured. As such, they are, in principle, not a part of the rights-and-duties logic, and for the same reason, they are not 'security'.

What they are instead, however, is not at all clear. They might resemble mercy and charity. Yet, they are called rights. And in fact, they are often granted on rough conditions, that is, in exchange for duties. Which raises the question of what exactly constitutes, today, the difference between social security and social assistance rights.

In conclusion: The welfare systems of the member states are presumed to be characterized by the following basic logic:

They are systems of rights and duties, differentiated according to specific benefits. Herein, they are not natural systems, but political systems: what constitutes a proper relationship of mutual exchange between rights and duties is a political question, not a matter of nature.

As systems of rights and duties, they are also integrators, like the labour markets. But whereas the labour markets integrate into life, the welfare systems of the member states integrate into membership, real, legally guaranteed membership as well as the idea of membership. Or, we may say that they integrate into 'belonging' where belonging means being part of the rights-and-duties-logic.

Due to the fact that social security systems of the state are no longer necessarily contributory systems, and that the duties implied may be of an abstract and general nature, the meaning of 'membership' and 'belonging' may transcend the particular systems of benefits and point to the existence of larger systems of membership and belonging, such as the national community as such.

But this is not the only tension underlying the basic logic of the welfare systems of the member states. Social assistance rights constitutes the ghost within these systems. They do not correspond to 'insurance' and are not truly a part of the rights-and-duties logic. Neither can they be captured by the concepts of mercy and charity. What are they? Expressions of humanity and decency, of humiliation or reprimand, or something completely different? What does 'assistance' mean? These are the questions of the fourth ghost.

The employment relationship: *a relationship of subordination and consequently an event, not a process or an idea; a rights-and-duties logic without membership*

To some extent, the employment relationship is presumed to be an institutional order which shares the logic of the national labour market. Like the labour market, it is presumed to be characterized by divergent interests, the employer's and the employee's. As such, it can be seen as an individual instance of the logic characterizing the labour market in a collective sense. We could say that the two mirror each other, reflecting each other in a grand or small scale, respectively.

Also, it is to a large extent so that it is the same rights which are meant to be implemented in the two orders: all the working condition rights and a great deal of the social security rights we have encountered. And if we understand the 'potential employment relationship' as being included in the employment relationship, then working access rights should also be implemented in both. This 'double' implementation simply means that the labour market as such - constituted by its different parties - as well the individual employer, should be made accountable for implementing the non-discrimination rights in question.

Accordingly, it would seem unnecessary to treat the employment relationship as an institutional order of its own; it would seem that it simply constitutes a part of the labour market, and a part of it in the particular sense that it mirrors, individually, the divergent interests which confront each other collectively in the labour markets. Or conversely, it could be said that it would be unnecessary to treat the labour market as an institutional order of its own, since it mirrors, collectively, the logic of the employment relationship. The only difference would be that the labour markets are more complex, they do not merely consist of two actors confronting each other, but of a number of different actors. But that complexity could be said to correspond to the totality of all individual employment relationships, including the potential ones.

None the less, I will argue that the employment relationship is presumed to be an institutional order characterized by a basic logic which is not the same as that of the labour market, although it shares some features with it. The employment relationship is not understood as a natural balance but as a 'relationship of subordination'. Furthermore, it implies a clear rights-and-duties logic. The employee *'provides, for a certain period of time, services for and under the direction of another person, in return for which*

he receives remuneration'.⁷⁶⁵ The remuneration - the pay - includes social security rights, whether provided directed by the employer, or through contributions to social security systems.

Hereby, the logic of the employment relationship resembles the logic characterizing the welfare systems. Also those systems could be said to be characterized by a relationship of subordination, in the sense that the systems would define a particular relationship between rights and duties.

On the other hand, it is clear that the relationship between rights and duties is not defined by the employer alone. To a large extent, it will reflect the ever vibrating 'balance' of the labour market, in combination with state legislation. Also, regarding the aspect of membership: being inscribed in an employment relationship, and thereby in a particular relationship between rights and duties, implies membership in the labour market. That applies to the employer as well as the employee.

For a closer look, however, the distinct nature of the employment relationship can be characterized in the following way:

The employment relationship is understood to be a 'relationship of subordination', implying a particular rights-and-duties logic. As such, it is likely to reflect, to a great extent, 'the balance' of the labour market. But to the extent that it does reflect that balance, it is the expression of a particular interpretation of this balance, over a certain period of time. In other words, it does not reflect the 'natural balance' understood as the continuous process of flexible adjustments; neither does it reflect the idea of a natural balances which must be created as such through state intervention. It defines and freezes a certain understanding of this balance, over a period of time.

Regarding the aspect of 'membership'. In the case of the welfare systems, the systems are, in principle, constituted by the members. This means that the aspect of subordination and the aspect of membership collapse; they become one and the same thing. In contrast, in the case of the employment relationship, the aspect of subordination and the aspect of membership do not collapse completely. The subordination implied in the employment relationship concerns a particular relationship between rights and duties. Membership of the employment marked may be obtained in other ways, through other particular relationships between rights and duties, as well as through more diffuse rights-and-duties logics.

⁷⁶⁵ The remuneration criterium introduced in chapter 7

It could be argued that this 'distinct nature' of the employment relationship is speculative. It could be argued that a modern employment relationship might very well be seen as a continuous process of adjustments, or possibly as the idea of a natural balance which could be reached by way of adequate intervention by a third part. And hereby, it could be seen as implying a diffuse and not necessarily a 'particular' relationship between rights and duties.

This might very well be true. However, my purpose has been to derive the institutional orders which are presumed by the law, along with their basic logics. And I will argue that the definitions of the employment relationship given by the CJEU have the implications I have described above.

Crucial to this understanding is that the employment relationship has its own distinct temporality. As a 'relationship of subordination', it constitutes an event. This does not in principle exclude the possibility of dynamical elements - whether due to dynamical elements specified in the employment contract, to frequent renegotiations of the contract, or to the lack of a contract at all. It does not exclude either that an employment relationship could be diffuse with respect to the precise meaning of its rights-and-duties-logic. But basically, the employment relationship constitutes an event, not a process, and not the realization of an idea. It institutes a particular relation, for a certain period of time.

In addition, it is not, in itself, characterized by a logic of 'membership', although it may lead to memberships - of social security systems and of the labour market. In the employment relationship, the aspect of subordination and membership does not coincide. It constitutes a hierarchical relationship.

The logic of the employment relationship is, in a sense, stunningly simple. However, the fifth ghost questions the relationship between the employment relationship itself and the memberships to which it leads. How can something as distinct and simple as the employment relationship lead to collectiveness and societal integration, even to 'life'?

The internal market: *a pure logic of exchange*

The internal market is an institutional order which is both realized through the law we have dealt with, but which is also presupposed as an already existing order.

As far as concerns the free movement of people, it is an order which is being realized through the non-discrimination law which concerns the discrimination ground of

nationality, dealt with in part I.1. But as far as concerns the free movement of goods, services and capital, it is an institutional order which is presupposed as a foundation for the free movement of people - and hereby for all the transnational rights we have dealt with. In a more specific sense, it was presupposed as a foundation for the rights regarding 'access to and supply of goods and services'. Such rights were found in connection with the discrimination grounds 'sex' and 'racial and ethnic origin'.

In the latter connection we saw that 'goods' are defined as entities which have economic value and are exchangeable. And 'services' must be services 'provided for remuneration' in order to be covered by the Treaty. In other words, a basic logic of exchange is laid down. On the basis of the definitions of goods and services, we may say that the internal market is an institutional order characterized by transnational exchange of entities which have economic value. As we know, to the internal market is attributed the concept of 'freedom' ('the four basic freedoms'; 'the free movement of goods, capital, services and people'). Freedom in this context simply means transnational mobility.

A basic logic of exchange of entities carrying economic value - that must certainly be seen as a general, and minimal, logic of markets as such. It should be noted that this logic is so minimal that it does not even imply the aim of profit-making. It implies nothing but the occurrence of exchange - for whatever reason.

But will this basic market logic serve as a foundation for all four freedoms? As far as the free movement of 'people' is concerned, our subject, it is clear that people may be seen as entities carrying something of economic value which is exchangeable in a market (namely work). And certainly, there are aspects of the law we have dealt with which seems to rely on such an understanding (the 'remuneration criterium', f.inst., which plays an important role in connection with the concept of worker). However, there are a number of other aspects of the law we have dealt with (other aspects of the concept of worker as well as the concept of EU-citizen) which do not appear to rely on a basic logic of exchange?

In other words: the question is whether 'the internal market' does in fact constitute an institutional order characterized by one or more common basic logics? Or differently put: does the internal market constitute an institutional order at all?

Accordingly, the ghost within this anchor of order does not consist in a border element like in the other cases (the meaning of life outside of the labour market; the meaning of

social assistance; the connections to other orders). Here, the ghost appears as the suspicion that the internal market cannot be described as an institutional order at all.

The family: *internal asymmetrical dependencies and sacredness*

The family does not appear in the law as an institutional order *within which* rights are meant to be implemented. Rather, the family appears as an institutional order which should be protected by the law. It may be protected positively as well as negatively.

The family may be protected positively in the sense that it is being helped by the law so that it may be, or remain, a family, and so that it may carry out what is regarded as the fundamental functions of a family. Family reunification rights, family benefits and all the derived rights of family members are examples of positive protection. It may be protected negatively in the sense that the law lays down that the family should be left in peace - in general, or under certain circumstances. The fundamental right to privacy and family life entails such negative protection - although it also, positively, states the rights to a family life as such.

But the internal family relations as such are not regulated. Family members appear as rights holders who may claim derivative rights, but the family as an institutional order is not included under the material scope of any of the Directives and Regulations we have considered. In connection with discrimination on grounds of sex, it is made explicit that 'family life' constitutes a sphere of its own - a sphere in which discrimination on grounds of sex is not prohibited.

The crucial concept we encountered in connection with the family was 'dependency'. It was clear from the various definitions of 'family-member' that a family could involve many different kinds of family relations (from the relations characterizing the 'nuclear' family to much more distant relations). It was also clear that the law took into account the phenomenon of step-families as well as different kinds of family life-forms, most notably the lifeforms of the transnational family (a family would not necessarily need to live together, or live in the same state, in order to be understood as a family). However, the concept of 'dependency' proved to be crucial again and again, throughout the various definitions.

In other words, a family is characterized by internal dependencies. Not in the sense of mutual dependencies, but in the sense that some family-members are dependent on others and that it is the responsibility of the latter to support and take care of the former. The law can help the family members who are responsible for the other family

members with respect to this responsibility, both when these responsible family members are still alive (in the form of family benefits, f.inst.), and when they are dead (survivor's pensions, f.inst). Likewise, the law can help the family members who are responsible with respect to their possibilities for carrying out this responsibility at all, by making sure that the family can live together (by the means of family reunification laws, f.inst.). Finally, the law can establish legal foundations for all of these rights related to the family, in the form of marriage laws or laws of registered partnership.

As we saw, the family was being intimately connected to the concepts of 'privacy' and 'dignity'. We shall analyze those concepts in Part II.2. Here, it should merely be recalled that whenever we have encountered these concepts, their meaning has been highly unclear. Simultaneously, they have been applied in a manner which indicated that they meant something crucial. In short: it has been indicated that something not quite graspable, something not quite definable, yet extremely precious, was at stake. These two concepts were the closest we ever came to anything which appeared to indicate the existence of something sacred.

So, the family is presumed to be characterized by a basic logic of internal dependencies and responsibility. It is also being connected to something presumed to be precious, possibly even sacred, but highly ungraspable. According to its internal logic, it stands for itself, strangely unconnected to all the rest - the labour market, the systems, the employment relationship and the internal market. But according to its external logic, it is based extensively on all of those orders.

This makes the seventh ghost ask: If the family stands for a kind of sacred life which does not resemble the integrated life of the labour markets, the membership of the systems, the subordination characterizing the employment relationship or the logic of exchange, how may that sacred life be preserved - if the family is, simultaneously, dependent on all of those other orders?

The State as one: a logic of responsibility which is a logic of danger

Finally, the member states as such are being presupposed as anchors of order. It is the member states who are ultimately held accountable for implementing the EU-law within all the institutional orders of the state, no matter how the implementation is being carried out, whether through law, administrative procedures or agreements between the social partners.

In this sense, the state is both presumed to be one and many. It is one in the sense that it is the ultimate guarantor of implementation. It is many in the sense that it relates to different institutional orders corresponding to different logics. And the role it plays within these different orders is not the same. As we have seen already, the role of the state within the different institutional orders is woven together with the particular basic logics of those orders. It should be noted, though, that the state does play a substantial role within all of those orders, apart from the formal role of being ultimately responsible for those orders.

The basic logic presumed in connection with this formal role of ultimate responsibility for all of its institutional orders would obviously center around concepts such as 'sovereignty' and 'territorial units'. States are presumed to possess and exercise sovereignty within their territories. Both concepts should, however, be understood in a relativized manner, seen in the view of their classical definitions. Sovereignty would not mean 'ruling over without external interference'. The existence of EU-law in itself would contradict such a meaning of sovereignty. But, on a more subtle level, the presumption of the existence of a number of different institutional orders within which the state plays different roles would also cast doubts on such an understanding of sovereignty. 'Territorial unit' would need to be understood in a relativized manner as well. Transportation of national social rights across borders plays a huge role in the law we have dealt with. For this reason, it must be presumed that the states can be made accountable, also outside of their own territory.

Obviously, these are complicated matters. Presumptions concerning the meaning of 'national sovereignty' and 'the nation states as territorial units' do neither appear explicitly or implicitly in the law we have dealt with. Such presumptions would have to be derived on the basis of a comprehensive analysis of the constitutional order of the EU. This has not been the subject of this work. However, the law we have dealt with have certainly touched upon these matters. Expressions such as '*the responsibility of the member states*', '*left to the discretion of the member states*' and '*margin of appreciation*', as well as the principle of proportionality, point directly to the question of what constitutes the meaning of 'national sovereignty' and 'the nation states as territorial units'. The same can be said about the limitations of the material scope of EU-law, including the capabilities of the CJEU to transcend those limitations, under certain circumstances. Also considerations regarding definitions of legal concepts - whether

they should be seen as EU-concepts or as national concepts - regard, in a delicate manner, the meaning of national sovereignty.

Accordingly, from the perspective of the law we have dealt with, we may derive certain elements concerning the meaning of 'national sovereignty' and 'the nation states as territorial units'. As already indicated, from the perspective of the law we have dealt with, 'national sovereignty' hardly means anything but accountability or responsibility as far as concerns the institutional orders of the state (those within the territory, as well as those which transcend it). Accountability or responsibility in three ways, though: both with respect to the implementation of EU-law within these orders, with respect to the aspects of those orders which fall under the state's own discretion, and finally with respect to other orders which may not be covered by EU-law.

Qualifications of the responsibility logic: three constitutional principles

However, that responsibility which makes out the basic logic of the 'State *as one*' from the point of view of the law we have dealt with can be qualified according to three constitutional principles: 'rule of law', 'democracy' and 'human rights'. It is presupposed that the states are democracies governed by the rule of law, and that human rights 'result from their constitutional traditions'. That is not only laid down in the Treaty⁷⁶⁶ but also often repeated in the judgments.

The meaning of those three constitutional principles - 'rule of law', 'democracy' and 'human rights' - is far from obvious. 'Rule of law' means, as a minimum, that law rules in contrast to arbitrary forces. Generally, the principle is presumed to mean much more than that, but it is contested what that may be. But even in its minimal definition, it is hugely ambiguous. What does 'arbitrary' mean, in contrast to 'law'? The meaning of 'human rights' as they 'result from the constitutional traditions of the member states' is highly ambiguous as well since 'human rights' do not mean the same within those different traditions. Finally, 'democracy' would, today, generally refer to parliamentarism along with the two other principles, that is, human rights and rule of law. But more comprehensive ideals concerning the structures and forms of administration, the role of organizations as well as the nature of the public debate are often associated with 'democracy' as well.

Seen in connection with the role of the state as 'being responsible', we may say that the above mentioned principles have the formal meaning of making that responsibility

⁷⁶⁶ See in particular the preamble and art. 2, TEU

possible at all. They are conditions of possibility, directly as well as indirectly. Directly, in the sense that without the existence of some version of 'the rule of law' (including judicial institutions), some kind of respect for the idea of human rights, some variant of democracy which takes into account the features mentioned above, the EU-law could not be implemented in the member states at all. But also indirectly, these principles constitute conditions of possibility. They have the ideological meaning of endowing the member states with legitimacy. Through the principles of 'rule of law', 'democracy' and 'human rights' (whatever their exact meaning might be) the member states are regarded as legitimate political orders, possibly even as good and just political orders. And only legitimate orders can be 'responsible', both with respect to the implementation of EU-law and with respect to their 'ruling' in general, in the areas or aspects of national law which is not covered by EU-law.

Certainly, it would be possible to derive a number of more precise criteria. The Directives would, for instance, generally presuppose a distinction between political and administrative authorities, just as they would presuppose that organizations of various kinds are allowed to play a significant societal role. It is presumed as well that a free dissemination and exchange of knowledge takes place. Furthermore, the existence of particular judicial institutions and procedures is obviously presupposed. However crucial these criteria are (and we could have derived many more), they do not provide us with a fundamental conceptualization of the respective meanings of the three constitutional principles. They only provide us with certain aspects of those principles. It should be added to this that criteria in relation to the acceptance of new states as member-states of the EU have been developed over the last 2 decades. These criteria include characteristics of the meaning of the three constitutional principles. 'Democracy' requires, for instance, that all citizens of the country should be able to participate, on an equal basis, in the political decision making at every single governing level, as it implies a free press, free trade union organizations and freedom of personal opinion. The rule of law implies that government authority may only be exercised in accordance with documented laws adopted through an established procedure. Human rights are those rights which every person holds because of their quality as a human being.⁷⁶⁷ But again, these criteria hardly amount to a particular conceptualization of these principles. However important they may, they mainly confirm what is commonly

⁷⁶⁷ The Copenhagen criteria laid down in 1993, and clarified since through legislation and case-law (these criteria fall outside the scope of this dissertation, - but within the present context, it is meaningful to mention them)

recognized with respect to the meanings of these principles, while specifying certain particular aspects.

As far as concerns one of the principles, though, we have in fact been confronted with a fundamental conceptualization. The meaning of 'democracy' was developed extensively in the ECtHR-cases concerning the right to freedom of religion or belief. In those cases, the court establishes a universal understanding of democracy centering on the concept of 'pluralism'. It was clear that the equation of democracy with pluralism did not only constitute an ideal understanding of democracy. It also implied that all existing democratic states would be characterized by pluralism, although in different ways. On the basis of our analyses of the mentioned cases, we found that the crucial characteristic of democracy was presumed to be pluralism, and that pluralism in its turn was presupposed to constitute a fundamentally dangerous societal state of affairs. Also, it was presumed that vis-a-vis the dangers of pluralism the state would need to keep the pluralistic forces in check. In other words, the state - presumed to be a democratic state and thereby a pluralistic state - would need to turn against pluralism, that is, it would need to turn against itself. A contradiction which could only be avoided if it was assumed that it was society which was pluralistic, and not the state itself. But in that case, the state would be something different from, and above, democracy.

Another qualification of the responsibility logic: The state as a watchdog looking out for fraud, abuse and danger

We encountered the 'State *as one*' in another role as well: in the role of the sovereign power which decides who should enter its territory and reside there. As such, the 'state *as one*' constitutes the institutional order within which the mobility, residence and family reunification rights we have dealt with are supposed to be implemented.

Again, the principle of sovereignty must be understood in a relativized sense. It is exactly the purpose of the EU laws in question to establish that as far as certain people are concerned, most notably EU-citizens, it should not be the state itself, but the EU, which decides who may enter and reside in the state. Still, the states are presupposed to reign over their territory in many respects. And the EU laws are not supposed to break down the national sovereign order, it is still *within* that order that the EU mobility, residence and family reunification rights are being implemented, on the basis of national immigration authorities, police and border control.

So, how may we qualify the relativized meaning of sovereignty on the basis of those EU-laws? The crucial concept underlying the mobility, residence and family reunification rights is the concept of fraud. Entering and residence in the member states requires that the persons in question can document that they satisfy whatever criteria are laid down. Persons may be expelled if it turns out that the information they had given was false, or if they at some point do not any longer satisfy the criteria for residence. Not to mention that persons who have entered illegally may be expelled, unless there is some way in which they can change their situation into a legal situation. This is the basic logic which is presupposed. It is also presupposed that different kinds of criteria are laid down for different groups of people, - in other words, that some people are subjected to more severe suspicions than others.

The concept of danger also underlies the mobility, residence and family reunification rights. It is clearly presupposed (and often stated explicitly) that the states should not accept anyone within their territory who could represent a risk to the state as such.

Accordingly, 'sovereignty' acquires a double meaning. It does not only refer to the formal (relativized) possibility of deciding who should reside in the territory. It also implies that the state is a watchdog looking out for fraud, abuse and danger.

The responsibility logic as a logic of danger.

On the basis of these qualifications of the responsibility logic, we are confronted with a logic of danger. The watchdog logic revolves around the aspect of danger. But also the democracy-logic in the shape of 'pluralism' centers on danger.

Consequently, we were faced with the following basic logic of the '*State as one*'. The '*State as one*' is the common denominator of different institutional orders in the sense that it is ultimately responsible for them. Accordingly, the '*State as one*' is 'one' on the basis of being many. A logic of danger adheres to the '*State as one*'. This logic of danger does not only concern questions of immigration and external threats. It penetrates deeply one of the core constitutional principles of the state, that of 'democracy'. This means, however, that it also penetrates the other core principles of the state, 'human rights' and 'rule of law' (if the '*State as one*' is fundamentally characterized by all three constitutional principles, then they must necessarily complement each other; that is, the latter two principles must complement the principle of 'pluralism' and relate to the dangers in which it is entangled).

But how may we understand this logic of danger, more precisely, when taking into account that the state is the common denominator of different institutional orders? I

shall argue that three different scenarios of danger can be established. Naturally, the descriptions of these scenarios are inhibited by the fact that only the constitutional principle of 'democracy' is being conceptualized in the law we have dealt with.⁷⁶⁸

According to the *first scenario of danger*, 'democracy' in the shape of 'pluralism' would imply the existence of different, powerful institutional orders. The potential danger would exactly lie in the fact that the state is many and not one. It is clear that any institutional order (including those in which the state plays a visible and positive role) could become so strong that it would threaten the stability of the state - certainly not only churches or declared ideological entities. For the sake of its own pluralism, the state must keep its many different institutional orders in check

But a quite different logic of danger could be formulated as well. The *second scenario of danger* would take as its starting point that the many different faces of the state are not in themselves problematic. More precisely, it would not be seen as inherently problematic that the state is many and not just one. The potential danger, the risk of destabilization, would lie elsewhere, namely in the erratic nature of human beings. According to this scenario, what is feared is not so much that some of the institutional orders will become too strong. In contrast, what is feared is that they will not be strong enough. What would happen if people would suddenly no longer act in accordance with a particular rights-and-duties logic? What would happen if they would no longer accept that what is created through negotiations and adjustments is a 'natural balance'? What would happen if they stopped protecting their family, or would cease to understand the family as a sacral order and understand it instead as a political order? In other words, what is feared is the loss of regularity. Particular forms of regularity, in the first place. But ultimately, of course, the loss of regularity as such. One thing is the breakdown of particular institutional logics if others arise in their place. Another thing is, however, the perspective of unpredictability as such - shapeless, incalculable forces. This scenario is no less paradoxical than the first one. The existence of erratic forces within institutional orders does not only constitute a danger, such forces are also necessary. Without them, the institutional orders would not be able to unfold at all. Variations, flexibility, displacements, misunderstandings and even revolts are indispensable to the unfolding of any institutional logic. And without those forces, the institutional orders would not be able to change over time - with the result that they

⁷⁶⁸ As far as the constitutional principles of the member states, as presupposed by EU-law, are concerned. As we shall see in Part II.3, it is possible to conceptualize the meaning of 'rule of law' and 'human rights' within the context of EU-law.

would not be able to survive. Within the second scenario, pluralism must be kept in check by the state as many, not by the state as one. That is, it must be kept in check by the institutional logics. And crucially, pluralism does not correspond to definable differences, but to something which in principle is undefinable.

Finally, a third scenario can be established. According to the *third scenario of danger*, 'democracy' in the shape of pluralism would mean the existence of a multiplicity of different crosscutting perspectives, that is, different overall perspectives on the totality of institutional orders. This kind of pluralism obviously constitutes a direct threat against the 'State *as one*'. It means that individuals and/or communities create a variety of *integrating understandings* on the basis of which the different institutional orders can be said to belong to the same overall social order at all - or, reversely, a variety of *overall deconstructions* due to which all unity and coherence collapse. Clearly, a multiplicity of different overall integrations or deconstructions will threaten the role of the state as common denominator of the different orders and as ultimately responsible for these orders.

Whereas the two former scenarios confront each other as oppositions, it should be mentioned that the third scenario of danger is likely to imply either the first or the second scenario of danger: A particular overall understanding of all institutional orders and the relationship between them will either tend to strengthen or to undermine those orders.

The eight ghost is unsatisfied in a number of ways.

It circulates around the constitutional principles 'rule of law' and 'human rights' - and is unsatisfied with their general and vague conceptualizations and their unclarified roles with respect to the three scenarios of danger.

But first and foremost, the ghost simply asks: How is the presumed 'responsibility' of the state possible in the light of these dangers?

When returning to the six anchors of order we shall seek to answer the ghosts...

Above, I have presented the six anchors of order which I find to be presumed by the law we have dealt with, and I have drawn the contours of their basic logics. These are institutional orders which are presupposed by the law as existing prior to, or independently from, the law itself. As such, they stand in contrast to the ideal order which the law is meant to make possible or create. They are the orders *within which* the implementation of the rights and principles laid down by the law is meant to happen.

And they are the orders which are meant to be protected or supported by the law. Finally, they are the orders which make possible the implementation of the law at all.

As thoroughly discussed above, differentiations between the institutional orders which are presupposed, and the ideal order which is meant to be realized through the law, are not easily made. It cannot be disputed that the existence of certain institutional orders prior to the law itself, is presupposed. The difficult task consists in describing their basic logics independently from the ideal order which the law is meant to realize. The problem is that the law does not only presuppose those orders. It also qualifies them in more particular ways in connection with the application of the rights and principles it lays down. Hereby, they become part of the ideal order represented by those rights and principles. And it is not necessarily so that the basic presumptions concerning the institutional orders as they are presumed to be 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, and in ways which makes it almost impossible to distinguish clearly between the basic logics and the more particular qualifications.

Seen in this light, my presentation of the six anchors of orders above constitute a construction based on a distinction which cannot be drawn clearly on the basis of an analysis of the law itself. But establishing a distinction as such is not merely the result of a construction (although it is also that). The distinction as such springs from temporal-normative features characterizing any human-made law.

It has been my attempt to present only the most basic aspects of the logics of the anchors of order, and to avoid any descriptions of the rights and principles meant to be implemented within them and the particular qualifications which follow those rights and principles. However, sometimes a few indications as to the ideal order meant to be implemented has been unavoidable. This is no wonder. The two orders - the ideal order and the presupposed order - belong together; they make out a tensional and dynamical relationship continuously underpinning the law. And they are both idealizations.

Let me now specify the nature of this tension, just like I specified it in the last chapter, in connection with the presumption of a discriminating world.

In that case, a discriminating world was confronted with an aspiration to prevent - or combat - that discrimination. That tension was also a dynamical and continuous tension: it was not so that discrimination was expected to disappear as soon as the law came into force. That is, also in this case, a tension between a presupposed order and an ideal

order would continuously underpin the law. But the tension itself could be specified as a *contrast*.

In the case of the anchors of order, however, the tension must be specified in a different manner. The law is not meant to fight against those order. It is meant to be based upon them. But as stated, the law will need to qualify those orders in particular ways, while simultaneously being based upon them. Such qualifications can be of many different kinds. But there are some particular kinds of qualifications which are especially interesting for our purposes, namely the qualifications which concern the basic problematics or blind spots of the presumed anchors of order. In the descriptions above, such basic problematics and blind spots were formulated by the ghosts of those orders.

In other words, when returning to the six anchors of order from the point of view of the 'ideal order', in Part II.3, we shall be especially interested in qualifications which concern the problematics raised by the ghosts.

That is, in the case of the *national labour market*, we shall be especially interested in qualifications which concern the relationship between 'political creation' and 'natural balance'. What legitimizes the 'balance' as such? And what kinds of interventions in the national labour markets are regarded as necessary for the sake of the 'needs' of those labour markets, - so necessary that discrimination may be justified? Also, we shall be interested in qualifications which concern the relationship between life inside and outside of the labour market. Under what conditions can a person be said to be 'linked' to the labour market? What characterizes the life of a person considered to be linked to the labour market in contrast to the life of a person who is not?

In the case of the *national welfare systems*, we shall be especially interested in qualifications which concern the meaning of social assistance. How is social assistance defined in contrast to social security, and in particular, is another kind of 'belonging' involved than the belonging which means being part of the rights-and-duties-logic?

In the case of the *employment relationship*, we shall direct our attention to the connections between the employment relationship as such and the institutional orders to which it gives access, the welfare systems and the labour market. How may we see the connections between the crude logic of the employment relationship - 'an event instituting a relationship of subordination' - and the logics of integration implied in the other two orders? The concept of pay as interpreted by the court concerns exactly these connections.

In the case of the *internal market*, we shall be looking for logics which supplement the basic logic of exchange. Do these other logics (springing from different aspects of the concept of worker or from the 'fundamental status of EU-citizenship') conform to the logic of exchange, or do they constitute something entirely different? To what extent may we say, on the basis of such comparisons, that the logic of exchange constitutes the basic logic of the internal market at all?

In the case of the *family*, we shall ask, especially, what kind of life the family represents, in contrast to the life within the labour market, and in contrast to the right-and-duties logics of the employment relationship and the welfare systems. The concepts of dignity and privacy will be our doors into this ungraspable life sphere. But they must be connected with the feature of 'dependency', internal as well as external dependency.

Finally, in the case of the *state as one*, we shall seek to qualify the constitutional principles 'rule of law' and 'human rights' and compare these qualifications with the meaning of the principle of 'democracy' as derived from the ECHR-judgments. And on the basis hereof, we shall consider which one of the three scenarios of danger outlined above would most accurately capture the responsibility-logic of the 'State as one'? Is the 'State as one' essentially endangered by too powerful institutional orders? Is it endangered by erratic forces undermining those orders from within? Or is it endangered by a multiplicity of different integrating or deconstructing understandings?

PART II.2: THE INTERZONE

We shall now examine whether the existence of a common human foundation is being presumed by the law. Hereby I mean: Are there any characteristics which are presumed to be common to all human beings who are or could be subjected to the law - characteristics which would thereby make out a common foundation of the law?

In a way, it could be said that this examination belongs to the 'presumed order'. However, it will soon be clear that we stand confronted with a different normative-temporal logic than the one characterizing historical, human law. As will be explained below, this logic may be characterized as a universal logic. It implies a different relationship between a presumed and an ideal order than does human, historical law. More precisely, it implies that the presumed and the ideal order become one and the same - without collapsing, though. For this reason, the investigation of a common human foundation of law neither belongs to the 'presumed order' nor to the 'ideal order', but in-between the two, in an 'Interzone'.

Chapter 21

In the Interzone: A common human foundation

Are there any characteristics which are presumed to be common to all human beings who are or could be subjected to the law?

Such characteristics could be both optimistic and pessimistic; they could center on reason, love and compassion, or they could center on power, greed and anger. Likewise, they could be formulated (or presupposed) in a universal manner ('all human beings who ever have and ever will live are characterized by...'), in a more or less historical-contextualized manner ('all human beings living in a modern, western society', or simply 'all human beings living today'), or finally in a historical-generalizing manner ('human beings as we know them throughout the history of western civilization' or simply 'human beings as we know them through history').

In any case, it would have to be taken into account that the human beings who could be subjected to the law we have dealt with are of multiple kinds: children, adults, old people, Europeans and people coming from all over the world, healthy and sick, people 'belonging to the working population' as well as people who will never work, rich and

poor, legal and illegal, people of all kinds of beliefs, political opinions, ways of living their sexuality, etc. In fact, it would be hard to think of any one who could not some way or another be subjected to the law we have dealt with, as long as that person was living within the EU. That does not mean that the law does not privilege certain groups of people and neglect others with respect to crucial rights, - but those who are neglected are still *potentially* covered by at least some of the rights we have dealt with. In other words, the hierarchy implied in this regime of rights is one thing. A common human foundation is another. Such a foundation would need to underpin the entire hierarchy, even the darkest and most neglected parts of it.

The concept of dignity implies a universal logic

To the extent that such a common foundation is presumed by the law we have dealt with, it does not appear explicitly as such. Nowhere is the existence of such a common foundation directly stated or defined. The fact that certain 'rights of everyone' are formulated in the Charter of Fundamental Rights, and that also 'human rights' within the meaning of the European Convention of Human Rights form part of EU-law does not in itself imply such a common foundation. The name 'Human' or 'Everyone' could, in principle, be underpinned by a nominalistic, or at least pragmatic understanding ('human beings are those who we call human beings', or human beings or those who we, for various historical reasons, have come to accept as human beings').

However, the formulation and respect for human rights does of course make us think of such a foundation. Historically, human rights have been strongly associated with such a foundation, circulating around concepts such as 'reason', 'freedom', 'dignity' or simply 'human life'. In the law discussed in this work, the concept of 'dignity' does indeed play a part. Not only in the Charter of Fundamental Rights, it also appears in secondary legislation and case-law.

The concept of dignity is in fact introduced in a manner which implies that the existence of a common human foundation is presumed. It is crucial to note that the concept is introduced in a paradoxical manner.

'Human dignity is inviolable', says the Charter in its Article 1. This statement indicates that a common human foundation is presumed to exist. It makes us assume that all human beings are characterized by dignity. If only some, and not all human beings were dignified, then human dignity would not be inviolable, it would be violable. And if all human beings are dignified, then the concept of dignity is not primarily an ideal, it

describes human beings as they are, not how they ought to be. - However, when ever we encountered the concept of dignity in a contextualized manner, whether in the Charter, in secondary legislation or in the case-law, it became clear that human dignity can indeed be violated. In one case we even saw this stated explicitly, namely in the definition of 'harassment': *'Harassment shall be deemed to be discrimination [...] when an unwanted conduct [...] takes place with the purpose or effect of violating the dignity of a person [...]'.*

So, human dignity is both inviolable and violable. The paradox can be solved, though, if we interpret the meaning of the appearances of the concept of dignity in the following manner:

Human dignity, as a characteristic of human beings, may be violated. The idea of human dignity, however, cannot be violated. In other words, human dignity plays a double role: it is foundation, something presumed to exist in human beings; and it is ideal, something presumed to not exist in human beings (as inviolable, it does not exist in human beings).

This double role of human dignity opens for two scenarios. Either, human dignity exist in all human beings and can merely be superficially violated, but not essentially violated, and never lost. Then human dignity would need only 'protection', and the ideal would regard the protection of that which existed already. Or, human dignity can be violated so severely that it is essentially violated, and it may even be lost; possibly, there would even be human beings whose dignity is essentially violated from birth. Then the ideal would need to do much more than simply reflect that which existed already in order to protect it. It would need to establish a foundation which we cannot see. It would need to establish our hidden and lost foundation. It would need to claim that essentially we are something which is not realized in us.

We cannot say, on the basis of the law we have analyzed, which one of those scenarios would most adequately describe the meaning of the concept of 'dignity'. Rather, we will have to accept that it is an implication of the double role of the concept that its meaning will constantly oscillate between the two scenarios. Human dignity represents something which is presumed to exist in human beings, yet, it is not there in a clear and graspable way, its meaning continues to escape us.

By virtue of its double role, the concept of dignity as such is a manifestation of the basic tension which has been occupying us: the tension between what is presumed to exist and the ideal order meant to be realized by the law. But in the concept of dignity, the

two cannot be separated. They are one and the same - the ideal order and the world which already exists. But not in the sense of a collapse. Rather, in the sense that *the ideal order shall institute something which already exists*, something which was always essentially there.

Accordingly, we are faced with *another kind* of manifestation of the tension between what is presumed to exist and the ideal order meant to be realized by the law - different from the temporal-normative logic discussed in Part II.1. The latter temporal-normative logic says: From this particular moment in time, the law will come into force, and it will seek to realize an ideal order; however, since this realization will never be complete (because in that case, the law would no longer be necessary), the tension between the world as it is presumed to be was it not for the law and the ideal order of the law will continuously underpin the law. The logic of the dignity-concept, in contrast, says: From this particular moment in time, the law will seek to realize an ideal order which has always existed. The crucial difference is that the former logic concerns a human order - and human laws arise and come into force at particular moments in time. The latter logic concerns a universal foundation - and universal foundations have always existed. The concept of dignity, in its double role, implies a universal logic. As such, it neither belongs in the 'presumed' nor in the 'ideal order'. It is both at once; and in this sense, it constitutes an Interzone.

The concept of dignity as a 'value'. Values cannot be universal

Dignity is not only introduced by means of the inviolable-violable-paradox. It is also introduced as a 'universal value'. In the preamble of the Charter of Fundamental Rights, it is stated: *'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity'*.

This would seem to confirm the conclusion drawn above: that the concept of dignity implies a universal logic. However, I will argue that in the preamble, we are not dealing with a universal logic - in spite of the fact that the notion of 'universal values' appears in it. 'Universal' means 'at all times', 'at all places', not bound to any historical situation. Universality may spring from transcendent conditions (a transcendent metaphysical source, such as a transcendent God), or it may spring from immanent conditions (an immanent metaphysical source, such as 'Nature', 'Reason' or the force of 'History' itself). But in any case, it cannot be bound to a particular human situation. 'Universal' means that which has always been and always will be.

I will argue that the concept of 'value', in its contemporary applications, has a positivistic meaning. It means 'that which we believe in simply because we believe in it'. Values are immediately subjective. That is, they are not founded in a *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.

'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*'.

Now, the preamble does in fact tell us why we are supposed to believe in the values of '*human dignity, freedom, equality and solidarity*'. They are what we believe in if we are '*conscious of our spiritual and moral heritage*'. We believe in them due to our common history, and as such, they are not unchangeable either. They may be developed, we are told: '*The Union contributes to the preservation and to the development of these common values [...]*'.

This founding of the values of '*human dignity, freedom, equality and solidarity*' in a common history may free them from the nihilism of a coincidental subjectivity, - but it does not free them from their metaphysical unfoundedness. That is, if they were the result of a common historical self-reflexion, one could say that they were founded in the principle of historical self-reflexion, in the immanent metaphysical principle of a 'historical spirit', even an 'objective spirit'. As such, they could be said to be universal in a sophisticated manner. Although they would have been discovered at a particular moment in time, they would in a certain manner have existed always; they would have existed as seeds, waiting for the point of historical development at which they could grow and blossom. But this is not what the preamble tells us. It simply tells us that the diverse traditions of the different member states all have the values of '*human dignity, freedom, equality and solidarity*' in common, and that those values can and will be developed by the EU.

So, the concept of value in general implies nothing more than the positivistic 'that which we believe in', and the particular qualifications of the concept in the preamble of

the Charter - by means of references to a common history - only confirm that no universal logic is at stake. The values of *'human dignity, freedom, equality and solidarity'* belong to particular historical traditions, and they will be developed historically. They have not always been there. And they are not founded in a metaphysical principle, neither transcendent nor immanent. They are what we have come to believe in by virtue of our common history.

But the preamble claims that the Union is founded on 'universal values'? What does 'universal' mean, then? I will argue that within this context, 'universal' serves to boost the values of *'human dignity, freedom, equality and solidarity'* so that they may withstand the looming nihilism inherent in the concept of 'value'.

The concept of value is not only dangerously close to nihilism because of its purely normative and subjective nature. Also the economic connotations it carries drags it towards nihilism. 'Values' within an economic context is but another word for exchangeability as such. 'Value' is what we want, yes, it is what we seek and what makes markets alive at all, the running blood of economic life, so to speak. We may discuss what creates 'value', how it comes about, but the economic concept of value as such is no longer connected to any substantial ideas, such as 'work', 'usefulness' or some other understanding of 'materiality'. 'Value' is simply that which is being regarded and treated as 'value'. And something is regarded and treated as a value if it is regarded and treated as exchangeable.

As can be seen, the economic concept of 'value' goes a step further than the moral concept of value in that it relies on the idea of exchangeability. But the two concepts share the same positivistic logic: 'that which we believe in because we believe in it'. We may say that 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. The fact that the moral concept of value has a twin sibling, the economic concept of value, which resembles it immensely but which takes the positivistic logic a step further, towards exchangeability as such, does not make it any easier. The existence of the economic twin concept in itself is a derision against the moral concept of value.

Accordingly, the temptation to apply the concept of 'universal' in connection with moral values is understandable, even if no universal logic is implied. The historical logic which is implied does in fact guard against the worst dangers of nihilism. Being

part of a common heritage, the values in question can not be seen as merely exchangeable, and they may even be founded in deep-rooted political reflections. But they may also be founded in 'whatever historical circumstances', including habits of power, hidden hierarchies and ideological representations. In truth, they are likely to be founded in all of those factors and many more. The historically qualified logic of the concept of value simply says: 'that which we have come to believe in because of history'. It is no wonder that a boosting of such moral values by means of the concept of 'universal' appears in the midst of the historical logic.

The adjective 'indivisible' plays a similar role (*'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity'*). 'Indivisible values' means values which cannot be divided into different aspects, or relativized in the light of other values. A universal logic is hereby indicated. If a value *cannot* be divided, then we must assume that it is 'as it should be', it is complete, it 'could be no different'. But then it is difficult to see how the Union could '*contribute to the development of these common values*'. Something which is complete cannot be developed. Or formulated in terms of conceptual development (and law must deal with concepts in order to deal with values): A concept which cannot be divided cannot be developed.

In other words: neither the adjective 'universal', nor the adjective 'indivisible' is in line with the historical logic which permeates the preamble of the Charter of Fundamental Rights. Their role is to guard against the lurking dangers of nihilism inherent in the concept of value - dangers which the historical qualification of the concept can modify, but not eliminate.

We see that the concept of dignity is involved in two different logics. As a result of the inviolable-violable-paradox, it is involved in a universal logic: it represents an ideal which is meant to be instituted by the law, but which has always existed. As a result of the concept of 'value' and the historical qualification of it, it is involved in a historical logic. The historical logic is in a sense a third kind of temporal-normative logic. It says: from this particular moment in time, the law will come into force, and it will seek to realize an ideal order - an ideal order, however, which has already been an ideal order for a long time. This third logic is closely related to the logic which underpins human laws in general, though. Also this third logic is based on a tension between the world as it is presumed to be was it not for the law and the ideal order of the law. Only, the ideal order is extended backwards in time. In contrast, the universal logic is based on inseparability between the ideal order and the world as it is presumed to be. The ideal

order is presumed to exist already, and not only as an ideal order, but as part of human nature.

Due to the fact that 'values' represent pure normativity, and not nature, they are part of the ideal order meant to be instituted by the law. They do not belong in the interzone.

They have nothing to do with a human foundation presumed by the law.

In the rest of this chapter we shall pursue the universal logic in which the concept of dignity is involved due to the inviolable-violable-paradox.

We have good reasons for doing that. The inviolable-violable-paradox is not only something which can be derived from the Charter of Fundamental rights. The concept of dignity appears in connection with many different kinds of provisions within EU-law. Admittedly, it does not appear often. But when it appears, it centers on 'violation'. And it centers on something which is presumed to be hugely precious, yet simultaneously not quite definable, not quite graspable. This ungraspability is quintessential to the universal logic which we derived from the inviolable-violable-paradox: Human dignity represents something which is presumed to exist in human beings, yet, its meaning continues to escape us.

The concept of dignity revolves around 'independence'

What does 'dignity' mean?

In chapter 4, in connection with the analysis of the name 'Human', I sought to qualify the concept of dignity. That was not easy. The concept is not defined anywhere, neither in legislation nor in case-law. In all appearances, 'dignity' functions as a vastly indefinite term. In addition, the different applications of the term seem to point in different associational directions.

We found, on the one hand, that 'dignity' has to do with not being physically owned or controlled by other people, and not being cheated or humiliated. The possibility of realizing some sort of independence appeared to be crucial to 'dignity', physically and mentally.

On the other hand, we also saw that family life was being intimately connected to the concept of dignity. Seen in the light of the significance of 'independence', this is somewhat confusing. As we saw in the last chapter, 'dependencies' constitute the basic logic of the family as an institutional order. So, in connection with the family, would 'dignity' then be associated with 'dependence', rather than 'independence'?

Also, the concept of 'equality' plays an obscure part as well. We learned that equality concerns dignity in a non-economic sense, but that dignity as equality may very well be manifested in the form of a requirement of equal economic conditions, namely in the form of the principle of equal pay for men and women.

Likewise, the concept of 'freedom' or 'liberty' was being connected with 'dignity', both in connection with mobility and residence rights for EU citizens and their family members, and in connection with non-discrimination rights of transsexuals.

What is common to these diverse examples and tendencies? At a first glance only that dignity is something which can be violated. It is clear, though, that applications of the concept all somehow center on the relationship between dependence and independence, and that family-life and issues of sex are somehow especially important to dignity.

Let me, none the less, attempt to interpret the meaning of the concept of 'dignity' on the basis of the somewhat muddy landscape outlined above.

Dignity concerns a persons possibilities of realizing independence. Whenever other people cross particular borders, dignity is violated. Those borders are physical as well as mental. But they are also clearly sexual. A person should not be owned or controlled by other people, physically or mentally. But 'not crossing particular borders crucial to independence' also means respecting the sex of a person, both the chosen sex (in the case of transsexuals) and the given sex (in all other cases).

'Equality' and 'liberty' should be understood in the light thereof. 'Equality' does not mean 'social' or 'economic' equality in general. Different people have different rights, according to their different circumstances. This is a basic condition underpinning all parts of the law we have analyzed in this work. And the connection between 'dignity' and 'equality' established in a single instance (in an opinion, not a judgment) - concerning 'equal pay' between men and women - does in no way undermine that basic condition. That single instance only tells us that men and women should be seen as equals.

As far as the concepts of 'liberty' or 'freedom' are concerned, they function as enhancements of the meaning of dignity as independence. More precisely, they add a positive aspect to the concept of dignity. In connection with 'liberty' or 'freedom', dignity does not only mean 'not having one's borders crossed', but means 'being able to change one's situation'. But it should be noted that the connection between dignity and freedom does not apply to everyone. As far as the issue of transsexuality is

concerned, it does. Everyone should have their sex respected, also the chosen sex. But as far as mobility and residence rights are concerned, only some people may realize the connection between dignity and freedom. Only some people may change their situation in the sense that they may move and reside freely within the EU.

In other words: The concepts of 'equality', 'freedom' and 'liberty' do not make out the core of the concept of dignity. Only with respect to the relationship between women and men may we say that 'equality' belongs intrinsically to 'dignity'. That is, it is inherent in the concept of dignity that men and women are equals as regards social and economic conditions, but it is not inherent in the concept that human beings in general are equals as regards social and economic conditions. Likewise, only with respect to the issue of sex does 'dignity' imply freedom to change one's situation. Otherwise, freedom to change one's situation is not inherent in the concept of dignity.

Finally, the intimate connection between 'dignity' and the family constitutes a complication when seen in the light of what we learned in the previous chapter, that the family as an institutional order is characterized by asymmetrical relations of dependency. I believe we should approach the issue as follows. The fact that the family is characterized by dependencies makes it particularly vulnerable in so far as concerns dignity. The protection of dignity becomes particularly important. We have seen this in two ways. Firstly, when family relations break down because of death or divorce, the family members who have lost the person on whom they were dependent, shall retain certain rights '*exclusively on a personal basis*'. That is, '*with due regard for human dignity*', family members who used to be dependent shall now be helped to gain independence. Secondly, when family relations are upheld, the family as such should be protected and helped so that it may stay together, '*in compliance with the principle of dignity*'.⁷⁶⁹ Families are always, due to their basic logic of dependency, close to violations of dignity. For this reason, protecting and helping the family so that its basic logic of dependency may be manifested in ways in which dignity is not violated, becomes crucial - for dignity as well as for the family.

Accordingly: we are confronted with an intimate connection between 'dignity' and 'family' not because the family is particularly dignified, but because the family, due to its basic logic of dependency, is particularly close to possible violations of dignity. The inviolable-violable-paradox is manifested in the strongest possible way within the

⁷⁶⁹ Recital 15, Dir. 2004/38/EC and Case C-413/99, *Baumbast and R*, par. 59

family as an institutional order. Dignity is crucial to that order because violations of dignity are implied in its basic logic - as a danger which will always threaten it.

A constellation of concepts: 'dignity', 'private life', 'privacy', 'decency'

We have encountered three other concepts which appear to share some crucial features with the concept of dignity, as outlined above, namely the concepts of 'private life', 'privacy' and 'decency'.

We have seen that also these concepts concern something hugely precious to human beings, yet ungraspable. And that this ungraspable something can be violated. Furthermore, also these concepts are being intimately connected to family life and to issues of sex. The issue of 'independence' did not turn up, but through our analyses we found that the issue of 'being a self' was crucial to their meaning.

Accordingly, we have good reason to see all four concepts - 'dignity', 'private life', 'privacy' and 'decency' - as a constellation of concepts. They do not mean exactly the same, but from different angles, they touch upon the same not quite definable something - a something which is presumed to be common to all human beings, a something which forms a human foundation.

I shall now attempt to interpret the concepts of 'private life', 'privacy' and 'decency' on the basis of what we have been able to derive about their meaning in the course of our analyses in Part I. Afterwards, I shall seek to interpret all four concepts taken together - that is, the entire constellation.

'Private life' - deconstructing the concepts of 'autonomy' and 'integrity'

The concept of 'private life' appears in the Charter of Fundamental Rights, connected with 'family life'. Article 7 reads: *'Everyone has the rights to respect for his or her private and family life, home and communication'*. The wording is almost identical to article 8(1) of the European Convention of Human Rights.⁷⁷⁰

It was in connection with an interpretation of the latter article, by the ECtHR, that we were presented with some reflections concerning the concept of 'private life'. The court emphasized that the concept *'cannot be defined exhaustively'*. None the less, we found, on the basis of the considerations of the court, that 'private life' has to do with the core of a person's self- and other-relations. In principle, private life could occur anywhere

⁷⁷⁰ Art. 8(1) of the European Convention of Human Rights reads: *'Everyone has the right to respect for his private and family life, his home and his correspondence.'*

and any time. However, it is indicated that there are certain spheres of life which are more crucial to the core of a person's self- and other-relations, than others. The family obviously forms part of those spheres. But also the sexual life of a person belongs to them.

In the considerations of the ECtHR as to the 'broad and inexhaustible' meaning of the concept of 'private life', expressions such as '*autonomy as such*' and '*physical and moral integrity*' also appeared. What could they mean?

At a first glance, 'autonomy as such' would seem to be related to some of the aspects discussed above in connection with the concept of dignity, not being physically or mentally owned or controlled by other people, not having particular borders crossed, - that is, aspects which regard personal independence. However, for a closer look, it becomes clear that 'autonomy' is a stronger concept than 'independence'.

Naturally, none of these concepts can be understood without modification. No human being living a societal existence is independent or 'autonomous as such'. But it could be said that a human being could be independent with respect to certain aspects of his or her life. Or, perhaps, that certain kinds of independence could be possible *on the basis of* unescapable dependencies. In other words, that some way or another, certain zones of non-interference could be established. Those zones could then be understood as independent zones.

'Autonomy' implies more than that. No one subjected to the law could be 'autonomous as such', - but neither could he or she be 'autonomous to some degree', 'autonomous with respect to certain aspects of life' or 'autonomous on the basis heteronomy'. Modifications of that kind would not make sense. In contrast to the concept of 'independence', the concept of 'autonomy' necessarily concerns a 'self', understood as a unity. Autonomy means 'self-law' or 'giving oneself one's own laws'. There is no way in which the concept could be separated from the self as a unity. Accordingly, it could not simply be attributed to certain zones.

In fact, there is only one way in which someone subjected to the law could also be autonomous. This is the way we know from modern social contract theory: Fundamentally, we are autonomous, but we choose, freely, to subject ourselves to laws which are not our own. Since we choose freely to subject ourselves to those laws which are not our own, they become our own laws. They become our own making, in a certain sense. Any political theory based on the idea of 'the constituent power of the people', including democratic theory, could be associated with this understanding of

autonomy. But the problem is that this understanding cannot be presumed by the law itself. Only from an *external* point of view can it be argued that human beings subjected to a given law regime have chosen (or could, ideally, have chosen) to do so. From the perspective of a given law regime this cannot be presumed. From the perspective of a given law regime, human beings are subjected to that law, not to their own law.

It should be noted, though, that this understanding of autonomy may *form part of* the ideal order meant to be realized through a given law regime. It could be implied, for instance, that each person subjected to the law should be served by the law in a way which fully takes into account the loss of individual autonomy and seeks to *modify or compensate for that loss* - or seeks to give the individual something which is grander than individual autonomy. It could be implied in the ideal order of a given law regime that the law should be manifested in such a way so that each person subjected to it *could have chosen to be so*, had such a choice been available. But this 'taking into account the loss of autonomy originating from an external source' does still not mean presuming the presence or actuality of autonomy. From the perspective of the law itself, it can only be presumed that human beings are subjectable to laws other than their own, regardless of whether they might choose it or not. (In this connection, we must distinguish between 'obedience' and 'being subjected to the law'. The law certainly presupposes the possibility of disobedience; sanctions of all kinds are an intrinsic part of the law. But from the perspective of the law, someone who disobeys the law is still subjected to the law.)

We seem to have come to a dead end. It is very hard to see, what 'autonomy as such' could possibly mean from the point of view of a presumed human foundation.

How about the concept of 'physical and moral integrity', then? Also this concept could be associated with some of the aspects discussed above in connection with the concept of dignity, - aspects centering on independence. But just like the concept of 'autonomy', it is stronger than the concept of 'independence' in that it presupposes the self as a unity. The concept of 'integrity' implies the existence of something which integrates all the diverse aspects of a person, a self.

Seen from the perspective of the law, could a person be said to possess 'integrity'? Someone subjected to the law is drawn in multiple directions, due to the law as well as to the institutional orders presupposed by the law. All the analyses of this work testify to that. Someone subjected to the law exists as a right-holder under many different names, non-names or double-names and is involved in different institutional logics

which imply different kinds of self- and other-relations. What source of the individual person could possibly integrate all that, gather it together in 'one self'? Where would that integrating force come from? But even if it was presumed that such an integrating force existed, another question arises: Could the law possibly presume that the source by which all the diverse aspects of the law could be integrated would lie in the individual?

Let us consider for a moment what that would mean. It would mean that that integrating force could not be a societal force of some kind - whether situated in fundamental principles of the law itself, in the EU as a political unit, in the state *as one*, or in some sort of collective reflection cutting across law, political units and institutional orders. The two possibilities exclude one another. If the integrating force was presumed to be situated in the individual, then there would be no societal integration. If, on the other hand, the integrating force was presumed to be a societal force, then it could not be situated in the individual. And then the law could not presume that the subjects of the law were characterized by 'moral and physical integrity'.

Carefully considered, the law could not presume that the integrating force was situated in the individual and not in some sort of societal force. That would imply that the integration of the law would only exist as an uncountable number of different integrations, separate from one another. In that case, the law could not function as a law. It is the function of the law to bind people together in multiple ways. Every time a law is applied, common interpretations are required. If the integrating force was situated in the individual, then the different interpretations of different individuals could not interact with each other, and no common interpretations could be established.

Accordingly, both concepts - 'autonomy' and 'integrity' - lead us into dead ends.

From an external perspective, these concepts would not necessarily lead to absurdities. Other sources of law-giving and of integration could be imagined, sources springing from 'the self'. However, in order to be a source for self-law-giving and for integration, the self would need to be founded in a metaphysical principle. 'The self' could be a transcendental self, constituting the condition of possibility of experience, knowledge or moral existence, or 'the self' could be thought of as a relation between historical existence and divinity or eternity. Without such a principle, however, the concepts of 'autonomy' and 'integrity' will dissolve in absurdities. Rousseau demonstrated that

sharper and more radically than anyone else. True autonomy and integrity would require a completely non-social state of existence.⁷⁷¹ If this kind of autonomy and integrity was presumed, we could think of several simultaneous sources of law and integration. We could think of the individual as someone who chooses to subject him or herself to the societal law and who integrates the diverse aspects of the law, while simultaneously being bound together with others in the medium of the law.

In order to complete our reflection as to the concept of 'private life', we need to see the concepts of 'autonomy' and 'integrity' in the light of the other features of 'private life' outlined above - that is, the building of self- and other-relations, and especially the building of self- and other-relations within certain spheres of life, spheres connected to the family and to sexuality. For that purpose, we will need to draw on the double-perspective established above, the perspective of the law and a possible external perspective - while still forming our conclusions from the standpoint of the law.

What characterizes the family and sexual relations? As we saw in the previous chapter, 'the family' cannot be said to be less regulated by law than any other institutional order, yet, an atmosphere of a sacred kind of life is associated with it. Although its internal relations of asymmetrical dependencies are strongly supported and developed by the law, these relations are simultaneously understood as representing something which cannot and should not be determined by the law. The same can be said of sexual relations. There are certainly regulations, not only with respect to a person's rights to be free of intimate relations to the other sex (whether by word, eye, insinuations or physical approach), but also with respect to upholding sexual relations (in the family or registered partnership, as well as outside of those orders). Yet, it is presupposed that sexual relations concern something which escapes the law.

Family relations and sexual relations are in fact the kind of relations in which autonomy and integrity - if founded in an external principle - would have the very hardest conditions. It belongs to the spheres of intimate relations that one has to give up some of one's own law in order to open oneself to the other person's law, and to extend the reflexion by which one integrates the diverse aspects of oneself and the world in order to open oneself to the other person's ways of integrating.

⁷⁷¹ This follows both from Rousseau's description of the 'state of nature' and from his 'educational experiment', as described in 'Emile'. See my analysis of the absurdities of the concept of 'autonomy' within Rousseau's work in "Creation, Destruction and Continuity of Order", p. 141ff, in Holger Ross Lauritsen and Mikkel Thorup: *Rousseau and Revolution*

Of course, not all family relations and sexual relations are like that. Maybe this kind of opening to another person's law and integrations are more likely to be found in friendships. Reversely, it could also be said that all human relations are like that, because otherwise human interactions would not be possible at all. Again, we touch upon the relationship between law and societal integration on the one hand, and individual integrations on the other. The underlying question is: If individual autonomy and integrity exists, founded in an external principle, is it then something which exist as a parallel kind of law and integration separated from the societal law and integration, or would the two sources of law and integration interact in some way? If they interact, then all human relations are characterized by openings to another person's law and integrations. If they do not necessarily interact, then openings of that kind would either never take place, or they would only rarely take place, namely in special, intimate relations.

However that may be, family relations and sexual relations can certainly be said to be special relations. In any case, they are symbols of intimate relations in which one gives something up of one-self, independence, individual freedom, secrets of the mind or secrets of the body. As such symbols, they represent the opposite of individual 'autonomy' and 'integrity'.

So, when analyzing the meaning of the concept of 'private life' on the basis of the considerations of the ECtHR and of the general connections established between 'private life', 'family' and 'sexuality' throughout the law we have dealt with, we stand confronted with certain concepts - 'autonomy' and 'integrity' - the meaningfulness of which cannot be upheld when seen from the perspective of the law. Moreover, their meaningfulness can hardly be upheld when seen from a societal perspective at all. In order to be reconciled with a societal perspective, they would need to be founded in something external to society, in a metaphysical principle of some kind.

In other words, a presumption is upheld - a presumption regarding the existence of individual 'selves' as unities, 'selves' which are sources of self-law-giving and of integration - which is meaningless from the point of view of the law as well as any society. Should we see this as merely a metaphysical residual? A way of boosting the importance of the law, a way of contradicting any inherent relativism - just like the word 'universal' boosted the claimed values? I do not think so. This presumption regarding self-law-giving and self-integrating individuals does not boost the law; on the contrary, it undermines the law completely, if taken seriously.

If taken seriously. I believe we need to see the presumption regarding the existence of self-law-giving and self-integrating individuals as an absurd comedy. The meaning of the concepts of 'autonomy' and 'integrity' is to remind us of what the law will need to continuously reject in order to be law. The fact that those concepts are being connected to the most intimate human relations - or at least symbols of intimate human relations - serves the staging of the comedy. The meaning of the comedy is the complete undermining of the concepts of 'autonomy' and 'integrity'. We may in fact say that they are being undermined in a double sense. First, they are being undermined by the fact that they are mentioned at all within the context of the law - as if they stood for something which the law could protect. By being mentioned within the context of the law, their possible meaning outside of the law is being undermined. They exist within the context of the law; that is, they exist as meaningless skeletons, nothing else. Secondly, they are being undermined by the fact that they are connected to special relations which represent the opposite of individual 'selves'.

What is left then? What constitutes the 'human foundation' when seen through the concept of 'private life', if anything at all? The opposite of what is claimed. The 'human foundation' is not constituted by 'selves' but by deep connectedness and interwovenness.

'Private life', 'privacy' and 'decency'

- the protection of a striving self relying on being on sex in contrast to the other sex

The last two concepts of the constellation which makes out our door into a presumed 'human foundation' are the concepts of 'privacy' and 'decency'. We met those two concepts together, namely in connection with certain exceptions from the principle of equal treatment between men and women laid down in the Goods and Services Equality Directive.

According to our analyses, the two concepts were not only woven together with each other, but also with the concept of sex (in its widest meaning, implying 'being a sex', the relationship between 'the sexes' as well as 'sexuality' in terms of attractions and physical intimacy). Again, what was at stake was possible violations. *Something* which concerned sex, and which could be related to physical differences, but which could not be explained by physical differences as such, was seen as potentially dangerous to 'privacy' and 'decency'. In fact, simply by its presence, it could violate privacy and

decency. It could also lead to explicit forms of physical or psychological violence. But crucially, simply by its presence, it was presumed to be a kind of violence.

We found that what was at stake was the possibility of being a self. And we found that the possibility of being a self was presumed to rely on the possibility of being one sex *in contrast to the other sex*. In this connection, we were not confronted with presumptions regarding any particular differences between men and women; we were 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.

Also, it should be noted that 'the private home' played an important role in connection with the establishment of close connections between privacy, decency and sex - just like 'the private home' was presumed to be important to 'private life'.

In one of the earliest judgments concerning discrimination on grounds of sex, the Johnston-judgment, we found similar presumptions concerning the significance of the 'difference as such' between the sexes. Here, the concept of 'decency' was not mentioned, and instead of 'privacy', it was the concept of 'private life' in connection with intimate physical activities in the private home which was broad forward. Also, it was made clear that it may change over time what kind of activities and what kind of situations are potentially violable to 'private life'.

We have good reason to assume that 'privacy' and 'private life' are, in certain contexts, used interchangeably. That is, they are used interchangeably when 'the difference as such' between the sexes is at stake.

Once again we are confronted with presumptions concerning a 'self' which may be violated. But this time not in the form of an autonomous and integrating self, but a self which relies on being one sex - in contrast to the other sex.

This leads us to raise the question of the meaning of that difference - being one sex in contrast to the other. On the basis of our analyses in Part I.3, we may conclude that the relationship between the sexes depends on three cornerstones, all circulating on 'fundamental differences', but in different ways.

First, the only particular differences presupposed between the sexes were differences related to 'pregnancy' and 'maternity'. 'Pregnancy' and 'maternity' functioned as signifiers for circumstances which '*can affect only women*'. However, the exact interpretations of the differences related to 'pregnancy' and 'maternity' was presumed to be subjected to historical change. That is, the meaning of 'pregnancy' (when taking into account, for instance, a wide range of ways in which to become pregnant by the

help of medical science) and the meaning of maternity (taking into account, for instance, that the father could take over some of the functions traditionally ascribed to the mother, also in the very first part of the child's life) was assumed by the court to be historically flexible.

Secondly, it was presupposed that the difference between the sexes *as such* had a crucial and fundamental meaning. This is the kind of 'fundamental difference' referred to above, closely connected to 'privacy' and 'decency', 'private life' and the 'private home'. In itself this difference is unqualified and abstract. But it is clear that it will manifest itself in historically changeable ways. It will change over time when and how this abstract 'difference as such' is being experienced, - and in particular, when and how it is being experienced as a disturbing and problematic element.

Finally, in three judgments all concerning the question of whether the exclusion of women from violent occupational activities (in the army or in the police) could be justified, a somehow problematic relationship between women and violence was presupposed. Also this difference was abstract, unqualified. But it was not abstract and unqualified in a pure sense, like the 'difference as such' between the sexes. It was an obscure difference. It remained unclear whether the problematic relationship between women and violence was due to physical, psychological or cultural reasons. Or whether, for ideological civilizational reasons, women and violence should be kept apart. It was a difference which did not appear to be a historically changeable difference, but neither was it claimed to be a fundamental difference. It was a difference which seemed to be a tabooed difference, floating ambiguously between being presumed and not claimed.

So what does this mean? Is 'the self' given a foundation, after all? Only not in 'autonomy' and 'integrity', but in the sex?

We may say so, yes. But we should be aware that to the extent that 'the sex' provides us with a foundation of 'the self', it is an extremely abstract foundation. The only particular features of this foundation is constituted by the fact that women can be 'affected by' pregnancy and maternity and that men can not. And those particular features are not so particular after all; they are subjected to historical interpretation. Mainly, we are confronted with an abstract, unqualified difference between the sexes, 'the difference as such'. It is indicated, though, that this difference as such is not unrelated to the relationship between violence and non-violence. And it is clear that

this abstract difference is manifested stronger in connection with particular spaces (one's home) and in connection with physically intimate activities, than otherwise.

So, we are confronted with an abstract foundation which may be violated in connection with intimate physical activities, in particular if they take place in a person's home. The violating factor is the mere presence of the other sex. In other words, this does not concern the protection of particular intimate relations (like family and sexual relations), it concerns the protection of a person *from* relating to the other sex in particular situations. And not protecting a person from relating to the other sex in those particular situations implies a threat towards the 'self' of that person.

Now, let us consider a little more thoroughly the nature of this abstract foundation, this abstract 'self'. Obviously, this abstract foundation concerns basic civilizational distinctions - between mothers and fathers, violence and non-violence, intimate physical activities and other activities, and between the home and other spaces. An interpretation of the abstract self we are confronted with would require an interpretation of these basic civilizational distinctions.

First, motherhood versus fatherhood. The CJEU emphasizes that the maternity provisions of the non-discrimination directives with respect to sex concern '*a woman's biological condition during and after pregnancy*' and '*the special relationship between a woman and her child over the period which follows childbirth*'. These are, in other words, the circumstances which 'can affect only women'. Accordingly, these are the circumstances which distinguishes motherhood from fatherhood. Otherwise, motherhood and fatherhood are, from the point of view of the law, comparable. I suggest that the fundamental difference between motherhood and fatherhood which is at stake in the statement of the court is the following: For a certain period of time, two bodies are physically inseparable, mother and child (this is the case during pregnancy, and it is still, although in a relativized and diminishing sense, the case for a period thereafter); in contrast, the body of the father and the body of the child are always separate bodies. The difference between motherhood and fatherhood is thus the difference between being a body which is separate from other bodies, and being a body which, for a short period, is inseparable from a body of the generation to come. Accordingly, maternity and pregnancy concerns historical time in a particular sense: the symbiosis of the new and the old generation, followed by the break of the new generation from the old.

Secondly, violence versus non-violence. The kind of violence which is seen as problematic as far as women's participation in it is concerned, is clearly violence

against enemies of the state, whether external or internal, like the violence taking place in combat units of the army, or violence taking place in the police related to the Northern Irish conflict. What characterizes this kind of violence in contrast to other kinds of violence exercised by the state is of course that killing is an essential part of it, that is, the destruction of bodies.

Accordingly, also in connection with the distinction between violence and non-violence, we are confronted with a kind of dissolution of the separation of bodies, although in a different way. When destructing another body, a person dissolves the status of bodies which applied until then: different bodies relating to each other as separate bodies. In contrast, other kinds of violence (whether physical or psychological) exercised by modern states are exactly based on the separation and mutual recognition of bodies. On the basis hereof, different names (stemming from law or other institutional sources) may be attributed to different people which, in turn, may be held responsible in accordance with the names attributed to them.

On the basis of these reflections, it is reasonable to conclude that this time, we are not merely witnessing an absurd comedy which really is about the elimination of the self and the manifestation of the opposite of the 'self', namely deep connectedness and interwovenness. We are witnessing a striving self, a 'self' threatened by the dissolution of the difference between the sexes. More precisely, it is threatened by the dissolution of the distinction between separability of bodies versus inseparability of bodies, and between mutual recognition of bodies versus destruction of bodies. The loss of the former distinction would imply the loss of the difference between the present generation and the next, and thereby the loss of change and hope, whereas the loss of the latter distinction would imply the loss of the difference between destruction and construction of bodies, and thereby the loss of any kind of regulation connected to the establishment of a social order of living people, mutually interacting with each other.

The foundation of this striving self is 'privacy' (or 'private life') and 'decency'. This foundation represents the upholding of the 'difference as such' between the sexes. It is threatened by violation in particular situations, connected with nakedness and physically intimate activities, especially if they take place in a person's home.

Why nakedness and physically intimate activities, and why the home? Just like family and sexual relations can be seen as symbols of relations in which one gives up one's own law and one's own integrations, the naked body and the home can be seen as symbols of spaces in which all the names fall (the names carried by a person by virtue

of the law or other sources of names). In truth, the naked body and the home are regulated like all other spaces, but none the less, they are spaces permeated by an atmosphere of 'masks falling of', of 'being exposed beyond societal roles'.

So, we are confronted with a striving self. Interestingly, the troubles of this self are similar to the troubles of modern western societies. Also they must continuously strive for a clear distinction between destruction of bodies, on the one hand, and the forms of regulation which builds on the construction of bodies, on the other. And they must strive for a clear distinction between stasis (symbiotic relationships between different generations) and development towards new and better societal forms (each generation representing a break with the former). In other words, this is a striving self which constitutes the foundation of what we may broadly understand as societal regulation - a self which can be named and regulated, not once and for all, but continuously and dynamically.

Apart from the appearances of the concepts of privacy, private life and decency already mentioned, we have also encountered the concept of 'decency' in a context where it is not immediately connected to sex or to private life or privacy. In art. 34(3) of the Charter of Fundamental Rights, it is stated 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'*. Would 'decency' not mean something different within the context of this statement? I believe not. In fact, the conception offered above makes it possible for us to interpret the meaning of that statement. Without that conception, it would be difficult to reach an interpretation which was not at least partly tautological. If the statement was seen in isolation, we would simply have to conclude that 'decency' meant 'a basic level of resources', 'a material basis for human life' or something similar. But then the concept would not really add any meaning to the statement. It would simply confirm the significance of some material basis - and possibly, if seen as the instance of a universal logic, institute 'material basis' as a *human foundation* and an *ideal* at once.

The statement can certainly be interpreted like that. In fact, we need not at all argue against that interpretation. Within the context of the statement, 'decency' doubtlessly concerns the material conditions of human life. But the interpretation of the concept offered above makes it possible for us to add another dimension of meaning to the statement, and thereby to understand the significance of 'a material basis' in a different light.

In short: 'decency' means the ability to become, at all, a 'someone' who can be named and regulated, continuously and dynamically, - that is, the ability to become a civilizational self at all. Without basic means of subsistence, including 'a home', the foundation of the civilizational self may be threatened. At least that is what is presumed in the statement of the Charter, if read in conjunction with this civilizational interpretation of dignity. Naturally, the relationship between 'civilization' and 'material basis' could be seen otherwise. A homeless and starving person is still named and regulated in countless ways by law and other sources of naming. Such a person may indeed be seen as part of 'civilization' and accordingly not represent a threatened self in this respect. But if we take the statement of the Charter seriously, then it is presumed that 'decency' may be threatened by the lack of a material basis. In other words, according to our interpretation, that statement presumes that a homeless and starving person would be in risk of being a '*something*', lacking the ability to become a '*someone*' - a someone who can be named and regulated, continuously and dynamically.

Interpreting the conceptual constellation as a whole

As suggested above, the four concepts - 'dignity', 'private life', 'privacy' and 'decency' can be seen as a constellation of concepts. They all concern something presumed to be crucial and precious, yet not entirely graspable. And they concern something presumed to be related to fundamental issues of human life as such - but which may also be violated. In the case of 'dignity', the latter tension was expressed in the inviolable-violable-paradox. In the case of the other three concepts, it appeared through the presumption, on the one hand, of the violability of 'private life', 'privacy' and 'decency', and on the other, on the close connections established between those concepts and the fundamental conditions of self- and other-relations. Finally, all four concepts center around issues of family life and of sex.

On the basis of the analyses above, I shall attempt to bring the different aspects of the constellation together. We should, in fact, see the three analyses above as representing three different perspectives on the same problematic, rather than representing different concepts. As far as the concepts of 'decency', 'private life' and 'privacy' are concerned, they appear in the law as largely woven together or as overlapping concepts, - although they also displayed variations with respect to their contextual possibilities. In other words, those concepts are not clearly separable, but none the less, considering their different appearances, two different perspectives could be derived from them. In

contrast to those three concepts, the concept of 'dignity' appeared only alone, without the other three. Also, that concept appeared much more often than the other three. None the less, important factors binds that concept to the others. Apart from the similarities between the concepts summarized above, it is clear that the crucial feature of 'dignity', namely 'independence', must relate some way or another to the crucial problematic underlying the other three concepts, being 'a self' or not being 'a self'.

In order to bring the three different perspectives together we need to consider exactly this difference: that the concept of 'dignity' does not center around being 'a self' or not being 'a self', but on 'independence'. In fact, the concept of independence could have been seen as dependent on a 'self' - and accordingly deconstructed just like the concepts of 'autonomy' and 'integrity'. It could have been demonstrated that this concept could only lead to absurdities when reflected on the basis of societal existence. But as argued, it is possible to approach the concept of 'independence' without presuming a 'self'. Consequently, it is possible to relativize the concept and reserve it to certain spheres or aspects of life. In other words, it is possible to avoid a complete deconstruction and secure the meaningfulness of the concept.

On the basis of this interpretation of 'independence', how may we then understand the relationship between the three perspectives? I shall argue that they all concern fundamental conditions related to what we may call 'the becoming of the civilizational self' (which is subjectable to law), - and that they are complementary in this respect. In this sense, the concept of 'dignity' also relates to the question of being a self or not being a self; only, it relates to the civilizational self, not to a self which may serve as a foundation for the civilizational self. More precisely, I see the respective roles of the three complementary perspectives as follows.

The first perspective, springing from the concept of 'dignity', provides us with an almost entirely negative characteristic of 'a human foundation'. 'Independence' does not mean 'being independent as such'; it solely means 'not being completely dependent'. Human beings cannot be completely owned, completely controlled or determined, in every aspect of thought or behavior, by other people. If they could, they would be programmable slaves, machine-like creatures. Something remains which cannot be captured completely by regulation (whether that regulation comes from other citizens or from some political unity). This something which remains is however not a self. It is simply something which is not completely capturable by the definable aspects of the civilizational self. We do not need to see it as something which resists or

works against regulation. It may just as well serve regulation - in the sense that it provides for variations and reinterpretations of regulation.

As we saw, this something is not qualified in any further sense, neither by the concepts of freedom or equality. It remains negative. The only positive aspect concerns sex. 'Independence' simply means not being completely controllable or definable by other people or by political sources of regulation, - but it also means 'having one's sex respected' (the chosen as well as the given sex), that is, having it respected as different from, but equal to the other sex.

The second perspective, springing from the concept of 'private life' seen within the context of the establishment of self- and other-relations, especially family- and sexual relations, tells us that human beings are fundamentally deeply interwoven with one another. In other words, our connectedness and interwovenness is not only due to political or legal regulation, or to institutional orders which have otherwise arisen. We are fundamentally bound together, we are fundamentally giving ourselves to others. This, and not autonomous and integrating selves, constitutes the human foundation. And it is on the basis of this fundamental condition that the law and other sources of regulation create connectedness between civilizational selves.

Finally, the third perspective, springing from the concepts of 'privacy', 'private life' and 'decency' together with the establishment of a difference as such between the sexes, qualifies the human foundation in terms of a striving self relying on being one sex in contrast to the other sex. That is, in order to be a civilizational self, a more fundamental self is needed, something which breaks free of the amorphousness which would otherwise be the result of our complete interwovenness. This fundamental self is not an autonomous and integrating self, it is a self which is separable and recognizable as a body. As a separable and recognizable body, this self represents the dynamical temporality of modern western states, the break of a new generation with the old, as it represents a modern view on the nature of regulation according to which the distinction between destruction and construction of bodies is crucial. It relies on being one sex in contrast to the other in this very abstract sense. Being one sex in contrast to the other symbolizes the capability of separating bodies, and thereby separating generations, as it symbolizes the capability of recognizing and thereby constructing bodies, in contrast to destructing bodies.

On the basis of this human foundation - a self in the sense of a separable and recognizable body - the law and other sources of regulation may establish particular

characteristics of the civilizational self, by naming and regulating it, continuously and dynamically. In this connection, we found that the separable and recognizable body would be less suited as a foundation for the civilizational self if it was a starving and homeless body. Accordingly, the separable and recognizable body relies not only on being one sex in contrast to the other, it relies as well on some sort of material basis, including a home.

So, the three perspectives provide us with the following three characteristics of a human foundation: not being completely controllable or definable by any regulation (whether springing from political or legal sources or not); deep connectedness and interwovenness of human beings; and a striving self in terms of a separable and recognizable body. All three characteristics may be seen as conditions for the becoming of 'the civilizational self', subjectable to law. The two latter characteristics in a positive sense - the law builds on our fundamental connectedness as it establishes order, as it also builds on the possibility of distinguishing between bodies and on the possibility of recognizing the separate body as a self -, and the former characteristic in a negative sense.

This human foundation is both presumed as a foundation of law, as it is presumed to be something which is violable and accordingly needs protection and/or positive establishment by the law. Family, sex and sexuality, the home, the naked body and physically intimate activities all play important, but ambiguous roles in this connection. They are both symbols of that which needs special protection, as they are symbols of that which threatens the foundation. This ambiguity is due to the fact that they are symbols of our deep connectedness with each other, but hereby they also threaten the distinctions upon which the striving self relies and they constitute complexities for the realization of independence. Likewise, they are symbols of spaces or situations in which the 'masks fall off'. As such, they point simultaneously to the strengths and the weaknesses of the civilizational self: its dynamic and flexible nature, but also its fragility.

The difference between a presumed human foundation and presumed institutional orders

One might ask: Could a 'human foundation' not be derived in a different manner than by means of these obscure concepts, 'dignity', 'private life', 'privacy' and 'decency'?

For instance, would an 'active, mobile and flexible individual' not be presumed by the mobility, residence and transnational working access and social security rights? Or, would fundamental relations of power not be presumed by the working condition rights, regulating the relationship between employer and employee? Is it not presumed, more generally, that human beings are susceptible to economic incentives, whether out of greed or out of an urge to survive?

No doubt, such presumptions are in play. But I do not believe that we would be able to go beyond such very general and vague presumptions and conceptualize in a more precise way a human foundation, that is, a foundation which would characterize all human beings. On the contrary, I will argue that the law embraces a variety of possible human driving forces or characteristics. It takes into account a range of different situations, corresponding to very different expressions of human will - a will to money, to work, to change, to family life, to love, to a spiritual foundation, to equality as such - or a will to stability, not to work, not to be part of society, a will to discriminate, a will to cheat, a will to passivity, even a will to self-destruction. All these variations and many more are inherent in the legislation we have dealt with, and some of them are unfolded in the case-law. We have seen absolutely no sign of the CJEU attempting to reduce these variations inherent in the case-law to a basic understanding of human nature or the driving forces of human beings. In each case, the court takes as its starting point the interests of the parties, as presented to it in the form of claims and arguments (whatever those interests might be) in order to consider the legal possibilities and impossibilities which these interests gives rise to.

It is also important to note that if we had been able to detect certain reductions with respect to the variety of possible human driving forces presupposed by the law, we would have no reason to assume that those reductions provided us with a universal human foundation. Now, as stated in the beginning of this chapter, a human foundation could also have been thought of as a historical foundation, it would not need to be universal. We could imagine that the law would presume that 'all human beings living in Europe today are characterized by, or driven by, (x).' In that case, we would need to distinguish between the universal foundation derived from the concepts of 'dignity, 'private life', 'privacy' and 'decency', and the historical foundation derived from the ways in which human driving forces are presupposed and dealt with in legislation and case-law. However, as argued, I believe that the law embraces the multiplicity of possible human motives and actions, rather than reducing them.

What the law presupposes as its historical foundation is different institutional orders. In other words, the vague presumptions mentioned above, concerning power, money, security and forms of self-realization should be addressed within the contexts of those different orders. Within those orders, they are conceptualized, not in the form of a human foundation, as something which characterizes all human beings, but in the form of institutional logics. Also, the law presupposes a generally discriminating world; it does not presuppose that all human beings are discriminating. These presumptions are analyzed in Part II.1. They regard the presumed orders (and disorders) of the world, not a presumed human foundation. The difference is crucial. The only thing that the presumed orders of the world tells us about human beings is that human beings are capable of adapting to the logics of those orders, at least to some extent. It does not tell us what human beings are capable of, or what they are conditioned by, as such.

A spiritual foundation?

There is, however, one presumed driving force which we will need to dwell on, namely believing. Non-discrimination rights on the grounds of religion or belief, as well as the right to freedom of thought, conscience and religion guaranteed by the European Convention of Human Rights presupposes 'believing' as a crucial aspect of human life in general.

But it is stated nowhere that believing is something which characterizes all human beings. It is clear that believing may be based on a religious foundation and on a non-religious foundation. But throughout our analyses in chapter 14, we found that it was somehow indicated that a neutral position with respect to believing would be possible - whether as unfolded by the state in its role as an overall reconciler, or in the form of a special attitude required of citizens in certain places. By the end of the chapter, I concluded that the ECtHR had undermined, again and again, its own claimed ideal of a neutral state. The role granted to the state in the various judgments concerning religious freedom was far from neutral, just like the standards of the court was not. But I also concluded that this ideal of neutrality constitutes an intrinsic part of the conceptual foundation of the modern European state for which reason it cannot simply be rejected.

I will argue that any position from the basis of which one would evaluate the legitimate existence of particular beliefs would itself involve particular beliefs. More generally, the question could be raised whether societal life does not require believing of some kind -

if not in political or legal authorities, then in the idea of social order as such, or in particular institutional orders. But a human foundation of that kind does not appear to be presumed by the ECtHR - no matter how broad and open its understanding of 'religion or belief'. As we recall, beliefs in general were understood by the ECtHR as '*views that attain a certain level of cogency, seriousness, cohesion and importance.*' That would seem to exclude more ambiguous, possibly half-sub-conscious and not necessarily coherent kinds of believing, underpinning a person's existence in a given social order.

But it cannot be excluded either that believing in a broader sense would be presumed to be a general feature of human life - even if the Convention does only protect 'beliefs' in a more particular sense. It is at least indicated that there is something which would potentially apply to every one. '*Freedom of thought, conscience and religion [...] is also a precious asset for atheists, agnostics, sceptics and the unconcerned*', says the court. That seems to imply that 'thought and conscience' would potentially apply to everyone?

Of course, the connections between the different concepts at stake here are far from clear. Would, for instance, the position of 'the unconcerned' constitute a particular belief, or rather believing in a broader sense, - or would it represent neutrality, not believing at all? Would atheism, agnosticism and skepticism constitute particular beliefs, - and if they would, would they not need to rely on other kinds of beliefs - or believing - than religious believing? Finally, would 'thought and conscience' overlap with believing of some kind, or would those concepts possibly be meaningful on the basis of non-believing?

Those questions cannot be answered on the basis of our analyses. In fact, they are deeply connected with the inescapable conceptual dilemmas characterizing this field of law, as discussed by the end of chapter 14. Those dilemmas, I argued, were due to the distinction between the *belief as such* and the *manifestation of belief*, - that is, to the basic understanding of beliefs according to which they are essentially a matter of *inner* conscience. This amputation of the meaning of beliefs has deep roots in the conceptual history of the modern state and is intrinsically connected to the idea of the neutral state. It is clear that the ambiguities mentioned above - regarding the relationship between 'beliefs' and 'believing', and regarding the status at all of 'believing' - are deeply related to these conceptual problematics. 'Believing' is something which should be kept in place, be kept within certain borders. Presuming that we are all believers, that societal life relies on believing, would be the same as giving up, entirely, the idea of neutrality.

So, if we assume that believing - also in the broader sense - is not presupposed as something which applies to everyone, but that 'thought and conscience' is, at least potentially, what would that mean?

We would need to understand 'thought and conscience' in accordance with the overall conceptualization of the individual; that is 'thought and conscience' would be something characterizing the 'inner individual' in contrast to 'the manifested individual'. But in that case, 'thought and conscience' would be based on the same problematic foundation - bordering on absurdity - as 'belief'. In order to mean something serious, 'thought and conscience' would need to find articulation in a person's life, some way or another. Not to mention that in order to be protected by the Convention at all, 'thought and conscience' would need to be articulated somehow. Manifestation is, in other words, inevitable. As manifested one way or another in a person's life, 'thought and conscience' would necessarily interact with the societal order; they would interact with law and institutional orders. More precisely, it would be necessary for the person in question to understand the law and the institutional orders in the lights of his or her 'thought and conscience' - and vice versa.

In other words, individual integrations would be implied. 'Integrations' not in the sense of overall conceptual integrations, embracing the societal order as such, but particular integrations, possibly fragmented integrations, more or less conceptually developed, and more or less conscious. And not 'integrations' based on an integrated individual. But integrations based on the deep intertwinement between the 'thought and conscience' of an individual and social order. Due to such integrations, due to 'thought and conscience', the societal order would be a *lived* social order in a particular and qualified sense.

It is important to underline that 'thought and conscience' does not necessarily imply freedom. Just like 'religion and belief' can be seen as the expression of acts of freedom, but also as the expression of social coercive forces, 'thought and conscience' could imply both. Furthermore, 'thought and conscience' could be constructive as well as destructive for social order. Seen as individual integrations, they could be related to the kind of danger discussed in connection with the 'State *as one*' as an anchor of order, under the second scenario. According to that scenario, the potential risk of destabilization lies in the erratic nature of human beings. What is feared is not so much that some of the institutional orders will become too strong, but that they will not be strong enough, - faced with unpredictability as such, with shapeless, incalculable

forces. However, such forces are not only dangerous, they are also necessary. Without them, the institutional orders would not be able to unfold at all. Variations, flexibility, displacements, even misunderstandings and revolts are indispensable to the unfolding of any institutional logic.

Had we assumed that believing, and not just 'thought and conscience' was presupposed by the law as a general human foundation, then the same point could have been made, only in a stronger sense. 'Believing' would imply individual integrations in a stronger sense. Law and institutional orders would not merely be seen *in the light of* a person's 'thought and conscience', and vice versa; law and order would be *believed in* or *not believed in* or possibly *believed in in a certain sense*.

If we take a further step and consider beliefs in the strongest sense of the word, then the individual integrations at stake would no longer merely be particular integrations. A religion or belief in the strong sense means a comprehensive understanding of the world. As manifested some way or another in the life of a person, that understanding would need to encompass an overall understanding of the social order as well. Even if the believing person would find that the social order had nothing to do with the belief in question, then that would also be an overall understanding of the social order, an understanding according to which the social order was without truth, existed in the shadow of another world or something similar. In other words, overall conceptual integrations, disintegrations or deconstructions of the social order lived by the believing person would be at stake. Accordingly, beliefs in the strongest sense of the word could be related to the third scenario of danger, discussed in connection with the 'State as one', in the previous chapter.

It is important to note that such overall individual conceptual integrations would still not presuppose an autonomous or self-integrated individual. Our discussion is still based on the perspective of the law. We are considering the possibilities of the civilized self - possibilities of reflecting and interpreting (alone and together with others) the social order by which the civilized self is constituted, named and regulated. But to the extent that such reflecting and interpretative possibilities are generally presumed, then they would also form part of a human foundation - either understood as freedom, or merely understood as erratic human forces by which law and institutional orders are both potentially threatened and infused with life.

To sum up:

In the judgments of the ECHR concerning freedom of thought, conscience and religion, it is indicated that some sort of reflexive and interpretative capability characterizes human beings in general. But it is unclear whether believing - in a broad or in a more particular sense - should be seen as an intrinsic part of this capability. We concluded that due to the dominating idea of the neutral state, we cannot assume that it is.

In any case, also in a more modest version, as 'thought and conscience', this reflexive and interpretative capability is a potentially powerful force. It is indispensable to law and institutional order, but it may undermine them as well. That is, if 'thought and conscience' was taken to mean something serious, something which truly pervaded the life of a person.

But 'thought and conscience' is not taken to mean something serious, no more than 'religion and belief'. The overall construction according to which we should distinguish between 'the inner individual' and the manifestations of the individual serves to amputate any powerful potentials. Beliefs, thought and conscience are held back, or held in place, in the 'inner individual'.

Had that not been the case, and had the status of believing not been so ambiguous, then 'thought', 'conscience' and 'believing' could have served to qualify the human foundation which we derived from the concepts of 'dignity', 'private life', 'privacy' and 'decency'. We could have seen our social connectedness and interwovenness as fundamentally characterized by reflexivity and passion. We could have seen the striving self as fundamentally involved in interpretative endeavors. And finally, 'independence' could have gained a positive characteristic: we are not only not fully controllable or definable, we are also, as such, directed towards the establishment of societal integrations, small or big, constructive or destructive or both.

In stead, we are left with only indications of such potentials.

Concluding remarks - in the light of William Burroughs' concept 'Interzone'

On the basis of an analysis of a constellation of concepts - 'dignity', 'private life', 'privacy' and 'decency' - we were able to establish that a common human foundation is indeed presumed by the law we have dealt with.

This human foundation can be characterized according to three complementary perspectives. The first perspective, springing from the concept of 'dignity', provides us with an almost entirely negative characteristic of 'a human foundation'. It centers on the concept of 'independence'. 'Independence' only means 'not being completely

dependent'. Something remains which cannot be captured completely by regulation. This something which remains is however not a self. The second perspective, springing from the concept of 'private life', tells us that human beings are fundamentally and deeply interwoven with one another - prior to the interwovenness created by political and legal regulation. This, and not autonomous and integrating selves, constitutes the human foundation. The third perspective, springing from the concepts of 'privacy', 'private life' and 'decency', seen in the light of presumptions as to the existence of fundamental differences between the sexes implied in the law, qualifies the human foundation in terms of a striving self relying on being one sex in contrast to the other sex. That is, in order to be a civilizational self, a more fundamental self is needed, something which breaks free of the amorphousness which would otherwise be the result of our complete interwovenness. This fundamental self is not an autonomous and integrating self, it is a self which is separable and recognizable as a body.

All three perspectives provide us with characterizations which must be seen as conditions for the becoming of 'the civilizational self' - a self which can be named and regulated. This human foundation is both presumed as a foundation of law, as it is presumed to be something which is violable and accordingly needs protection and/or positive establishment by the law. Family, sex and sexuality, the home, the naked body and physically intimate activities all play important, but ambiguous roles in this connection. They are both symbols of that which needs special protection, as they are symbols of that which threatens the foundation.

We were able to qualify the common human foundation according to yet another perspective, derived from ECtHR-judgments concerning religious freedom. The common human foundation can be qualified as a spiritual foundation, but in a poor sense.

Human beings are assumed to possess some sort of reflexive and interpretative capabilities. These capabilities can be connected to what I have called 'individual integrations', that is, crosscutting and overall perspectives in relation to the social order in which a person lives. We distinguished between different kinds of individual integrations. 'Thought and conscience' would constitute the most general level, corresponding to particular and possibly fragmented integrations, more or less conceptually developed, and more or less conscious. 'Believing' in the broad sense of the word would make out the next level. Finally, 'particular beliefs' would constitute

the highest level of individual integrations; comprehensive understandings of the world would be at stake.

The law we have dealt with only implies that human beings in general possess reflexive and interpretative capabilities in the most modest sense - as 'thought and conscience'. 'Believing' is not presumed to characterize human beings in general. In addition to that, 'thought and conscience' (just like 'believing') is ascribed to a presumed 'inner individual' rather being seen as the manifested capabilities of a social individual. This means that any powerful potentials are amputated. Had that not been so, the common human foundation could have been qualified as a striving self which is fundamentally involved in interpretative endeavors, passionately and reflectively, constructively or destructively, or both. In stead, we are left with only indications of such potentials.

The common human foundation is inscribed in a universal logic in the sense that it represents an order which is meant to be instituted by the law, but which has always existed, also before and independently from the law. This universal logic can be captured by what I have called the inviolable-violable-paradox: the human foundation is inviolable in the sense that it has always existed and always will exist; yet, it may be violated for which reason it needs protection by human law. The universal logic constitutes *another kind* of manifestation of the tension between the presumed and the ideal order than the logic which adheres to human legal orders; it is based on an inseparability between the ideal order and the world as it is presumed to be - though without implying their collapse into each other. In this sense, the presumption of a common human foundation, as implied in the law, constitutes an 'Interzone' between the 'presumed order' and the 'ideal order'; it neither belongs to one or the other, but to both.

But I have also chosen the word 'Interzone' for another reason. In the writings of William S. Burroughs, 'Interzone' refers to a mental state just as it refers to physical places. With respect to physical places it refers first and foremost to the Tangier International Zone which existed from 1923-1956. But also New York City and Mexico City are cities which exhibit Interzone-features, as Burroughs sees it, even if they are not international zones. Crucially, the 'Interzone' is a place which all people can enter, no matter their nationality, their history (including the crimes they have committed) or their possible non-identity (in a legal as well as social and psychological sense). In fact,

the 'Interzone' is in particular a place for people without context. As such, the 'Interzone' is a mental state more than anything else.

The 'Interzone' is on the one hand characterized by complete stasis: nothing happens and nothing will happen, no meaning beyond survival and immediate pleasure will ever arise. No meaningful relations between people are possible beyond mutual abuse. No communication beyond physical intimacy exists. On the other hand, the 'Interzone' is haunted by continuous transformations: bodies disintegrate, bodies melt together so that they become inseparable, bodies are violated; human bodies, sexual organs, animals, money and drugs are part of a constant flow of exchange; human language either crumbles or explodes in cascades of disjointed sentences; logics are dreamlike and associative - to the extent that they exist at all.

The human being in the Interzone is a ghost, disconnected from time and space. Past and future are contained in the present moment. And as such, the present is endless: *'I am now, therefore I always was and always will be'*.⁷⁷²

Certainly, it is a provocation: to use Burroughs' 'Interzone' - a place and state of addiction and abuse - as a symbol of the common human foundation implied in the law we have dealt with. But the symbol is honestly meant.

The common human foundation we have derived from the law appears to us as nothing but a *condition of civilization*. That is, it reveals to us what must be assumed about a human being so that he or she may be named and regulated. This common human foundation can be described as a state in which bodies and sexes are hardly distinguishable. An actual 'self' does not exist, neither in a physical nor spiritual sense; only a 'striving self' exists, marking a movement towards a condition of separable and recognizable bodies while being simultaneously interwoven with other 'striving selves' and being the expression of a kind of ungraspable, irreducible life. This 'striving self' is characterized by spiritual capacities, but they are reduced to a minimum, they stiffens and crumbles in the 'inner individual'. - I find that Burroughs' 'Interzone' does indeed constitute an accurate and powerful symbol in this connection: In the 'Interzone', human interactions are devoid of meaning, they are pure exchanges; but a dream logic creates a space which both resembles and does not resemble the civilized world.

In other words: The common human foundation does not represent an 'autonomous' or 'free self', and far less a moral self capable of meeting and considering other selves. We

⁷⁷² "Lee's Journals", p. 68, in William S. Burroughs: *Interzone*. The description above is largely based on "The International Zone" and "Lee's Journals" (both in *Interzone*), but it is also inspired by other works of Burroughs, such as *Junky*, *Queer* and *Naked Lunch* (the original title of *Naked Lunch* was 'Interzone')

are not even facing human forces of some kind that wants something, seeks for something. Except for civilization as such. The common human foundation constitutes nothing but a foundation of naming and regulation - although as such, it transcends civilization.

In spite of its complexity and conceptual richness, this human foundation is a poor foundation. In a sense, it represents a much more pessimistic anthropology than the 'natural state' envisioned by Hobbes - or any metaphysical presumption of a 'will to power'. But apart from being poor, it is also clear that we cannot derive any purposes from this foundation. So, even if it is inscribed in a universal logic which means that it represents something which is presumed to be hugely precious and which needs protection and *in this sense* constitutes a purpose of human law (more precisely, a purpose of fundamental or human rights), it does not give rise to any purposes of the ideal order as such. It constitutes nothing but a condition of possibility for the ideal order.

PART II.3: THE IDEAL ORDER

‘The ideal order’ is the social order meant to be realized by the law. As such, it stands in a tensional relationship to the presumed order - the order presumed by the law to exist prior to and independently from that law. The relationship between the two is both negative and positive: the ideal order breaks with the presumed order, intervenes in it with the purpose of changing it. But it also builds on it. As extensively argued in Part II.1, both forms of the relationship, the negative and the positive, give rise to complicated dynamics.

Moreover, as also unfolded in Part II.1 and in chapter 2-3, both the ideal and the presumed order depend on idealizations. The construction of both has a double-nature: it is based on the rationality forms implied in the regime of EU social rights in the sense that it pursues the conceptual forces of the material itself; but it also spring from creations which break with the very horizons they depend on. Only the tensional relationship in itself - the temporal-normative logic underpinning any human historical law - is indisputable.

Part II.3 is structured according to the three remaining political-philosophical categories (the category ‘human foundation’ provided the basis of the examination carried out in the previous chapter).

First, we shall construct the ‘social structure’ of the ideal order. This construction 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. But in order to construct a ‘social structure’, we will first need to construct three hierarchies: the hierarchy of names, the hierarchy of non-names and the hierarchy of signifiers in-between names and non-names. Due to the different nature of the signifiers in question, they cannot be compared right away within the same hierarchy. But on the basis of the three different hierarchies, it will be possible to construct a ‘social structure’ by extracting the hierarchical as well as the non-hierarchical features from all of them.

Secondly, a construction of the ‘social means’ of the ideal order will be carried out on the basis of the various logics of rights derived throughout Part I. 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?

Finally, the purposes of the ideal order will be sought and discussed. The construction of ‘purposes’ will be based on analyses of the interpretational horizons within which the judgments of the CJEU (and ECtHR) have been carried out. To some extent, the interpretational horizons in play in the judgments have already been analyzed in Part I (especially, that was the case in Part I.2, concerning non-names). To some extent, however, I have merely indicated the presence of such horizons.⁷⁷³ Now, we shall consider a range of horizons - both those which have already been brought forward and those which have only been indicated. Crucially, the relationship between them will be analyzed. 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?

After these constructions, an extensive analysis of the qualified logics of the six anchors of order follows. When returning to these anchors of order, we shall seek to answer the ghosts. We shall consider whether the qualifications of the basic logics are capable of satisfying the ghosts. Are the qualified logics free of the deep problematics adhering to the basic logics?

Chapter 22

The hierarchy of names

From the analyses of Part I.1, it has become clear that the different names implied in non-discrimination law in relation to the discrimination ground ‘nationality’ - ‘Human’, ‘EU-Citizen’, ‘Third Country National’, ‘Worker’ and ‘Family-member’ - are extremely different with respect to the rights attributed to them. In other words, a

⁷⁷³ As explained in chapter 3: Throughout Part I, interpretational horizons have only been explicitly thematized and analyzed whenever we encountered a judgment the argumentation of which could not be understood on the basis of definitions, implications logics and declared purposes - or other argumentative elements. Certainly, such elements will never suffice in themselves; interpretational horizons will always be in play. 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.

hierarchy can already be discerned. But it is not only so that the different names constitute a hierarchy when considered together. In fact, apart from the name 'Human', each name implies a hierarchy in itself. The hierarchy implied in each name is due to the sub-names which are special for it (like 'Long Term Resident' is a sub-name which is special to the name 'Third Country National'), but it is also due to sub-names which arise because of combinations between names (an 'EU-citizen Worker' is both a sub-name of the name 'EU-citizen' and a sub-name of 'Worker').

The establishment of an overall hierarchy must take into account these complexities: a name may imply an 'internal' hierarchy which covers so great differences between sub-names that the place of the name in an overall hierarchy becomes highly unclear. Likewise, the possible combinations of names (including, of course, combinations of sub-names of names) are practically limitless.

In fact, due to these complexities, it would be very difficult, if not impossible, to establish a complete hierarchy which took into account all possible sub-names. That would amount to the task of taking into account all social situations which could be named at all by the law we have dealt with. I shall not even attempt to do that. What I shall do instead is to point to the overall features and dynamics of such a hierarchy. For our purposes, this will not only be sufficient, it will also be more suitable. It is exactly the dynamics of the hierarchy which are interesting: the dynamics within names and between names, and the ambiguous border areas which are the consequences thereof.

The strongest names: 'EU-Citizen', 'Worker' and 'Family Member'

It is clear that the three strongest names are 'EU-citizen', 'Worker' and 'Family-member'. But it is especially when they are combined that they are powerful.

An EU-citizen who is not either a 'Worker' or a 'Family-member' can certainly claim important rights, namely mobility, residence, work access, family reunification, social security and even, under special circumstances, social assistance rights. But we shall not forget that in order to really benefit from social security and social assistance rights (at least over time), a person must be able to claim one of the many possible sub-names of 'Worker' - if not the name 'Worker' in the sense of someone who is presently working, then a job-seeker, a pensioner, or simply someone who is insured with respect to one of the risks covered by the Social Security Coordination Regulation.

Likewise, a 'Worker' who is not an EU-Citizen is but an amputated version of an EU-citizen Worker'. Only on the condition that some kind of a more particular legal door

has been found, a 'Third Country National Worker' will be able to benefit from social security equal treatment rights, like EU-citizen Workers. And all the other rights which apply to an 'EU-citizen Worker' will either not be granted at all, or they will be limited. Being a 'Family-member' in itself sparks no EU-rights. But being a 'Family-member' in relation to someone who is eligible for EU-rights will give rise to derivative rights for the 'Family-member'. The rights of 'Family-members' depend on who the sponsor is. And if the sponsor is an 'EU-citizen' or a 'Worker' or preferably both, then the name 'Family-member' is a powerful name.

What characterizes these three strong names is that they are not marked by clear logics of demarcation, but that we may rather understand them as constituted by a core (or two cores, in the case of 'Worker') surrounded by vast grey areas. In the case of the name 'Worker', this is very obvious. This name is so differentiated and wide-reaching that it can even, with respect to certain parts of the law, be claimed by persons who never has worked and never will work. There are huge differences between the different sub-names of 'Worker'. But simultaneously, it is also a very dynamical name in terms of the nature of its internal hierarchy. Many of the sub-names which do not belong to the cores of the field, also sub-names belonging to the border areas, are directed towards the cores, so to speak. Someone who is temporarily not working, f.instance, due to illness or unemployment, is expected to move towards the core within a period of time. Someone who has no working history is expected to gradually build one, so that he or she may be able to do the same. The rights attributed to those in the middle- and border-areas are largely constructed so that they will facilitate such dynamics. Reversely, it is not expected to move from the cores to the border areas, - only to move from the core to areas close to the cores (as a retired person). This does not mean, though, that dynamics away from the cores are not possible; nothing in the cores guarantees that that could not happen.

Of course, the name 'EU-citizen' is different. This is a name that a person can either claim or not claim, based on one clear criterium: being a 'national citizen' of one of the member states, or not. Yet, if we consider this name together with its counter-name, 'Third Country National', we may see this name as constituting a core surrounded by vast greyish areas as well. The greyish areas would then be constituted by the more privileged sub-names of 'Third Country National', - sub-names which can be seen as weak imitations of the name 'EU-citizen'. And the borders of the field would be constituted by those sub-names of 'Third Country Nationals' which are not privileged,

but to which EU-rights of some kind are still attributed. In this field, there will only be dynamics from the border areas to the middle-areas (over time, it will be possible for some of the less privileged 'Third Country Nationals' to satisfy the conditions which are necessary for claiming some of the privileged sub-names), as there might be dynamics from the middle-areas to the border areas (the privileged sub-names may be lost). But it will not be possible to make the full movement from the border areas (or the middle-areas) to the core, and become an EU-citizen. Not on the basis of EU-law, that is. The member states decide, sovereignly, who should be granted national citizenship. Likewise, they decide who should lose their national citizenship.

Finally, the name 'Family-member' may be said to be constituted by a core with greyish areas around it as well. But differences between the sub-names of 'Family-member' depend, as mentioned, largely on the sponsor, rather than the family-member. This means that possible dynamics between the core and the greyish areas are dependent on possible movements of the sponsor. More precisely, the sponsor will need to move within the field of the name 'Worker' and/or within the field of the name 'EU-citizen' as extended towards the field of 'Third Country National'. Only when family ties are broken and the 'Family-member' will need to acquire independent rights will it matter who the family member is. In this case, it is the former Family-member who will need to move within the fields of 'Workers' and 'EU-citizens' as extended towards Third Country Nationals.

Common to the three strongest names 'EU-citizen', 'Worker' and 'Family-member' is that they are *possibility names*. They open possibilities to those who can claim the names. They imply, of course, duties as well, in exchange for these possibilities. This is true for what I have called the cores of the names, as well as for the greyish areas surrounding them. The closer we come to the border areas, however, the more reduced the possibilities, and the harder the requirements, that is, the duties.

The different possibilities opened by the strongest names mainly center around one main possibility: that of *replanting one-self in another state*. It is a replanting which entails numerous and significant aspects of life in that state - work life, 'links' to the labour market, including societal integration, as well as membership of all the national welfare systems.

The weakest names: 'Third Country National' and 'Human'

The weakest names are possibility names as well, though. But their flaws are greater.

First, the name 'Third Country National' does not in itself open any possibilities for those who can claim it. Only the privileged sub-names of it will open possibilities. Those privileged sub-names could be seen as belonging to a greyish field surrounding the name 'EU-citizen', as unfolded above. But they could of course also be seen as constituting a few oases in a desert - the name 'Third Country National' being that desert. It is important to note that dynamics between the oases and the surrounding desert are possible. In principle, any legal 'Third Country National' could, over time, meet the necessary conditions (length of residence, economical resources, educational competences or work experience - or some other conditions, due to bilateral arrangements) so as to be able to claim one of the privileged sub-names. Illegal 'Third Country Nationals' would first need to become legal before they could begin their journey towards one of the privileged sub-names, towards one of the oases.

Accordingly, the name 'Third Country National' can be seen as a possibility name as well, but in an indirect and flawed sense. In truth, not every legal 'Third Country National' will be able to meet the necessary conditions, and not every illegal 'Third Country National' will be able to become legal.

The structure of the name 'Human' is different. In many ways, this name is an exception. It is the name which everyone can claim. As such, it does not correspond to a particular social situation, like all other names we are dealing with; it corresponds to all possible social situations. On the other hand, the name 'Human' as such does not give rise to any rights. As we saw, the name 'Human' is either reduced to a non-visible core, or it functions as an interpretational aspect which serves to strengthen or limit the rights of other names. In other words, being able to claim the name 'Human' does not in itself open any possibilities for a person. It only gives rise to rights for those who can claim another, more specific name.

For this reason, I referred to it as a *fictitious name*. It does not really function as a name like the other names. Although everyone can claim it, no one can claim it and gain any rights from it. However, as a *fictitious name*, it has a certain power. It may strengthen the power of other names, and accordingly, it enhances the possibilities which are opened by those other names. It does this by bringing them in contact with the presumed human foundation analyzed in chapter 21 - that not quite graspable foundation centering on the separable body, the interconnectedness between human beings and not fully controllable forces. As we recall, this foundation was presumed to be violable and inviolable at the same time - for which reason it would be something which would

need protection as well as creation. But apparently, only some people and not all should be served (protected or created) with respect to this foundation.

Thus, also the name 'Human' is a possibility name, but in a flawed manner as well. The possibilities opened by the name are not due to particular sub-names. The possibilities are due to the name as such, but these possibilities are slumbering, passive possibilities. It takes another more particular possibility name to activate these possibilities.

The Excluded

Lastly, who are excluded from the hierarchy?

Among EU-citizens in principle no-one, since all EU-citizens have mobility, work access and residence rights. Children as well. But in practice, it is clear that anyone who wishes to go to another state, but who has not yet found work there and who has not earned social security rights in his or her own state (such as the right to unemployment benefit), it will be very difficult to actually benefit from the transnational rights. Unless such a person is rich enough to support him- or herself for a while, or is being supported by others, he or she will be without any means of subsistence when going to another member state. Also a person who has resided for a certain period in another member state, but who is not working and who has not earned any social security rights in that state will be in risk of 'disappearing' from the hierarchy, so to speak. Unless such a person can demonstrate that he or she is a job-seeker (and has a 'real link to the labour market'), or at least that the difficulties are only temporary, expulsion from the state of residence is a risk.

In short: anyone who depends on social assistance (wholly or partly), or has no income what so ever, and who is not working or has not been working for a certain period in the other member state in question is in risk of falling out of the hierarchy - or in risk of never being able to enter it. As for children, they will only be able to enter the hierarchy in case they have parents who will. In other words, those whose social rights situations are already difficult in their own state are in risk of being, in practice, excluded from the hierarchy. - When that is said, there are many EU-citizens in desperate economic situations who chose to make use of their mobility, residence and work seeking rights in other member states, although they can claim no social security or social assistance rights there. Often, they will live on the streets for longer periods. These people are - in a brutal manner - not excluded from the hierarchy, but they belong to the very bottom of it.

Among 'Third Country Nationals', a large number are excluded from the hierarchy. As described already, only those who can claim the more privileged sub-names of 'Third Country National' because they are able to satisfy a number of conditions or have found other legal doors to transnational mobility within the EU are included - along with their family members. However, we saw in chapter 8 that there are even cases in which a close 'Family member' of an included 'Third Country National' could be excluded from the hierarchy. A child over the age of 12 arriving to a member state alone may be denied family-reunification with a father or mother residing in that state.

The hierarchy as a whole. Three focal points: 'citizenship', 'work' and 'family'

Those who are EU-citizens and Workers, as well as their Family-members, belong to the top of the hierarchy. However, the name 'Worker' covers so huge differences that there are parts of the name which extends towards the bottom of the hierarchy - those parts which can be claimed by job-seekers without a working history, by people who are covered by social security benefits but has never worked and will never work, extremely mobile people, and finally job-seekers who have no income what-so-ever.

In the middle of the hierarchy we find the privileged sub-names of 'Third Country National' as well as 'EU-citizens' who are not 'Workers' according to any of the definitions of the name, and not 'Family-members' either, but who are capable of supporting themselves due to other sources (like f.instance study funding from their own member state or from private funds).

In the bottom of the hierarchy we find - apart from the most fragile kinds of 'EU-Citizen Workers' already mentioned - the less privileged sub-names of Third Country National (such as 'Victim of Trafficking', but also those who satisfy the conditions for family-reunification, f.instance, but are not granted any mobility, residence or working access rights). The name 'Human' would, when taken alone, belong in the bottom of the hierarchy as well, but when considered as a fictitious name, it belongs everywhere and nowhere in the hierarchy - capable of being attached to any specific name.

Completely excluded are a large number of 'Third Country Nationals', especially the illegal 'Third Country Nationals'. And in practice, a number of EU-citizens - who are dependent on social assistance in their own member state and who have not found work in another - will be excluded from entering the hierarchy.

So, the hierarchy focuses on citizenship, work and family. The strangers and those who do not work at all and are far away from the possibility of working are discriminated against, - unless they are family-members of a citizen or a worker.

The dynamics which lead from the grey zones into the cores of the names are governed, in the case of 'EU-citizens', by *the building up of a working history*, by *stability* and by *the will to work and integration* - primarily in the national labour market, but also in the national systems and the society in a broader sense. Even in the top of the hierarchy, stability and integration is rewarded. - In the case of 'Third Country Nationals', stability and the will to integration are not only rewarded, these factors are also necessary in order to acquire rights at all. In addition, the *capability of selfsupport* is crucial for Third Country Nationals in order to move up in the hierarchy. Whereas work and working history matters to social security rights, self-support is crucial to mobility, residence and work access rights. Roughly put: 'Third Country Nationals' must be capable of self-support, before they are given access to the labour market, in the second as well as the first member state. Finally, 'Third Country Nationals' must prove *their good will as such* in order to move up in the hierarchy; they are subjected to a general suspicion of fraud and abuse.

Accordingly, we see that although this is a right regime which is meant to serve *mobility* (and it certainly does), the factor of *stability* within the respective member states is still crucial. And although this a right regime which is largely meant to serve the transnational *flow of workers* (and it certainly does), the general factor of *integration* within the respective member states plays an important part. Integration means integration within the national labour market, but it also covers the attitude of a person, as it covers other (not clearly defined) aspects of societal integration. In the case of Third Country Nationals, however, it is ambiguous to what extent their integration in national labour markets is desired at all.

A confirming or progressive order?

Lastly, we shall consider the nature of the hierarchy in the light of the basic temporal tension characterizing every human law: the tension between the world as it is presumed to be was it not for the law and the ideal order meant to be realized by the law.

As argued in chapter 19, every human law presupposes the possibility of change; otherwise, the law would be obsolete. But there are huge differences between laws.

Some laws are conservative in the sense that they confirm norms and arrangements which are already well established. Other laws are progressive or even revolutionary in the sense that they break with what is well established.

As also argued in chapter 19, we may look upon EU non-discrimination law in general as *progressive* because it seeks to break with well-established and historically deep-rooted forms of discrimination. Simultaneously, however, EU non-discrimination law is full of exceptions: it does not only break with established forms of discrimination, it also upholds them. In addition, and crucially, it is based on *other* norms and arrangements which are already established and which are only meant to be modified, not radically changed. Those norms and arrangements were sought captured as 'anchors of order' in chapter 20.

Now, when considered more specifically in the light of this basic temporal tension, in what sense and to what extent does the hierarchy of names mark a change of conditions, and in what sense and to what extent does it merely confirm already well-established conditions?

The hierarchy of names represents a comprehensive and complex rights regime in which non-discrimination rights are supported by a number of other rights which are not non-discrimination rights, but substantial rights. It is a rights regime which establishes a vast range of new rights. Non-discrimination rights are mediators for new rights in the sense that through them, national social rights, work access and working conditions rights are extended to large groups of people who would not otherwise have access to those rights; and the supporting substantial rights (mobility, residence and family reunification rights) are new rights in a direct and immediate sense. Notwithstanding the in principle endless number of names contained in the hierarchy, these names are generally clearly defined by the law, - or would be clearly definable on the basis of the law, as particular variations of overall names. Many of the rights attributed to these names (non-discrimination as well as substantial rights) can also be said to be clear and indisputable rights when taking into account their development through the case-law of the CJEU. Fundamental principles and rights are hugely important in this connection. 'Justification of discrimination' does not play a major role within the hierarchy of names.

Finally and importantly, a conceptual world has been built, a world of EU-concepts. These EU-concepts do not only regard the definitions of names. They make possible at all the functioning of non-discrimination rights: they secure the material scope of these

rights (so that non-discrimination rights will not be undermined by national conceptualizations of benefits and social rights areas), as they make possible the translation between national systems.

Because of these features, the hierarchy of names can be said to be progressive. New rights are given to new right holders, and to a large extent, the efficiency of these rights are guaranteed by the complementarities between different kinds of rights, by strong fundamental principles and a large number of specifications of those principles, as developed by the CJEU, along with a conceptual world. And lastly, not to forget: the rights in question are not unimportant rights. They concern the possibility of replanting one-self in another state with respect to a large range of life factors, - or they concern the integration of certain so far generally excluded workers with respect to working conditions, including a number of social rights.

However, the progressive features of the hierarchy of names is most obvious in the top of the hierarchy. In the lower parts of it, rights are more limited (either because they are not granted at all or because exceptions are laid down) which also means that the complementarities between different kinds of rights are limited. Most notably, restricted residence rights, mobility and working access rights function as closing mechanisms with respect to social security and social assistance rights. Also, 'justification of discrimination' plays a certain role in the bottom of the hierarchy. Finally, and crucially, the combination of vague formulations and huge discretion granted to the member states provides an uncertain foundation of rights. We saw how the CJEU would sometimes - vis-a-vis such vagueness - 'save' particular rights for particular persons by way of nuanced contextual interpretation and conceptual distinctions derived from EU concepts. This interpretative practice certainly strengthens the names in question, but it does not remove the basic uncertainty which characterizes many of the rights attributed to them.

But the hierarchy of names is not only progressive (more in the top of the hierarchy than in the bottom). It also *confirms* already established laws, norms and arrangements. As already mentioned, the forms of discrimination in question are not only sought eliminated by the law, they are also upheld, - directly through 'justification of discrimination' and indirectly through exceptions and limitations of scope. Similarly, the limitations characterizing the content rights attributed in the lower parts of the hierarchy, indirectly confirm the national laws which would otherwise apply. These different kinds of confirmations we shall call *negative confirmations*: the EU rights in

question confirm already existing national laws or arrangements in the sense that they *leave them untouched*.

But also *positive confirmation* is at stake, and in a crucial sense. Non-discrimination rights depend on the content of national substantial rights. Non-discrimination rights cannot, in principle, alter the content of national substantial rights or create a content of their own; what they do is to extend the personal scopes of national substantial rights. In this sense, they reproduce directly the content of national substantial rights. Hereby, they also reproduce national criteria and forms of discrimination (other than the forms which are prohibited), like for instance discrimination on grounds of length of education, profession or sector of employment, income or other conditions. In a word: they *reproduce national hierarchies*.

However, the non-discrimination rights inherent in the hierarchy of names do not only reproduce national hierarchies in the sense that they are mediators of *specific* national hierarchies, they also double some *general* features of national hierarchies within the EU. As we have seen, the possibility of transporting and aggregating rights across borders constitutes a crucial feature of non-discrimination social security rights with respect to the discrimination ground 'nationality'. Hereby, the general idea of earning rights (through contributions or through various kinds of membership, national citizenship included), dominating the member states in general, is confirmed by these EU-rights. This doubling of a general feature of national hierarchies constitutes *direct positive confirmation*, whereas the mediation of specific national hierarchies constitutes *indirect positive confirmation*.

Finally and crucially, it is clear that the hierarchy of non-names is a *conservative hierarchy* within a general modern European context in the sense that it focuses on citizenship, work and family, and that it rewards stability and societal integration, including the will to integration. However, it should be noted that it is a conservative hierarchy in a modulated sense. Firstly, 'citizenship' means EU-citizenship, not national citizenship. Secondly, it is noteworthy that 'work' plays a more important role than 'self-support' in the higher parts of the hierarchy. 'Work', in its turn, has become an extremely differentiated factor. Thirdly, 'family' figures as a highly flexible concept. And finally, the meaning of 'will to integration' has been sought developed into a range of criteria, instead of being merely assumed or treated as an object of motivation.

So, also in an overall sense, the hierarchy of non-names doubles some very basic general features of national hierarchies in Europe and constitutes *direct positive*

confirmation. But the mentioned modulations should not be taken to lightly. In order to fully comprehend the meaning of these modulations, we will need to revisit the six anchors of order the basic logics of which were analyzed in chapter 20. Likewise, in order to fully comprehend the meaning of the general idea of earning rights, as confirmed by EU-law, we will need to revisit these orders. In other words, we have come as far as we could on the basis of the hierarchy of names, - and in order to complete our considerations as to the 'ideal order' expressed by this hierarchy, we will need to engage in another kind of analysis. We will need to consider the way in which the law we have dealt with subtly alters the very institutional orders it relies upon.

Chapter 23

The hierarchy of non-names - a disrupted hierarchy

The hierarchy of non-names is very different from the hierarchy of names in terms of its structure. It is not characterized by an endless number of sub-names and internal combinations. This does not mean that there is not an infinite aspect to it; it would be impossible to describe it exhaustively. But the infinity stems from conceptual flexibility as well as conceptual uncertainties, and from the undeveloped nature of the rights entailed in the hierarchy.

Due to the basic formula of non-discrimination, manifested as the non-significance-logic, *conceptual flexibility* will necessarily be a feature of the hierarchy of non-names. It cannot - and should not - be possible to determine in advance the number and nature of the particular names which may be formed on the basis of the five discrimination grounds. But when that is said, we have also seen that conceptual definitions of those discrimination grounds are either completely lacking, insufficient or problematic. Huge *conceptual uncertainties* characterize the hierarchy in this respect. Furthermore, the rights attributed to the non-names are still rather 'unfinished'. The Race Equality Directive and the General Framework Directive are dominated by open and purpose-oriented formulations, apart from the basic formal definitions of discrimination. The non-discrimination-rights laid down in those Directives will need to be specified in a number of ways. But so far, only a limited case-law exists. In comparison to the names we have been investigating, the five non-names in question are still to a large extent *undeveloped* in terms of the rights attributed to them.

For these three reasons, the hierarchy of non-names can only be established in a very tentative way. It is still uncertain and undeveloped in terms of its basic features. This may change over the following years, with a growing case-law. However, to the extent that the non-significance logic is upheld (and the discrimination grounds are not simply identified with a number of defined particular names), huge conceptual flexibility will continuously constitute a fundamental characteristic of the hierarchy of non-names, for which reason it will remain very open and tentative. It belongs to the very logic of it that we shall never know exactly who the right-holders might be.

The aspect of infinity or inexhaustibility can also be seen in the progressive role of conceptual horizons. Conceptual horizons are crucial to the establishment of the hierarchy of non-names, both in terms of substances and attributes. Conceptual horizons create bridges between discrimination grounds and particular names, that is, possibilities of transforming the discrimination grounds into particular names. Likewise, the argumentations related to 'justification of discrimination' function on the basis of conceptual horizons within which overall purposes and means of the member states may be evaluated. We have seen that only to a small extent do these argumentations rely on consistent, established criteria. Also, we have seen that the establishment of 'comparable situations', crucial to the logic of non-discrimination, can not always follow a formal path, but will need to rely on broader and multi-faceted notions of 'comparability'.

A large and developed case-law may relativize the creative role of conceptual horizons to some extent by building up a number of specifications and criteria which will rely on 'stiffened' and more predictable horizons. Yet, as long as the non-significance-logic is the sole logic which adheres to non-names, only complemented by modifications springing from 'justification of discrimination', conceptual horizons will play a huge and progressive role in the hierarchy of non-names.

Furthermore, it is important to say that apart from being open and tentative, the hierarchy of non-names is also *disrupted*. As we have seen, all of the non-names are more or less weak, but for different reasons. Some are mainly weak in terms of their substance, others in terms of their attributes. Some are weak due to conceptual uncertainties, others are weak because of escape routes established by 'justification of discrimination' possibilities or by exemptions. Accordingly, we are not simply confronted with a flat hierarchy in which all non-names are equally weak. We are confronted with a disrupted hierarchy in which internal comparisons are very difficult

to carry out. None the less, I shall attempt to compare the non-names according to their respective strengths and weaknesses, but I will need to do it on the basis of the distinction between substances and attributes.

As mentioned above, internal combinations do not play a crucial role in the hierarchy of non-names, like they do in the hierarchy of names. This does not mean, though, that they do not exist. They exist in two different ways. Firstly, different non-names may *supplement* each other: a person may be the victim of discrimination on several different grounds. Combinations of that kind are not important in relation to the hierarchy. The CJEU will consider each discrimination ground separately, - we have seen several examples of that. Different non-names do not affect each other by way of supplementing each other - neither conceptually, nor in terms of strength. Secondly, different non-names may *clash* with each other: non-discrimination in relation to one of the discrimination grounds may involve discrimination in relation to one of the other grounds. Combinations of that kind are of course important. One of the non-names will need to win over the other, - or they will need to relativize each other mutually. Not all non-names may clash with all other non-names. In fact, all possible clashing combinations of non-names will involve the non-name 'Religion or Belief'. The case-law displayed no examples of such clashes (not the analyzed ECtHR-case-law either), but the General Framework Directive made clear that in the case of the discrimination ground 'religion or belief', non-discrimination rights would never justify discrimination on other grounds.

So, after these remarks as to the general structure of the hierarchy of non-names, we shall attempt to describe its general features as far as the different non-names are concerned. We shall consider their respective strengths and weaknesses. But as mentioned above, we shall proceed on the basis of the distinction between substances and attributes - in order to be able to detect some common patterns at all. But first an observation regarding the general meaning of non-names.

Signifiers of destiny centering around *freedom from cultural destiny*.

The names entailed in the hierarchy of names are all *possibility names*: they will open possibilities for those who can claim the names. Non-names could, in principle, be described as signifiers of possibilities as well: they are meant to secure that certain people will obtain certain rights that they might otherwise be excluded from. However, non-names concern certain obstacles in relation to possibilities - obstacles which should

be removed by virtue of non-discrimination rights. These obstacles in turn correspond to certain differences which have destiny character (or, in the case of the non-name 'Religion or Belief', differences which comprise destiny, freedom and social determination), as argued in chapter 19. For these reasons, I find that non-names are more adequately described as *signifiers of destiny*, than as signifiers of possibilities.

So, non-names are signifiers of destiny meant to give access to possibility names. More precisely, the infinitely many destiny categories implied in each non-name (on the basis of which particular names can be formed) are supposed to be made non-significant for the purposes of a range of possibility names. These possibility names would in the first instance be national possibility names - names to which work access and work condition rights, and, in the case of the non-name 'Racial or Ethnic Origin', also a broader range of social rights are attributed. But naturally, having access to those national possibility names would also mean having access to EU-law possibility names, or having access to stronger and not just weaker EU-law possibility names. In this sense, the signifiers of destiny give access to national hierarchies of names as well as to the EU-law hierarchy of names analyzed in the previous chapter, and to the internal dynamics of those hierarchies. Consequently, the dynamics of the hierarchy of non-names are largely directed against other hierarchies, rather than being internal dynamics.

Whereas the names of the EU-law hierarchy of names mainly center around the possibility of *replanting one-self in another state*, but also around *national planting*, non-names center around *cultural destiny*. By 'cultural destiny' I mean 'the establishment of and significance of destiny'. Non-names will not eliminate the destiny character of the infinitely many categories which they imply, like old, young, middle-aged, disabled, non-disabled, homosexual, heterosexual, bisexual, roman, immigrant, atheist or muslim. On the contrary, they reaffirm these categories as inescapable categories. But non-names are supposed to make these categories insignificant for certain purposes. If we understand 'culture' as particular social distinctions dominating a given time and place, along with the respective significance attributed to them, we may say that non-names both establish certain destiny categories while simultaneously declaring their insignificance. As such, they center around cultural destiny with a view to *freedom from cultural destiny*.

Accordingly, evaluating the respective strengths and weaknesses of the five non-names means evaluating to what extent they are capable of realizing their purpose:

establishing a range of categories as destiny categories, while simultaneously freeing human beings from the significance of those categories so that they may gain access to possibility names.

**Evaluating the strengths and weaknesses of the different non-names
according to substances and attributes**

Firstly, if we were only to consider the *substances*, the hierarchy of non-names would appear as follows:

The non-name 'Age' would be in the top of the hierarchy. It is both precise and flexible according to its substance; the meaning of 'age' is beyond dispute, and it would seem that nothing would delimit the number of particular names which could be formed on the basis of the discrimination ground. Presently, the non-name is colored by the structures of the labour market, though.

In the middle of the hierarchy, we would find the non-names 'Disability' and 'Sexual Orientation'. Both can be said to function rather well in the sense that particular names are formed on the basis of the discrimination grounds according to commonly held understandings, but both are deeply problematic in terms of their conceptual definitions. 'Disability' is torn 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. The former understanding reduces 'disability' to a hindrance for professional life - and undermines, accordingly, any substantial meaning of the concept within the context of the general Framework Directive. In addition, the distinction between 'disability' and 'sickness' is inadequately drawn. The latter understanding is silently and unreflectedly applied, never discussed. Whereas the non-name 'Disability' is characterized by contradictions and blind spots, the non-name 'Sexual Orientation' confronts us with silence and a deeply complex underlying conceptual landscape. A distinction between the discrimination grounds 'sex' and 'sexual orientation' is established, but the argument supporting it is contradictory. I demonstrated, however, that it would be possible to establish a conceptual foundation which would underpin the two corresponding distinctions established by the CJEU (between 'sex' and 'sexual orientation' and between 'transsexuality' and 'homosexuality') - a conceptual foundation centering on the difference between sexual self- and other-relations. But this foundation is not

formulated by the court itself. Also, it is a fragile foundation which could easily be torn down.

In the bottom of the hierarchy we would find the non-names 'Racial or Ethnic Origin' and 'Religion or Belief'. Both are characterized by huge conceptual difficulties which affect deeply the possibilities of applying the respective discrimination grounds precisely and consistently. And in both cases, the conceptual difficulties are intimately connected to important ideological problematics of the modern state - which means that the functioning of these non-names become dependent on ideological considerations.

The discrimination ground 'Racial or Ethnic Origin' does not, today, refer to anything precise. As far as we could discern, it is being interpreted associationally and ideologically, supported by consensualized knowledge regarding existing marginalized groups or communities, or by reflections or sensitivities with respect to dominant prejudices. In any case, this discrimination ground concerns the idea of 'the ideological stranger'.

The non-name 'Religion or Belief' is the most complex of them all. The conceptual definitions and implications derived from the case-law of the ECtHR led us to a dead end. The basic understanding of 'religion and belief' as being primarily a matter of inner conscience prevents the development of criteria by which the problems of delimitation could be met. This basic understanding, in turn, springs from the conceptual history of the modern European state. In the case-law of the ECtHR we identified three different approaches which could be taken with respect to this inherited basic understanding: upholding it including the contradictions it leads to; upholding it on the basis of an ideological foundation of the state called 'neutrality', meaning that only some, and not all, beliefs would need to be 'inner beliefs'; discarding it for an integrating approach according to which it is the nature of beliefs to be manifested in individual lives as well as in the cultural patterns of communities. A fourth possibility (not immediately identifiable in the case-law of the ECHR) could be formulated as well: discarding the basic understanding for a declared and substantial ideological foundation of the pluralistic state. - In other words, when dealing with the meaning of the discrimination ground 'religion or belief', the CJEU will be dealing with the ideological foundation of the modern European state as such.

If, on the other hand, we were to consider the hierarchy of non-names from the point of view of the *attributes* of the five non-names, it would be a different hierarchy:

Now, the non-name 'Racial or Ethnic Origin' would be in the top of the hierarchy. It is the only non-name which is attributed rights which go beyond the area of working conditions. In addition, no special 'justification of discrimination' paths are laid down in the Directive, - and as far as the general occupational-requirement-provision is concerned, the CJEU appears to give weight to non-discrimination rights vis-a-vis the interests of employers.

In the middle of the hierarchy, we would find the non-name 'Disability'. It is not dominated by many escape routes, neither in terms of exceptions, nor in terms of justification routes. However, the non-name is weak for another reason. In the case of the discrimination ground 'disability', non-discrimination rights are largely insufficient. They would need to be supported by content rights regarding accommodation in order to function at all. The General Framework Directive does not grant such content rights; the issue is merely indicated.

In the bottom of the hierarchy, we would find the non-names 'Age', 'Sexual Orientation' and 'Religion or Belief'. The former two are deeply tormented by escape routes. In relation to the non-name 'Age' a range of justification-paths exist. Most notably, practically any national policy aim related to the functioning of the labour market may justify discrimination. The criteria established are inconsistently applied. Ultimately, non-discrimination rights depend on two overall ideas: the idea of the labour market as a natural balance and the idea of a socially inclusive labour market. Only in relation to the latter idea does the CJEU argue in a precise and contextualized way. - The non-name 'Sexual Orientation', in its turn, is severely inhibited because of the exemption regarding marriage laws and marital status laid down in the General Framework Directive.

'Religion or belief' would be in the bottom of the hierarchy for the same reasons as those mentioned above; in the case of this non-name, the problematics of substance and attributes have the same conceptual roots. The different justification paths opened by the General Framework Directive would all involve evaluations of particular manifestations of particular beliefs from the point of view of the pluralistic society. The question of the standard of evaluation would coincide with the question of the ideological foundation of the modern European state.

A disrupted hierarchy, mirroring the hierarchy of names asymmetrically

As can be seen, all five non-names are weak in terms of realizing their purpose: establishing a range of categories as destiny categories, while simultaneously freeing human beings from the significance of those categories so that they may gain access to possibility names. But they are weak for different reasons. When considered from the perspective of substance, the non-name 'Age' belongs to the top of the hierarchy, while 'Race or Ethnic Religion' belongs to the bottom. When considered from the point of view of attributes, it is the other way around: 'Race or Ethnic Religion' belongs to the top of the hierarchy, while 'Age' belongs to the bottom. 'Disability' must, in both cases, be placed ambiguously in the middle, while 'Sexual Orientation' is more problematic according to attributes than according to substance - although fragile in terms of both. Finally, 'Religion or Belief' is the only non-name which occupies the same position according to both perspectives - in the bottom of the hierarchy, due to the ideological dilemmas haunting this non-name with respect to all its problematics.

Consequently, the hierarchy of non-names is disrupted, - it changes radically according to the perspective through which it is seen. All we may say is that all non-names are weak, and that 'Religion or belief' is particularly fragile. We could say that the hierarchy is flat, but since the respective weaknesses are not really comparable, that would be disingenuous. More precisely, therefore, we should say that the hierarchy of non-names is torn in multiple directions at the same time - it is disrupted.

Apart from this disruptedness, we can make another important observation. The hierarchy of non-names mirrors the hierarchy of names in the sense that it mirrors the three focal points of the latter: citizenship, work and family. These three focal points are not represented directly in the hierarchy of non-names, but rather in the shape of problematics.

As mentioned above, the non-names 'Racial or Ethnic Religion' and 'Religion or Belief' both concern fundamental ideological issues related to the modern European state - to democracy, pluralism and human rights. The issue of 'the ideological stranger' as well as that of individual beliefs which go beyond the ideology (or lacking ideology) of the dominant societal order constitute *fundamental problematics of inclusion and exclusion in relation to societal order as such*. That is, these issues constitute fundamental problematics of citizenship.

As regards the non-name 'Disability', we saw that the CJEU has made it dependent on the concept of 'professional life'. It is clear that this non-name circulates around the distinction between *those who can* and *those who cannot participate in the work force* (the fact that the court has sometimes had to operate with a broader understanding of 'disability' and undermine its own circular understanding of 'work' and 'disability' only confirms that this distinction is constantly in play). The same distinction characterizes the non-name 'Age'. This non-name is strongly colored by the structures of the labour market - the ages of entering it, the ages of leaving it. By implying, just like 'Disability', that *not everyone can* and *not everyone should work*, it concerns in a fundamental way the status of *work* in human society.

Finally, the non-name 'Sexual Orientation' concerns, as we saw, the issues of heterosexuality, homosexuality and bisexuality. But as we also saw, within a context of social and working rights, more than physical attractions and intimacy are at stake. It is the situation of 'lifepartners' - sharing daily life and material conditions with each other over many years - which is crucial in connection with this non-name. Notwithstanding that other and more strictly 'sexual' understandings (in terms of physical interactions) could be relevant as well, this non-name circulates around fundamental problematics of the *family*. What kind of constellations may constitute a family? What kind of constellations may replace the institutional order of the family?

So, the hierarchy of non-names reflect fundamental problematics of 'citizenship', 'work' and 'family'. As explained above, it is the purpose of non-names to give access to possibility names - to national possibility names, in the first instance, but in the second instance also to EU law possibility names. On the basis of the common focal points, we may say that the hierarchy of names and the hierarchy of non-names match each other. The hierarchy of non-names, reflecting the problematics of 'citizenship', 'work' and 'family' are meant to give access to the possibility names 'EU-citizen', 'Worker' and 'Family-member' and their internal and external dynamics.

However, an asymmetry can be detected. The material scope of the rights attributed to the five non-names regard working conditions (and in the case of 'Racial or Ethnic Origin', it regards a broader range of social rights). Laws of citizenship as well as immigration and residence laws are in no way covered. Neither are family laws, including marriage laws. In this sense, the non-names provide access to the possibility name 'Worker' (that is, to all possible national variants of 'Worker' and hereby also to the EU name 'Worker' and its multiple sub-names), but they do not provide access to

the possibility names 'Citizen' or 'Family member'. Indirectly, they may do so, but only to a small extent. As explained under the hierarchy of names, we may regard the name 'Citizen' as constituted by a core ('being an EU-citizen') surrounded by grey zones around it in which the more privileged sub-names of 'Third Country National' would be situated. Those sub-names may be acquired by way of work (in that work enhances the possibilities of being capable of 'self-support', - just as it may, under certain circumstances, give access to the EU name 'Blue Card Holder'). Likewise, we also saw that work condition rights could, in the view of the CJEU, imply derivative rights for homosexual couples - rights similar to those granted to married people - as long as a 'parallel regime' constituted by the institution of 'registered partnership' could be said to exist.

Consequently, the hierarchy of non-names reflect all three focal points - citizenship, work and family - in the shape of fundamental problematics, as it reflects possible entanglements between them. But it reflects these entanglements from the point of view of only one of these focal points, namely work. This can be illustrated as follows.

The hierarchy reflects that being a 'problematic worker' (in terms of being on the border of what is understood to be a competent worker or someone who naturally belongs in the workforce) may give rise to difficulties in terms of work access and equal work conditions - for which reason non-discrimination rights in relation to 'age' and 'disability' are needed *in order for the 'problematic worker' to gain access to the possibility name 'Worker'*. The hierarchy also reflects that being a 'problematic citizen' in an ideological sense (representing the 'ideological stranger' or adhering to a belief which appears foreign to dominating institutional orders) may give rise to difficulties in terms of work access and equal work conditions. In such cases, non-discrimination rights in relation to the discrimination grounds 'Racial or Ethnic Origin' and 'Religion or Belief' are needed *in order for the 'problematic citizen' to gain access to the possibility name 'Worker'*. Likewise, being a 'problematic family-member' by virtue of being in a homosexual partnership may give rise to difficulties. Non-discrimination rights in relation to the discrimination ground 'Sexual Orientation' will be needed *in order for the 'the problematic family member' to gain access to the possibility name 'Worker'*. - But we cannot continue any further along these lines. 'The problematic worker' will not gain access to the names 'Citizen' or 'Family member', and neither will 'the problematic citizen' nor 'the problematic family member'.

The hierarchy of non-names is asymmetrical in the sense that the issue of work plays the heaviest role. Not only does the hierarchy reflect a fundamental problematic of work, namely the status of work in society as such, it is also within the area of work that paths and bridges are created so that the 'problematic worker', the 'problematic citizen' and the 'problematic family member' may enter national hierarchies of names - and subsequently the EU-law hierarchy of names analyzed in this work.

A confirming or progressive order?

Lastly, can the hierarchy of non-names be said to be confirming or progressive when seen in the light of the fundamental temporal tension of law - the tension between a presumed and an ideal order?

By being the manifestation of an attempt to combat historically deep-rooted forms of discrimination, the hierarchy of non-names is progressive. However, it is not the manifestation of a developed rights regime as is the hierarchy of names. It is largely undeveloped both in terms of conceptual definitions and with respect to specifications of which arguments related to 'justification of discrimination' would be acceptable and which would not. As such, the rights entailed in it are uncertain to a large degree. Moreover, and importantly, non-discrimination rights are not supported by substantial rights. In the case of the non-names 'Disability' and 'Sexual Orientation' the lack of substantial rights is obviously a weakness. But it could be a problem for all of the non-names. They all depend on the pre-existence of a certain level of equality, both in terms of equal rights in other respects and in terms of similar conditions (which would need to be established either informally or by means of more particular rights addressing the specific problems of certain people). Finally, fundamental principles and rights do not have the same powerful role as in the hierarchy of names. The fundamental status granted to the principle of non-discrimination is undermined by the dominating role of 'justification of discrimination'. And there are not any other fundamental EU principles or rights, such as the fundamental rights connected to the EU-citizenship, which play a role in the hierarchy of non-names.

Accordingly, the hierarchy of non-names is less progressive than is the hierarchy of names, both in the sense that interpretational uncertainties are bigger, and in the sense that non-discrimination rights unfold their feeble capabilities alone, unsupported by substantial rights and fundamental principles.

The hierarchy of non-names is supported by something else, though. As recalled, additional judicial elements, such as rules concerning the burden of proof and victimization, are laid down in the Race Equality Directive and in the General Framework Directive, along with policy-elements concerning the role of organizations, knowledge provision and dissemination, monitoring and establishment of best practices. These elements are of course meant to strengthen the non-discrimination rights. But their presence also indicates that these rights are not necessarily powerful, and that their efficiency may be undermined. They address the kinds of problems which would arise from existing relations of power (most notably, those of the employment relationship), as they address the deep-rootedness and therefore also invisibility of many forms of discrimination. That does not, however, solve the problem mentioned above - that in order for non-discrimination rights to function, a certain level of equality must already exist, in terms of other rights as well as in terms of formal and informal conditions.

The hierarchy of non-names confirms already established laws, norms and arrangements in an number of ways.

First, the hierarchy of non-names is *negatively confirming* in the same ways as is the hierarchy of names. Due to severe limitations of scope as well as important exemptions, and to the very significant role of 'justifications of discrimination', a range of already existing laws and arrangements are left untouched. In addition, the hierarchy of non-names leaves untouched all those manifestations of discrimination which cannot be captured by the non-significance logic because they do not constitute 'comparable situations'. That is, discriminating situations in which a certain level of equality does not already exist are not represented by the hierarchy of non-names. If, for instance, people who are discriminated against on grounds of 'racial or ethnic origin' in relation to work access are not educated to the same degree as others, then the discrimination they suffer cannot be captured by the Race Equality Directive. As mentioned above, this problem became very obvious in connection with the non-names 'Disability' and 'Sexual Orientation', but it is not difficult to see its relevance to the other non-names as well.

Also, it should be mentioned that the hierarchy of non-names only represent five discrimination grounds out of a multiple number of possible discrimination grounds. In principle, the number of possible discrimination grounds is infinite. Every regime of laws as well as every social order is fundamentally based on discrimination - as is

language as such. However, there are a number of discrimination grounds which would be obvious to mention in connection with the hierarchy of non-names since they point to predominant social distinctions and power relations. Article 21 of the Charter of Fundamental Rights mentions, for instance, the discrimination grounds 'social origin', 'genetic features', 'language', 'political or any other opinion' and 'property'. Apart from 'genetic features', these grounds are what one would generally call 'social grounds' in contrast to 'biological' or 'natural' grounds. However, they are hardly more 'social' or less 'biological' than the grounds of 'age', 'disability' and 'sexual orientation'. As should be clear by now, these latter discrimination grounds depend largely on contemporary societal concepts and distinctions. On the other hand, some of the grounds mentioned in the Charter - 'language', 'political or any other opinion' and 'property' - do not exactly have destiny character. They certainly could be associated with powerful forces of social coercion. Yet, they could also be associated with freedom. In this sense, they are different from the five discrimination grounds represented in the hierarchy of non-names.

In addition to the discrimination grounds mentioned in the Charter, one could think of discrimination grounds such as 'education', 'competences', 'personal appearance', 'working experience', 'social status' or 'income'. All those grounds could certainly be associated with both freedom and forces of social coercion - or the tension between them.

Accordingly, the hierarchy of non-names focuses on social distinctions which have destiny character - and ignores the social distinctions which are rather characterized by the tension between social coercion and freedom. Obviously, the discrimination grounds mentioned above - 'language', 'property', 'education', 'competences', 'personal appearance', 'working experience', 'social status' and 'income' all correspond to social distinctions which are more or less constitutive for contemporary Western societies, formally as well as informally. Establishing non-discrimination law in relation to those grounds would constitute an impossible endeavor if not accompanied by radical society change as such. In contrast, the five non-names are based on discrimination grounds which *used to be* constitutive of social order. That is, they still are, to a large extent, but only in some respects. Whereas the discrimination grounds listed above are deeply embedded in contemporary structures of power, the five non-names are based on discrimination grounds which represent past structures of power which still live on in contemporary societies.

The discrimination ground 'political or any other opinion' deviates from this pattern. One should think that this discrimination ground, just like 'religion or belief', would be an old discrimination ground living on in contemporary society - but a discrimination ground which does not fundamentally belong within the pluralistic society and should be combatted. So why is it not part of the hierarchy of non-names?⁷⁷⁴ It is clear that the discrimination ground 'political or other opinion' could easily open for problematics similar to those characterizing the discrimination ground 'religion or belief'. Political opinions might very well constitute individual integrations as well, in a fragmented, partly unconscious way, or in the form of a comprehensive societal reflection. Political opinions may confirm the existing institutional orders, or they may have their sources in ideas which lie beyond those orders. Political opinions could be the life-giving blood running through the multiple individual and collective interpretations by which law and order are maintained and developed, or they could endanger law and order. But in contrast to 'beliefs', it would not be possible to claim that political opinions are mainly a matter of individual conscience, an 'inner' matter, and only derivatively a matter of manifestation and community. 'Political opinions' have not been conceptually neutralized to the same degree as 'beliefs' (although they have been conceptually and institutionally neutralized by way of parliamentarism). For this reason, they can be said to represent a more immediate danger. Discrimination on grounds of 'political opinion' may very well be seen as a necessary feature of contemporary society.

Apart from these infinite sources of negative confirmation - national laws and arrangements untouched by the Race Equality Directive and the General Framework Directive, forms of discrimination on grounds of racial or ethnic origin, age, disability, sexual orientation and religion or belief which cannot be captured by the non-significance logic and finally the multiple kinds of discrimination which are constitutive of contemporary order - also *positive confirmation* is at stake.

Naturally, the hierarchy of non-names resembles the hierarchy of names in one crucial respect: it reproduces national content rights. Non-discrimination rights depend on the content of national content rights, for which reason they reproduce national criteria and various forms of discrimination.

⁷⁷⁴ In other words, why is it not listed together with the other discrimination grounds (sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation) in art. 19, TFEU - which provides the foundation for non-discrimination Directives in relation to those grounds?

But another feature of the hierarchy should be brought forward as well. As mentioned above, 'justification of discrimination' provides for negative confirmation of existing laws and arrangements in the sense that it is being accepted that non-discrimination law shall not apply to these laws and arrangements. However, we have seen to what extent complex patterns of argumentation have been developed in relation to 'justification of discrimination'. And we have seen that these patterns of argumentation rely on progressive interpretational horizons. In other words: 'justification of discrimination' should not only be viewed under the perspective of 'negative confirmation', but also under the perspective of positive confirmation. Conceptual worlds are being build. As we recall, a certain overlap of horizons in relation to the respective non-names could be detected. In fact, we could very well say that it is one and the same horizon which we discover again and again in different variations. But to the extent that it can be said to be the same horizon, it is also a torn horizon.

In connection with the non-name 'Racial or Ethnic Origin', the idea of 'a socially inclusive labour market' clearly makes out the overall horizon within which the Race Equality Directive was to be understood, and not other ideas mentioned in the Directive such as 'a democratic and tolerant society'. However, it is indicated that this horizon is torn with respect to the respective interests of employers and employees.

In connection with the non-name 'Age', we encountered the same overall horizon, in a more developed version. We found that it implies a fundamental right to work. But this fundamental right to work appears both as a naked right to work (the right to be part of the labour market as such) and in a more substantialized version (as the right not to be discriminated against in the labour market unless this happens on the basis of a differentiated and contextualized consideration of the personal situation of the worker). But the horizon was not only developed in terms of the fundamental right to work and the different versions thereof. We also encountered that it was scratched in yet a different way.

The idea of 'a socially inclusive labour market' and the idea of 'the labour market as a natural balance' were both complementing each other, but they were also fighting over which one should be *the* crucial idea with the power to determine the other. The latter idea, in its turn, is also subject to a differentiation - namely between 'natural balances' understood as processes of continuous flexible adjustments on the basis of the existing power relations between the actors of the labour markets (in which case 'nature' and political creation are the same thing), and 'natural balances' understood as something

which is created through state intervention (in which case 'nature' and political creation are not the same thing).

In connection with the non-name 'Disability', we found, yet again the idea of 'a socially inclusive labour market' to be constitutive of the overall interpretational horizon. But in the disability-cases, this idea was confronted with a different understanding according to which not everybody should work and according to which those who are facing special difficulties in life in general deserve economical help. However, this latter understanding could be said to constitute a residual understanding, rather than an understanding which would really challenge the overall horizon. None the less, it gave rise to fundamental conceptual difficulties.

In connection with the non-names 'Sexual Orientation' and 'Religion or Belief', the idea of 'a socially inclusive labour market' was complemented by other ideas which are not directly related to it. In the cases concerning homosexual 'life-partners', it turned out to be crucial that 'life-partners' depend on each other in terms of material conditions, and that they are obliged to take care of each other, just like married people. In other words, a horizon constituted by the idea of material dependencies and obligations between family members complemented the overall horizon. In the cases concerning religious freedom, the idea of 'a socially inclusive labour market' was complemented by ideas as to the ideological foundation of the state.

In other words, an overall horizon, constituted by the idea of 'a socially inclusive labour market' dominates all five non-names. But, it is torn or differentiated in several ways - in relation to the idea that the employment relationship is fundamentally conflictious, in relation to the two different versions of the idea of the labour market as a natural balance, and in relation to a residual understanding circulating about the lives and needs of people who do not work. But apart from that, the overall horizon is complemented by other ideas giving rise to other horizons - concerning basic logics of living intimately together and the ideological foundation of the state.

In this landscape of torn or differentiated, though largely overlapping horizons, we recognize the contours of the presumed anchors of order, as described in chapter 20. The hierarchy of non-names strongly confirms those institutional orders - due to the powerful and conceptually well-developed role of 'justifications of discrimination' within this hierarchy. But the scratches and differentiations within the horizons also tell us that we are not merely dealing with a simple reproduction of institutional orders. At least, what is being reproduced is also the deep-lying problematics of those

orders - what we called their *ghosts*. The reproduction of ghosts can also be seen in the three basic problematics reflected by the hierarchy of non-names - the problematics of citizenship, work and family - as it can be seen negatively, in the neglected forms of discrimination (such as 'language', 'property', 'education', 'competences', 'personal appearance', 'working experience', 'social status' and 'income').

Again, we have reached a limit within the given context, just like we did by the end of our analysis of the hierarchy of names. In order to fully comprehend the meaning of 'confirmation' and 'reproduction' as far as concerns the conceptual horizons created by particular 'justifications of discrimination' and by particular manifestations of basic problematics of citizenship, work and family, we will need to revisit the six anchors of order and consider the way in which the law we have dealt with subtly alters the very institutional orders it relies upon.

Chapter 24

The hierarchy of signifiers in-between names and non-names - an intransparent hierarchy

The hierarchy of signifiers in-between names and non-names has its own characteristics, compared to the other two hierarchies.

First of all, it is special because it is a conglomerate in terms of logics. It is based on only one discrimination ground, but this discrimination ground appears to us as diversified - not just in the sense that it is conceptually flexible (as are the discrimination grounds we studied in connection with non-names), but in the sense that it has given rise to 3 different kinds of signifiers to which 7 different logics of rights are attributed, based on at least 6 different qualifications of the discrimination ground.⁷⁷⁵

In contrast, the hierarchy of names - based on only one discrimination ground - entails only one kind of signifier and two different logics of rights, substantial rights and as-if-rights (on the basis of three different qualifications of the discrimination ground 'nationality'). The hierarchy of non-names which is based on five different

⁷⁷⁵ See the summary of signifiers and logics by the end of chapter 15. I write 'at least' because the qualifications of the discrimination ground relating to maternity may be counted in different ways; they could be seen as different expressions of the same qualification, or as different qualifications

discrimination grounds only entails one kind of signifier and one logic of rights, the non-significance logic (which means that the five discrimination grounds are not qualified at all).

Like the other hierarchies, the hierarchy of signifiers in-between names and non-names is characterized by an aspect of infinity. Conceptual flexibility with respect to the meaning of the discrimination ground makes out an important part thereof. The discrimination ground is not given free as are the discrimination grounds relating to non-names; the flexibility is largely fixated in the shape of a number of disparate qualifications. But since new qualifications may arise, the meaning of the discrimination ground is still open.

The aspect of infinity is however first and foremost due to the significant role played by the principle of 'substantive and not formal equality'. A number of cases are dealt with on the basis of 'substantive' considerations, that is, contextualizing considerations springing from the particularities of the case in question, with a view to the situation of the right-holder as well as to social effects in general. In other words, on the basis of the particular context, the CJEU will form a particular understanding of 'substantive equality' - an understanding which will sometimes imply formal discrimination, other times formal non-discrimination. Of course, such understandings are not only based on analyses of particular situations. General horizons of interpretation can be glimpsed as well, based on the idea of 'special protection of women in relation to pregnancy and maternity', or on the idea that traditional roles and family patterns should not be maintained. But again, exactly what 'special protection of women in relation to pregnancy and maternity' means, and to what extent and in what ways traditional roles and patterns should be broken with, that will depend on the CJEU's understanding of the meaning of 'substantive equality', and not on formal criteria.

The significant role of the principle of 'substantive and not formal equality' is closely connected to the significant role of discrimination, instead of non-discrimination. 'Positive discrimination' constitutes a direct reversal of the principle of non-discrimination. The principle of 'special protection of women', in its turn, is based on an original fundamental distinction between women and men. In other words: 'substantive equality' may very well be based on discrimination - either in terms of formal discrimination or in terms of fundamental distinctions.

Due to this complexity - that discrimination and non-discrimination often stand side by side, both serving the principle of non-discrimination - the hierarchy becomes

intransparent as well. We cannot always say whose non-discrimination rights are better served by a given national measure. Positive discrimination of women may serve women and neglect non-discrimination rights of men, but it may also, when seen from a different perspective, undermine non-discrimination rights of women and even favor the situations of men. Likewise, 'special protection of women' may serve women, but it also upholds and develops the idea of fundamental differences between women and men. The CJEU is very aware of such problematics; they form part of the court's considerations as to the meaning of 'substantive equality'.

Furthermore, it is noteworthy that the hierarchy of signifiers in-between names and non-names is, to some extent, the manifestation of an interim order. On the basis of the exemptions laid down in the Social Security Non-discrimination Directive, temporary discrimination is permitted. We may say that, in a certain sense, the ideal order has been delayed; the hierarchy is the manifestation of an only provisionally ideal order. But as far as the mentioned exemptions are concerned, at least we know what the ideal order is supposed to entail, once we get there: it will entail the abolition of formal discrimination with respect to a range of issues within the national social security systems. Only, we do not know exactly when we can leave the interim order and enter the ideal order.

But there are other aspects indicating that the order manifested by the hierarchy is an interim order. Will positive discrimination, for instance, always be necessary, or only in a transitional period? Also, the judgments concerning the relationship between women and potentially violent occupational activities gave rise to complex questions as to the nature of the justifications accepted by the CJEU. As far as these issues are concerned, we are not only separated from the ideal order in terms of historical time, we are also separated from it for substantial reasons: we do not know exactly what it will entail; we do not exactly know the difference between the interim order and the ideal order.

So, the hierarchy of signifiers in-between names and non-names is characterized by infinity and intransparency due to the significant role of the idea of 'substantive, and not formal equality' and by the fact that discrimination and non-discrimination often stand side by side. In addition, it reflects an interim order which is separated from the ideal order, both in terms of time and knowledge. Consequently, it is a *historical hierarchy* in an enhanced sense. Not only is it based on historically instituted law and reflects the concerns of a given historical situation (that can be said of the other two

hierarchies as well). It is also largely dependent on contextualizing considerations, and it is separated from the ideal order which it is meant to institute.

On the other hand, however, the hierarchy of signifiers in-between names and non-names is the manifestation of fundamental differences which are meant to be maintained and protected, - not only by the interim order, but by the ideal order. This means that both the historical and the fundamental aspects are intensified significantly when compared to the roles of those aspects in the other two hierarchies.

With these points in mind, we shall now initiate the construction of the hierarchy. This construction will of course be based on the hierarchy as it is presented to us now, reflecting an interim order. The intransparencies arising from the complexities of 'positive discrimination' will create some disruptions; to some extent we will not be able to compare the respective strengths and weaknesses of the double-names 'Man' and 'Woman'. But apart from that, we will be able to construct a hierarchy which is clearly differentiated.

The strongest signifiers

The strongest signifier of the hierarchy is no doubt the CJEU-created name 'Woman in so far as she is subjected to circumstances which can only affect women'. Regarding its substance, it is both precise and open, fundamental and historical of nature. By virtue of its equilibristic capacities it functions as a mediator in connection with combinations and replacements of signifiers in the maternity-related judgments. In short: it is extremely flexible - capable of capturing a diversity of different social situations (and hereby potential rights-holders) - while simultaneously resting on a clear conceptual foundation. Likewise, regarding its attributes, it displays an extreme logical adjustability - made possible, first and foremost, by the idea of 'substantive and not formal equality' and by the fundamental status granted to the purpose of 'special protection of women' in relation to pregnancy and maternity.

Also the qualification of the discrimination ground 'transsexuality' should be mentioned among the strongest signifiers. Although marked by logical inconsistencies (in that the issue of 'transsexuality' is sometimes dealt with according to the logic of double-names, other times according to the logic of non-names), huge flexibility is demonstrated by the CJEU from the perspective of substance as well as attributes. In particular, the problem of multiple layers of discrimination is taken into account by the court, and human rights are integrated in the argumentations of the CJEU.

In the middle of the hierarchy

The double-names 'Man in contrast to being woman' and 'Woman in contrast to being man' display some very mixed patterns - and accordingly, they belong in the middle of the hierarchy.

From the perspective of substance, they are unproblematic as far as their application is concerned. Their conceptual foundation, however, is another matter. Also, it should be noted that they play an important integrating role in connection with combinations and replacements of signifiers in the maternity- and transsexuality-related judgments.

When viewed upon from the perspective of attributes, serious ambiguities and intransparencies begin. First, let us considering the double-names together, according to the four problematics dealt with above - temporary discrimination, justification of indirect discrimination, positive discrimination and justification of discrimination by reference to occupational requirements. What we have seen is that sometimes, precise and strict criteria are defined and pursued by the CJEU, other times not. Sometimes, criteria are of a contextualized nature, other times they are defined in general. Sometimes, financial considerations may constitute acceptable justifications, other times not. Sometimes, it is the situation of the potential right-holders which is held to be crucial, other times it is the internal needs of the national systems. That all depends on which problematic we choose as our prism of examination. Apart from that, criteria are not always pursued consistently, even when seen through the same problematic. And finally, it is important to realize that as far as justifications of discrimination is concerned, the acclaimed 'fundamental status' of non-discrimination rights is undermined from the outset in the sense that non-discrimination rights may always be overridden as long as the existence of a legitimate aim and appropriate and necessary means can be established.

Ambiguities become no less if we consider the attributes of the two double-names in comparison to one another. The consideration for the internal needs of the national systems, rather than for the situation of the right-holders in connection with interpretations of the exemptions laid down in the Social Security Equality Directive, is most likely to harm non-discrimination rights of men, but may harm women as well (both due to the fact that some of the exemptions may apply to national measures which are discriminating towards women, but also due to the fact that discriminating social institutions are hereby upheld). The strict criteria applied in connection with 'positive discrimination' are most likely to be harmful to the rights of women, but due

to the complex consequences of 'positive discrimination', a restrictive approach may also serve women. Finally, the tension between cultural and fundamental concerns underlying the judgments concerning justification by reference to occupational requirement and the general lack of any consistent argumentation as to this matter may in principle be harmful to non-discrimination rights of both men and women, but if we are to take into account that an especially intricate relationship between women and violence appears to be presupposed by the CJEU, then we will have to conclude that especially the rights of women are endangered.

Due to these general ambiguities - and to some extent inescapable intransparencies - it would not be possible to say exactly whose rights are the weakest and whose rights are the strongest. We may only say that when seen through the four problematics, the rights of both women and men are sometimes protected and cherished, and other times they are neglected or at least held more lightly.

The weakest signifiers

In the bottom of the hierarchy, we find the names 'Father on paternity leave', 'Adopting parent on leave' as well as the four names of the Self-employment Equality Directive, 'Spouse or life-partner of self-employed workers, taking part in the self-employed activity', 'Female self-employed worker', 'Female spouse or life-partner of a self-employed worker, taking part in the self-employed activity' and 'Spouses or life-partners establishing a company together'.

According to their substances, they are relatively precise as well as flexible. According to their attributes, however, they are not very strong. Largely, the problem is that they are undeveloped rights. But it is not the only problem. The non-discrimination rights of 'Father on paternity leave' and 'Adopting parent on leave' are not integrated as a general part of the discrimination ground sex, as are the rights related to maternity and pregnancy. In addition, 'maternity' and 'pregnancy' are certainly more comprehensive concepts than 'paternity leave' and 'adopting parent leave'. The rights attributed to the four names of the Self-employment Equality Directive are not even non-discrimination rights, but weaker versions thereof, indeterminate access rights and modified as-if-rights.

The discrimination ground 'sex' when viewed upon as a discrimination ground (and not as the basis of particular qualifications of it) belongs in the bottom of the hierarchy as well. This is due to the fact that it is not given free as a discrimination ground, that

is, it is not being interpreted as a non-name. It is frozen - fixated in particular qualifications. Only in connection with the transsexuality-related judgments, it was loosened a little, - but this happened silently, without a single remark.

However, the variety of particular qualifications which has been established on the basis of this discrimination ground bear witness to a highly flexible approach to the meaning of the concept of 'sex'. This flexibility does, in spite of the fact that it is fixated, point to the existence of conceptual resources on the basis of which the meaning of the discrimination ground could be further developed in the future.

Future developments are not unproblematic, though. First of all, it is not possible to establish a conceptual foundation of the discrimination ground which would be satisfactory seen from the point of view of all the existing qualifications. However, I will argue that 'sexual self-relation through sexual other-relation' - the conceptual foundation of the discrimination ground which I established in chapter 13 against the declared definitions provided by the CJEU - would constitute the best possible definition of a conceptual foundation. By virtue of this definition, we can account for the distinction between the discrimination grounds 'sex' and 'sexual orientation'. Also, as will be explained below, this definition can account for most of the existing qualifications of the discrimination ground, including the most dominating ones.

Secondly, the discrimination ground sex is caught in a difficult, if not unsolvable, dilemma between flexibility and fixation. On the one hand, the present 'fixated flexibility' constitutes a limitation. On the other hand, a completely free interpretation of the discrimination ground would not be unproblematic either. If the concept of 'sex' was understood in its widest possible meaning, non-discrimination law would have to encompass a frightening multiplicity of matters; issues of sex pervade practically all our formal and informal institutions, in multiple ways. If the discrimination ground was truly opened up with respect to the richness of the concept of 'sex', it would either lead to destruction of social order or to an arbitrary use of the law.

In other words: the discrimination ground 'sex' is frozen and unfree with respect to its possible meanings, but not without resources as far as possible future developments are concerned. But such developments would be dependent on a highly subtle and not fully satisfactory conceptual foundation (or they would be without conceptual foundation at all), and they would be dealing with an invincible dilemma between fixation and flexibility.

A paradoxical hierarchy

Now, is there a general pattern which we may extract from this hierarchy?

We see that in a certain sense, women are given priority. But crucially, women are only given priority to the extent that there is something which can be said to make them special in comparison to men (that they are subjected to certain 'circumstances which can only affect women'). Also, the issue of transsexuality is highly prioritized in the hierarchy - that is, the issue of choosing one's own sex - or, maybe more accurately, choosing to realize physically the sex which emotionally is already one's sex.

In other words, the hierarchy gives priority to non-discrimination rights which concern situations in which *the meaning of sex is highly accentuated*. In the case of 'circumstances which can only affect women', a special name has been established - a name which logically implies that the situations of men and women are so fundamentally different that they cannot even be compared for the purpose of non-discrimination law. In the case of transsexuality, the issue of being one sex and not the other sex has existential meaning to a person - and this is recognized by the CJEU which emphasizes that the issue of transsexuality must be seen as a matter of dignity. In both cases, it is presupposed that being one sex and not the other sex is highly significant. When seen in the light of the conceptual foundation of the discrimination ground that we were able to establish, 'sexual self-relations through sexual other-relations', we may say that the signifiers which belong to the top of the hierarchy are reflecting this foundation in accentuated ways: 'sexual self-relation' does not only mean 'being one sex and not the other sex', it means 'being substantially different from the other sex for fundamental or existential reasons'.

In contrast, the names in the middle and bottom of the hierarchy are names which do not reflect the conceptual foundation in a fundamental or existential manner. The double-names 'Man in contrast to being woman' and 'Woman in contrast to being man' are simply abstract expressions of this foundation. The names 'Father on leave', 'Female Self-employed Worker' and 'Female spouse or life-partner of a self-employed worker, taking part in the self-employed activity' are also abstract expressions of the conceptual foundation in that they can be claimed by either men or women - but apart from that they contain other elements such as 'marriage', 'leave' and 'self-employment'. To the extent that these names can be said to reflect sexual roles at all (being a father, a spouse or a lifepartner), these sexual roles concern sexual other-relations rather than sexual self-relations. Finally, the names 'Adopting parent on

leave', 'Spouse or life-partner of self-employed workers, taking part in the self-employed activity' and 'Spouses or life-partners establishing a company together' do not really reflect the conceptual foundation of the discrimination ground at all. They are all sex-neutral names in the sense that they can be claimed by both men and women. Certainly, to some extent, they concern sexual roles, but those roles would concern 'sexual other-relations through sexual self-relations', rather than 'sexual self-relations through other-relations'.

Consequently, the pattern confronting us is the following: The stronger signifiers of the hierarchy enhance the conceptual foundation we have established by reflecting it in a fundamental or existential sense. The double-names in the middle of the hierarchy are abstract expressions of it. And the names in the bottom of the hierarchy generally do not reflect the meaning of the discrimination ground, or they do it in muddled ways (reflecting a variety of other issues as well).

Let us dwell on the nature of the signifiers in the top and the middle of the hierarchy. They intensify the meaning of sex immensely by implying that sex is significant for fundamental or existential reasons. In other words, they imply that *the very issue which is meant to be rendered insignificant, due to non-discrimination law, is in fact immensely significant*.

A similar point can be made in relation to the double-names in the middle of the hierarchy, only not with respect to their substances, but with respect to their attributes. The intransparencies and ambiguities characterizing the middle of the hierarchy is exactly due to the fact that discrimination and non-discrimination, distinctions between the sexes and abolitions of distinctions - along with the historical-contextualizing principle 'Substantial and not formal equality' - makes it extremely hard to tell whether differences between the sexes are in fact meant to be confirmed, supported and even reinforced, or whether they are meant to be rendered insignificant.

On the basis hereof, it must be concluded that the hierarchy of signifiers in-between names and non-names is marked by a *paradoxical aspect* in a very striking way. It is in fact a paradoxical hierarchy in a stronger sense than is the hierarchy of non-names the paradoxical aspect of which is mainly manifested in the particular applications of the law. In the hierarchy of non-names, there is never any doubt as to the general unwantedness of the distinctions underlying the respective discrimination grounds. Some of these distinctions are even so unwanted that it threatens the possibility of a conceptual foundation of the discrimination grounds in question. In other words, the

paradoxical aspect of the hierarchy of non-names consists in the fact that distinctions which are fundamentally seen as unwanted will never the less have to be articulated in the law - and such articulations happen partly in the designation of the discrimination grounds as such, and partly in the particular applications of the law. In the hierarchy of signifiers in-between names and non-names, it is the other way around: the paradoxical aspect consists in the fact that *the distinctions which are meant to be rendered insignificant by the law, are not only confirmed by a range of general signifiers, they are intensified immensely* - due to presupposed fundamental and existential understandings of the meaning of sex, and to complex, double-sided manifestations of the principle of non-discrimination.

**Signifiers of destiny meant to create access to possibility names
by way of *regulating or adjusting cultural destiny***

The paradoxical aspect of the hierarchy of signifiers in-between names and non-names will prove crucial to a general characterization of the signifiers entailed in the hierarchy. As recalled, the names of the hierarchy of names were characterized as *possibility-names* mainly centering around the possibility of *replanting one-self* in another state. The non-names of the hierarchy of non-names were characterized as *signifiers of destiny* meant to create access to possibility names, centering around *freedom from cultural destiny*.

The signifiers of the hierarchy we are now considering are obviously also signifiers of destiny. Or more precisely, the most dominating signifiers, those in the middle and top of the hierarchy reflecting the conceptual foundation 'sexual self-relations through other-relations', are signifiers of destiny. Human beings do not generally choose their own sex, and if they do, we must regard this choice as a destiny choice as well, a choice taken for the purpose of realizing, physically, the sex which emotionally speaking is the true sex.

Also, these signifiers of destiny are obviously meant to create access to possibility names, just like the non-names. However, they are not just supposed to do that by freeing human beings from the cultural significance of the categories of 'man' and 'woman', they are also supposed to enhance the cultural significance of those categories. In short: they are supposed to nurture cultural destiny.

Accordingly, we may characterize the most dominating signifiers of the hierarchy, those in the middle and the top, as signifiers of destiny meant to create access to possibility names, circulating around *adjustments of cultural destiny* - meaning that sometimes, the

distinction between the sexes should be rendered insignificant, other times, it should be protected and even enhanced.

How about the remaining signifiers, then, the names in the bottom of the hierarchy? We cannot call those names 'signifiers of destiny'. The categories established by those names are categories which human beings can choose to belong to, or not belong to ('fathers on leave', 'adopting parents on leave', 'spouses or life-partners of self-employed workers, taking part in the self-employed activity', 'female self-employed workers' etc.) - not withstanding, of course, the general influence of social coercive forces.

Obviously, the matter is that only to some extent do these names reflect issues of sex. And to the extent that they do, they hardly reflect the issue of being one sex and not the other sex. Rather, they reflect something which in broad terms could be called 'sexual roles'. Some of these names ('Father on leave' and 'Adopting Parent on leave') are meant to secure that certain circumstances shall not function as barriers to the enjoyment of other rights - and we may therefore call them *barrier-names*. It is clear that barrier-names resemble destiny names in the sense that they are meant to create access to possibility names; only, barrier-names correspond to social categories in general and not necessarily to social categories which have destiny character. The rest of the names which we find in the bottom of the hierarchy are not granted any proper as-if-rights. They are either granted modified as-if-rights or indeterminate access rights. For this reason, they are not barrier-names; they do not create access to any existing possibility names, they only secure the right-holders in question some kind of rights (either unspecified, or specified by way of minimum-requirements). We may therefore call them *weak possibility names*.

Mirroring, asymmetrically, the three focal points of the hierarchy of names

So, the most dominating signifiers of the hierarchy of signifiers in-between names and non-names are signifiers of destiny meant to create access to possibility names by way of *regulating* or *adjusting cultural destiny*, rather than abolishing the significance of cultural destiny.

Just like the five non-names, these signifiers of destiny can be said to mirror the three focal points of the hierarchy of names, citizenship, work and family, in the sense that these focal points are reflected as fundamental problematics by these signifiers. However, the mirroring in question is more subtle and less obvious than the mirroring

we detected in the five non-names. We found that 'Racial or Ethnic Religion' and 'Religion or Belief' concern fundamental ideological issues related to *citizenship*, that 'Disability' and 'Age' concern in a fundamental way the status of *work* in human society, and that 'Sexual orientation' circulates around fundamental problematics of the *family*. As far as the signifiers of destiny related to sex are concerned, the mirror images are less clear, more difficult to recognize. In fact, it is only on the basis of the reflections carried out in chapter 21 (the Interzone-chapter) that we can establish the connections.

In the Interzone-chapter, a human foundation was established on the basis of reflections on the meanings and roles of the concepts of 'dignity', 'private life', 'privacy' and 'decency' in the law we have dealt with. But also assumptions regarding fundamental differences between the sexes - as derived from part I.3 - were integrated in those analyses. We were able to qualify a presumed human foundation by way of three complementary perspectives. The third perspective qualified the human foundation in terms of a striving self relying on being one sex in contrast to the other sex. In order to be a civilizational self, a more fundamental self is needed - a self which is separable and recognizable as a body. I argued that this fundamental self represents a modern view on the nature of regulation according to which the distinction between destruction and construction of bodies is crucial.

In other words: the possibility of a sexual self-relation - awareness of being one sex in contrast to the other sex - is fundamentally related to the possibility of distinguishing between destruction and construction of bodies - which in turn constitutes a condition of modern regulation. In this sense, the dominating signifiers of the hierarchy, all reflecting 'sexual self-relations through other-relations', concern a fundamental issue of modern *citizenship*: that only separable and recognizable bodies can be subjected to constructive regulation.

For the same reason, the dominating signifiers concern a fundamental issue of *work*. Work in modern states unfolds on the basis of the presumption that fundamental selves in terms of separable and recognizable bodies exist, and that they can be held accountable as such. Work in modern states depends on the possibility of distinguishing between forbidden violence and force, on the one hand, and acceptable means of disciplining, on the other. In addition, work in modern states rely on a dynamical temporality. As argued in the Interzone-chapter, the presumed fundamental self - in the shape of a separable and recognizable body - does not only represent a

modern view on the nature of regulation, but also a modern dynamical temporality according to which the possibility of distinguishing between generations is crucial.

Finally, the dominating signifiers concern a fundamental issue of *the family*. The family as an institutional order represents internal dependencies. When reflected in the light of the concept of 'private life', the family can be seen as a symbol of - and in general as a particularly strong manifestation of - our fundamental connectedness and interwovenness. According to the second of the three perspectives by which we qualified a presumed human foundation in the Interzone-chapter, we are fundamentally bound together, fundamentally giving ourselves to others. As a symbol and general manifestation of our fundamental connectedness and interwovenness, the family is also that order in which the possibility of sexual self-relations is particularly intricate. The family is characterized by modes of living together in which the separability and recognizability of bodies may, at times, partly dissolve. Simultaneously, it is traditionally characterized by sharply drawn sexual roles. In addition, it is in the family that the modern construction of bodies and the modern distinction between different generations unfolds in the most subtle way. - In short, the family concerns in complex and equivocal ways issues of sexual self-relations, of being one sex and not the other.

Thus, the dominating signifiers of the hierarchy can be said to mirror the three focal points of the hierarchy of names, 'citizenship', 'work' and 'family'. What the mirror images reveal to us are ways of distinguishing between bodies, between different kinds of regulation and between different generations and times. These are the fundamental issues which connect the signifiers in question - the conceptual foundation of which we have established to be 'sexual self-relations through other-relations' - to 'citizenship', 'work' and 'family'.

We saw earlier that the five non-names reflect fundamental problematics of 'citizenship', 'work' and 'family' in an asymmetrical way. This is so because the legislation which is relevant to non-names mainly cover issues of work. As to the signifiers we are now investigating, we are confronted with four non-discrimination Directives. Together they cover much larger areas of law. Not only social rights related to work and springing from the employment relationship are included, but also social security rights originating from and financed by the state as well as goods and services of public and private nature.

In spite of the bigger material scope, the mirroring which we may detect in the hierarchy of signifiers in-between names and non-names is also asymmetrical. Basic problematics of 'citizenship', 'work' and 'family' are reflected by that hierarchy, but these problematics are mainly met from the perspective of work.

The rights entailed in the hierarchy do not create access to the possibility name 'Citizen' since laws of immigration, citizenship and residence are not covered by the material scope of any of the four non-discrimination Directives. However, they give access to a range of rights which are usually attributed to national citizens (not least social security rights). In that sense they serve to enhance the meanings and benefits of citizenship, but only for those who are already citizens. In this particular sense, the rights entailed in the hierarchy can be said to give access to the possibility name 'Citizen'.

The rights entailed in the hierarchy do not create access to the possibility name 'Family-member' either, since family laws are not covered. However, indirectly and under certain circumstances they may be, as we saw in one of the judgments concerning transsexuality. Apart from that it is clear that the rights entailed in the hierarchy give access to many social rights the meaning of which is to support the family. Those social rights do not in themselves give access to the name 'Family-member', but they will improve the conditions under which people may choose to establish a family.

Consequently, the hierarchy of signifiers in-between names and non-names displays, in overall, a pattern similar to that of the hierarchy of non-names: it reflects all three focal points - citizenship, work and family - as it reflects possible entanglements between them. But it mainly reflects these entanglements from the point of view of only one of these focal points, namely work. However, the hierarchy of signifiers in-between names and non-names gives more weight to 'citizenship' and 'family' than does the hierarchy of non-names. It gives access to the possibility names 'Citizen' and 'Family-member' in the sense that it strengthens the respective meanings of those names. The '*problematic citizen*', the '*problematic worker*' and the '*problematic family-member*' will be helped to benefit more from the names 'Citizen', 'Worker' and 'Family-member'. But crucially, the right-holder who can not already claim to be a 'Citizen', 'Worker' and 'Family-member' will only gain access to the possibility name 'Worker'.

As for the remaining signifiers, that is, those in the bottom of the hierarchy which do not reflect the conceptual foundation 'sexual self-relations through other-relations', they can be said to mirror the focal points 'citizenship', 'work' and 'family' as well, but in a qualitatively different way. The names in the bottom of the hierarchy do not mirror

fundamental problematics of 'citizenship', 'work' and 'family'. They simply mirror some features of 'family' and 'work' in that they concern family roles (father, parent, spouse, lifepartner) and structures of work (working versus being on leave, employment versus self-employment), - and hereby, they mirror, indirectly, some features of 'citizenship' (it is in no way required that a citizen is also a family-member and a worker, but it is certainly expected; an ideological connection exists). Issues of sex are present in those names in a broad and associative way, mainly because of the references to family roles. Of course, it could be argued that this presence of issues of sex necessarily refers back to the establishment of differences between the sexes, and that therefore, the names in question do also mirror fundamental problematics of 'citizenship', 'work' and 'family'. If that is so, they do it highly indirectly - in a much weaker and more muddled sense.

The barrier-names 'Father on leave' and 'Adopting parent on leave' give access to certain aspects of the possibility name 'Worker', while simultaneously establishing some particular sub-names of 'Family-member'. The weak possibility names of the Employment Non-discrimination Directive, on the other hand, do not give access to any other names, but can be said to supplement existing names for workers and for family-members.

The internal dynamics of the hierarchy seen in the light of the conceptual foundation characterizing the dominating signifiers

Consequently, we are faced with a highly compound hierarchy. Not only does it entail a number of different signifiers and a number of different logics of rights. It is also so that if we are to characterize the signifiers of the hierarchy more substantially, that is, with respect to the matters of concern which underpin them, the hierarchy will break into two - the two upper levels of it forming a unity of its own, and the lower level constituting, in turn, a jumble of different concerns.

In the top and the middle of the hierarchy, we find the most dominating and mostly developed signifiers. They all reflect, some way or another, the conceptual foundation we have established, 'sexual self-relations through other-relations'. What characterizes this part of the hierarchy is that it is marked by a paradoxical aspect. The very distinctions which are meant to be rendered insignificant by the law, namely distinctions between women and men, are intensified immensely by the law. Distinctions between women and men are not not only intensified in the sense that they

are being articulated; they are given a fundamental and existential meaning. Also, distinctions between women and men are intensified in the sense that discrimination and non-discrimination are manifested side by side which means that such distinctions will not only be abolished, they will also be nourished and protected.

On the basis of this paradox, the signifiers in the top and the middle of the hierarchy can be qualified as *signifiers of destiny meant to create access to possibility names, circulating around adjustments of cultural destiny* (rather than circulating around 'freedom from cultural destiny' as non-names do).

As such signifiers of destiny meant to create access to possibility names, they mirror the three focal points of the hierarchy of names, citizenship, work and family, just like the non-names of the hierarchy of non-names. They mirror these focal points in the shape of fundamental problematics; the presumption of fundamental differences between the sexes are crucial to modern regulation (state- as well as work-regulation), to modern dynamical temporality (pervading, at least, the world of work, if not also the state), as it is, in an intricate way, to the order of the family. But just like the five non-names, they mirror these focal points in an asymmetrical way: All problematics are met, primarily, from the point of view of work.

If we turn our attention to the bottom of the hierarchy, we are facing a different and much more messy picture. A number of different issues are reflected - marriage, fatherhood, parenthood and issues related to structures of work. The names in the bottom of the hierarchy are not destiny names, they are either barrier-names or weak possibility names. To the extent that they can be said to mirror, at all, the three focal points, citizenship, work and family, they do not provide us with mirror images of fundamental problematics, only representations of particular features. All in all, the mirror images are too muddy in order for us to conclude anything as to 'symmetry' or 'asymmetry'. We can say, however, that issues of family and work are given weight in the bottom of the hierarchy.

Obviously, the dynamics of the hierarchy are both of an internal and external nature. To the extent that the hierarchy is dominated by signifiers of destiny meant to create access to possibility names, the most important dynamics are external; they are directed towards national hierarchies of names or EU-law hierarchies of names. Also, it should be mentioned that dynamics in the direction of the hierarchy of non-names would be possible; the signifiers of destiny we have examined could collide with another signifier of destiny, namely the non-name 'Religion or belief'.

But we have also detected important internal dynamics. As discussed above, the double-names 'Man' and 'Woman', the qualification of the discrimination ground 'transsexuality' and the name 'Woman in so far as she is subjected to circumstances which can only affect women' are sometimes combined with each other within the course of argument of a judgment. It is clear that these combinations are of a different kind than the multiple (actual and possible) combinations characterizing the hierarchy of names. In the hierarchy of names, different names or subnames are brought together with the result that new combined names arise. In the hierarchy of signifiers in-between names and sub-names, in contrast, different signifiers are replaced for each other. Hereby, they are complementing each other logically, but they are never synthesized.

These internal replacements of signifiers are manifestations of internal dynamics in the sense that the signifiers in question affect each other in terms of their respective meanings and logical possibilities. But also in the judgments in which no internal replacements occur (in which it is clear which signifier and which logic of rights is the operative one), complementary dynamics are implied. The signifiers in question are continuously developed as a constellation of signifiers, rather than individually. Most importantly, the difference between those kinds of discrimination which are logically based on the possibility of comparing the situations of women and men, and those kinds which are not, is constantly played with and refined. For instance, since positive discrimination implies such comparability, and 'special protection of women' does not, the CJEU must, whenever confronted with a particular case of favorable treatment of women, establish whether the woman in question has been treated favorably because she was subjected to circumstances 'which can only affect women' or whether she was treated favorably in a situation which could also be experienced by a man; in other words, the CJEU must continuously establish what characterizes the life of a women exclusively. But hereby, it is not only the name 'Woman in so far as she is subjected to circumstances which can only affect women' which is being developed and refined, the double-names 'Man in contrast to being women' and 'Woman in contrast to being man' are too. Or, to take an example related to 'transsexuality', if a case regarding transsexuality is interpreted in accordance with the logic of the double-names 'Man in contrast to being women' and 'Woman in contrast to being man', then these double-names are developed so as to include 'A Man the sex of which is the result of gender reassignment' and 'A Woman the sex of which is the result of gender reassignment'. If,

on the other hand, the case is interpreted in accordance with the logic of non-names, then it is the discrimination ground, and not the double-names, which is being conceptually developed.

When seen in the light of the analysis presented above, regarding the substantial nature of the signifiers in the top and the middle of the hierarchy, the unfolding of internal dynamics between those signifiers becomes intelligible. They all reflect the same conceptual foundation, the same paradox and the same fundamental issues, crucial to modern citizenship, work and family order. In other words: the signifiers in the top and the middle of the hierarchy are intimately related to one another for conceptual reasons; they all circulate around the importance of fundamental differences between the sexes in the midst of non-discrimination law.

A progressive or confirming order?

Finally: To what extent are we confronted with a progressive hierarchy, and to what extent are we confronted with a hierarchy which confirms already existing laws and arrangements?

Certainly, the hierarchy is *progressive*. In spite of the many exemptions, in spite of the many possibilities of justifying discrimination, and in spite of complexities and intransparencies, we are facing some very developed and logically flexible non-discrimination rights which already in a large number of cases have proved capable with respect to counter-acting discrimination against women as well as men, and with respect to protecting the work-situation of women who are becoming mothers. Powerful fundamental principles are laid down serving the interpretation of the principle of non-discrimination: 'special protection of women in relation to maternity' and 'substantive, not formal equality'. Also, it should be mentioned that non-discrimination rights are supplemented by a few substantial rights.

However, the progressivity of the hierarchy is of a special kind for two important and related reasons.

Firstly, as explained above, the hierarchy is, to some extent, the manifestation of an interim order. In other words, it is supposed to become more progressive at a later point than presently. The progressivity has been partly delayed for an indefinite period. The fact that we are not only separated from the ideal order in terms of time, but also in terms of knowledge, makes the matter especially intricate. We know that some of the exemptions are supposed to disappear over time. But we do not know whether positive

discrimination will always be necessary. We do not know either, whether the principle of 'substantive and not formal equality' will maintain its importance, or whether there will be a time in which the formal principle of non-discrimination will suffice (the importance of the principle 'substantive and not formal equality' is exactly due to the fact that discrimination on grounds of sex permeates the social world to such an extent that manifestations of discrimination could not be captured by formal non-discrimination law).

Secondly, the progressivity of the hierarchy is of a special kind exactly because of the importance of the principle 'substantive and not formal equality'. As we saw, in the hands of the CJEU, this principle means contextualizing considerations - with respect to the situation of the right-holder in question as well as the collective social situation at large. By virtue of its nature, a contextualizing consideration will have an inner tendency towards confirmation of existing orders, rather than towards progressively breaking with them. A contextualized consideration takes as its starting point that which exists - even if the purpose of the consideration is the transformation of that which exists. More precisely, in order for a contextualized consideration to not drown in the already existing purposes and logics of the context which it considers, it must bring a vision of *another possible context* in play with the context of investigation. Accordingly, we must ask to what extent interpretational horizons are established which imply such visions?

In the judgments analyzed under the perspective 'positive discrimination', it is clear that the CJEU presupposes - as self-evident - that traditional family patterns should be broken with. That presupposition constitutes at least a negative vision of another context. In the maternity-judgments, the idea of 'special protection of women' in relation to pregnancy and maternity (and related matters) is given the status of a fundamental principle. The CJEU explained that this principle honors the fragility characterizing the states in question, implying that it is important to prevent women from choosing not to become mothers, as it is important to keep them in the labour market. There can be no doubt that the CJEU envisions *another possible context* in which women are integrated in the labour market while simultaneously being mothers. This implies, obviously, another relationship between the labour market and the order of the family.

So, a vision of another possible context is doubtlessly involved in the manifestations of the principle of 'substantial and not formal equality' - a vision which means that the

CJEU will not merely drown in the concerns springing from the existing context under consideration. However, since this vision does hardly imply anything else than the features mentioned above, namely 'the integration of women in the labour market' and 'not preventing them from being mothers', it will still be for the CJEU to determine, in particular cases, the exact meaning of 'substantial and not formal equality'. This means that a large interpretational space will still be open; the 'substantial consideration' can drag the law in a progressive and transforming direction, as it may also largely confirm and merely adjust the formal and informal orders which already exists. To some extent, we may not even know whether an interpretation of what 'substantive and not formal equality' means in a particular case is of a progressive or a confirming nature. The intransparencies of the hierarchy does not only affect our possibilities of evaluating the respective strengths of the double names 'Man in contrast to being woman' and 'Woman in contrast to being man', but also of determining to what extent transformations of existing orders are implied.

Consequently, the hierarchy is doubtlessly progressive, but it is so in a peculiar bifurcated way. The progressivity is of an only intermediate nature, pointing towards other, more advanced transformations sometime in an unknown future. In addition, it is, to some extent, characterized by a contextualizing principle of interpretation which binds the law to the concerns of what presently exists. As it appears, this contextualizing principle of interpretation may itself be seen as an expression of intermediateness - even when guided by a vision of another ideal context yet to come. But since we do not know to what extent this principle of interpretation will still be necessary in the ideal order supposed to be realized at an unknown point in the future, we cannot say whether this ideal order will itself be characterized by a permanent intermediateness.

When taking into account, however, that also this hierarchy (like the hierarchy of non-names) is supported by additional judicial elements as well as policy-elements, it would be reasonable to conclude that the ideal order supposed to be realized sometime in the future will itself be an intermediate order. In the non-discrimination Directives regarding sex, the role of organizations is specified in greater details and in more obliging ways than in the Directives relevant to non-names. This indicates, of course, that non-discrimination rights are not seen as sufficiently powerful in themselves. And the support given by content rights is not enough. The deep-rootedness and all-permeating nature of discrimination on grounds of sex must be addressed in other

ways. Nothing indicates that these judicial elements and these organizations are meant to be only temporary. This, in turn, makes us assume that the contextualizing principle of interpretation will maintain its importance; there will hardly ever be a time in which the formal principle of non-discrimination will suffice.

In other words, we are confronted with an order which both possesses an intermediateness which is supposed to be only temporary and an intermediateness of a permanent nature.

Naturally, the hierarchy also confirms existing laws and arrangements.

In terms of *negative confirmation*, the hierarchy covers a wide material area but is also characterized by extensive exemptions, especially temporary exemptions meant to give the national systems time to adjust to a less discriminating future. Permanent exemptions are laid down as well, though - regarding educational institutions, media, the private space of the family as well as places of 'privacy' or 'decency' in general. Not to mention the areas of law which do not fall within the competences of the EU at all, family laws and immigrant laws for instance.

It is interesting that the permanent exemptions largely concern some of the most important institutions as far as cultural education is concerned: the family, the media, educational institutions. Considering the all-permeating nature of discrimination on grounds of sex and the problem of multiple layers of discrimination, as discussed above, these exemptions are obviously crucial.

As regards justification of discrimination, the hierarchy is not characterized by as many and as developed 'escape-routes' as is the hierarchy of non-names. The judgments concerning the 'occupational-requirement-provision', however, are noteworthy. They certainly confirm well-established male and female roles.

Finally, the discrimination ground 'sex' is not given free as a non-name; its meaning has been fixated in the shape of at least six different qualifications of the discrimination ground. This means that forms of discrimination which are based on other understandings of the meaning of sex than those implied in the established qualifications, are left untouched. As argued above, the fixations of the possible meanings of the discrimination ground are - in spite of the limitations they imply - not unreasonable; a completely 'freed' discrimination ground would endanger either the law or the institutional orders within which the law was applied.

In other words, the hierarchy negatively confirms a number of existing laws and arrangements. To some extent, a wider material scope could have served to counteract

the problem that discrimination on grounds of sex permeates practically all social institutions. On the other hand, opening all corners of the social terrain to non-discrimination law (by way of an extended material scope as well as by way of a free interpretation of the discrimination ground sex) would affect the existing social orders so radically that it would undermine them - had the efficiency of the law not been undermined before that happened.

In terms of *positive confirmation*, the hierarchy shares, naturally, an important feature with the other hierarchies, namely that of reproducing national rights. However, in connection with the unfolding of the principle of non-discrimination as discrimination ('positive discrimination') or on the basis of discrimination ('special protection of women'), non-discrimination rights can sometimes resemble substantial rights. The non-discrimination Directives concerning sex *encourage* positive discrimination of women, or alternatively, of 'the underrepresented sex'. This means of course that they allow for positive discrimination which already exist in they member states, but they may also give rise to new national rules regarding positive discrimination. To the extent that the court lays down, in connection with the principle of 'special protection of women' some general rule (such as the rule that pregnant women cannot be dismissed), we may also say that a substantial right has arisen from the principle of non-discrimination.

These are exceptions from the general pattern, of course. But they are important exceptions (especially the rule that pregnant women cannot be dismissed plays a significant role in the case-law). They reveal to us that discrimination unfolds on different conditions than non-discrimination. In principle, positive discrimination is merely the logical reversal of non-discrimination ('there shall be discrimination'). But since laws are build on discrimination, and not on non-discrimination, the introduction of a new element of discrimination is equal to the introduction of a new law (whereas the introduction of an element of non-discrimination merely loosens the discriminatory architecture of an existing law). As for the principle of 'special protection of women', it is manifested primarily as as-if-rights, implying other comparisons than that of men versus women. But with respect to certain issues (such as dismissal), the CJEU has transformed an as-if-right into a substantial right - a transformation which is not only logically possible, but also intuitively convincing on the basis of an original distinction between women and men expressed in the name 'Woman in so far as she is subjected to circumstances which can only affect women'.

So, the hierarchy reproduces, like the other hierarchies, national rights and hereby national criteria and various forms of discrimination. But to a small extent, new substantial rights can be said to have arisen from the principle of non-discrimination in its manifestations as discrimination.

Also, we should consider, like we did when analyzing the hierarchy of non-names, to what extent conceptual worlds are being build which positively confirm existing orders. In connection with the temporarily accepted forms of discrimination - the exemptions laid down in the Social Security Non-discrimination Directive - the internal needs of the national systems are not only emphasized by the CJEU, but developed conceptually in terms of a financial equilibrium criterium and a consistency criterium. But apart from that, the establishment of the existence of fundamental differences between the sexes constitutes a crucial conceptual contribution (mostly on behalf of the court, but also implied in the legislation) - and a most powerful way of confirming an already existing deep-rooted general understanding.

We have already analyzed the presumptions of fundamental differences between men and women, namely in the Interzone-chapter, and we have referred to some of the results in this chapter as well; there is no reason to repeat the analysis. We shall merely recall that these presumptions circulate around three elements: an abstract difference between the sexes (the difference 'as such'); differences related to maternity; and differences springing from a somehow intricate relationship between women and violence.

We shall also recall that since these are fundamental presumptions, they must be understood in accordance with the temporal logic of universal law: they concern conditions which have always and will always characterize human life; simultaneously, however, they are to be continuously re-installed as such through the law. Clearly, positive confirmation in the shape of universal confirmation constitutes the strongest possible kind of positive confirmation.

The conceptual foundation reflected by the names in the middle and the top of the hierarchy, 'sexual self-reflections through sexual other-reflections' is entangled in the same universal logic. As analyzed above, fundamental presumptions are in play in connection with all of the signifiers in question - in the substances of the signifiers in the top of the hierarchy and in the attributes of the signifiers in the middle of the hierarchy. This does not mean that 'sexual self-reflections through sexual other-reflections' are only unfolded in universal ways in the hierarchy. In most of the

particular applications of the law, such reflections are implied in a historical-cultural way, that is, they concern given contemporary ways of distinguishing between men and women. But in any case, the core of the conceptual foundation is universal. It concerns the issue of being a self. Or to put in the words of the Interzone-chapter: the civilizational self presupposes a more fundamental self, and that fundamental self depends on being one sex in contrast to the other sex.

Again, we have reached a point of the analysis from which we cannot continue any further. In order to understand the significance of these universal conceptual contributions to the ideal order, another kind of analysis is clearly required, namely an analysis of the qualifications carried out by the CJEU with respect to the basic logics of the anchors of order presumed by the law.

Chapter 25

The Social Structure of the ‘ideal order’

We have now constructed the three hierarchies, and the time has come for an integrating analysis. All along, we have been interested in the social structure considered as a whole, and not just in the three hierarchies. We shall now attempt to bring the three hierarchies together within an overall construction which takes into account both the clear hierarchical aspects they entail as well as the aspects which defy any hierarchical construction.

More precisely, we may ask: Is the social structure of the ideal order a hierarchical structure? Relying on many or few social categorizations? Or is it an egalitarian structure? Would there, in any case, be a foundation of equality - something which is common to all people of the order? And lastly, is it a fixable social structure, or are names and rights so fluid that no social structure can be determined once and for all, only logics and purposes?

I will argue that we are confronted with all of these features - and in rather complex combinations. We shall need to characterize the social structure of the ideal order by way of three different and complementary perspectives: The social structure we are facing is in some respects a *hierarchical structure*, and in some respects it is a *fluid structure* implying a particular idea of equality. Finally, it is a structure which is based on presumptions of a *common, human foundation*, but crucially, this foundation does not

give rise to common rights. For this reason, it can neither be seen as belonging to the hierarchical aspects nor to the fluid aspects. Rather than constituting a separable element of its own, the common, human foundation pervades the social structure in all its parts.

The hierarchical aspects of the social structure
- the celebration of a certain idea of a normal life

Certainly, it is possible to draw a hierarchy representing the social structure as a whole. Clear hierarchical structures are not only gained from the hierarchy of names - which is the only hierarchy among the three which comes close to being a hierarchy in a traditional sense, not disrupted or intransparent, and based on categorizations of people. Also the two other hierarchies imply hierarchical structures, but indirectly or negatively. By way of their asymmetrical mirroring of the focal points of the hierarchy of names, their exclusions and justifications, their reproductions of national rights, their principles and horizons, they both confirm and complement the hierarchical structures of the hierarchy of names.

It should be noted, though, that although the hierarchy we can draw is a *clear hierarchy* in the sense that it unquestionably implies that some people (according to certain categorizations) are far more privileged than other people (according to other categorizations) in terms of rights, it is also a complex and dynamical hierarchy, characterized by an endless number of sub-names, including combinations of names and sub-names, internal dynamics and vast greyish areas.

Hierarchical aspects derived from the hierarchy of names

Several of the main hierarchical aspects are given to us directly from the hierarchy of names. Accordingly, we may begin by rapidly summarizing the main hierarchical aspects which we derived from the analysis of the hierarchy of names.

Those who are both 'EU-citizens' and 'Workers', as well as their 'Family-members', make out the upper layers of the social structure, when considered as a hierarchy. Reversely, those who cannot claim any of these names make out the very bottom of the social structure. In many cases, they would be practically excluded. Those who can claim the name 'EU-citizen', but not the name 'Worker' (in any of its possible meanings) will belong to the lower levels of the social structure as well, along with their family members, unless they are capable of self-support, due to other economical sources than work. Likewise, a 'Third Country National' who is a 'Worker' will belong

to the lower levels of the structure, along with 'Family Members', unless other criteria are satisfied, concerning capabilities of self-support and length of residence.

When that is said, the name 'Worker' covers so huge differences that there are parts of the name which extends towards the bottom of the social structure, even if we only consider 'EU-citizen Workers'. In other words, a person may be an 'EU-citizen' *and* 'Worker', but belong to the lower parts of the social structure. That would be true, especially, for job-seekers without a working history, people who are covered by social security benefits but has never worked and will never work, extremely mobile people and job-seekers who have no income what-so-ever.

In the middle of the social structure, we find those EU-citizens who are not 'Workers', and not 'Family-members' of 'EU-citizen Workers', but who are capable of supporting themselves due to other sources (like f.instance study funding from their own member state or from private funds). In the middle, we also find those 'Third Country Nationals' who can satisfy certain criteria, primarily with respect to length of residence and self-support, but also with respect to education and professional experiences, - or who have found other legal doors (through national law or particular international agreements) to transnational mobility within the EU. Retired people belong to the upper levels of the structure if they have a working past in the state of residence, in the middle, if they have not, but can support themselves, and in the lower parts if they cannot satisfy any of those criteria.

It should be mentioned as well that that the earning of social rights is hugely important. Those who have already earned rights (primarily through work, but also through various kinds of 'memberships' of the national welfare systems) will generally belong to the middle or higher levels of the structure, whereas those who have earned none, or only few and weak, will belong to the lower levels. On the other hand, the amount of work presently carried out, the level of pay and the nature of the working contract do not directly influence the position of a person within the social structure. Indirectly, those factors will be influential, though, since they are likely to affect the possibilities of earning rights.

Completely excluded are a large number of 'Third Country Nationals', especially the illegal 'Third Country Nationals'. And in practice, a number of EU-citizens - who are dependent on social assistance in their own member state and who have not found work in another - will be excluded from entering the hierarchy.

Clearly, the focal points of the social structure is EU-citizenship, work and family. Internal dynamics are created by *the building up of a working history*, by *stability* and by *the will to work and integration* - primarily in the national labour market, but also in the national systems and the society in a broader sense. In addition, the *capability of self-support* is crucial for 'Third Country Nationals' as it is for those 'EU-citizens' who are not 'Workers'. Also, 'Third Country Nationals' must prove *their good will as such* in order to move up in the hierarchy; they are subjected to a general suspicion of fraud and abuse.

Apart from all of those features, it is a social structure which confirms national hierarchies and forms of discrimination due to its reproduction of national rights and due to the fact that national labour markets are based on competition. Naturally, it will vary from state to state what are the crucial factors. However, we can safely say that the significance of factors such as education, language, working experience, social status, social connections and capabilities, level of income and a general will to ideological adaption, not to mention pure luck, will generally be reproduced - that is, they will characterize the social structure of the ideal EU-order as well.

For the same reasons - the reproduction of national rights and the fact that national labour markets are based on competition - inter-European hierarchies are confirmed. Citizens from certain member states will generally be in a more difficult position with respect to finding work in other member states than citizens from other member states - due to their language and culture, the general education offered and the forms of working experience possible in their original member state. Likewise, the differences between national welfare systems are reproduced. Accordingly, nationality does play a role in the social structure, not just with respect to the difference between 'EU-citizens' and 'Third Country Nationals', but also with respect to the differences of nationality of EU-citizens.

Hierarchical aspects extracted from the hierarchy of non-names and the hierarchy of signifiers in-between names and non-names

The other two hierarchies - the hierarchy of non-names and the hierarchy of signifiers in-between names and non-names - confirm, indirectly or negatively, the social structure which can be derived from the hierarchy of names.

They both focus extensively on matters of work, especially the integration of people in the labour market who would otherwise be in risk of being excluded from it. But apart

from that, the two hierarchies mirror, according to our analysis, fundamental problematics of citizenship, work and family.

Also these hierarchies reproduce national rights - and hereby national hierarchies and forms of discrimination. And crucially, the discrimination grounds entailed in them do not include grounds such as 'language', 'property', 'education', 'talent', 'competences', 'personal appearance', 'working experience', 'social status', 'income' and 'political opinion' - discrimination grounds which are deeply embedded in contemporary structures of power.

Finally, it is noteworthy that the issue of 'nationality' is explicitly excluded from the scope of the Race Equality Directive. This confirms, of course, that discrimination against Third Country Nationals on the grounds of their legal status as 'Third Country Nationals' is not prohibited; on the contrary, that kind of discrimination constitutes a significant feature of the social structure.

The hierarchy of non-names and the hierarchy of signifiers in-between names and non-names do not only confirm the social structure which can be derived from the hierarchy of names, they also add more aspects to it.

Firstly, they tell us that certain factors should *not* influence the position of a person in the social structure. 'Racial or ethnical origin', 'age', 'disability', 'sexual orientation', 'religion or belief' and 'sex' should not determine whether a person would belong to the higher or lower levels of the structure - neither in case the person can be characterized, him- or herself, by those factors, nor in case he or she can otherwise be closely connected to those factors. As we know, their respective meanings are highly ambiguous, - for which reason we can only indicate that the mentioned factors play a negative role in the social structure in its manifestation as a hierarchy, we cannot define them.

But also from the exemptions and 'justifications of discrimination' which play a huge role in both hierarchies, we can derive a number of other features. It is clear that the rights of *young people* who have a whole working life in front of them are prioritized higher than the rights of older people who are close to retirement. *Religious people* are seen as representing a continuous problem. *Handicapped people* are protected in a number of ways, but no guarantee of financial support is given - which means that employers may not be able (or willing) to afford the necessary expenses in relation to the employment of handicapped people. With respect to a number of social rights (those involving the condition of marriage), *homosexual people* can only be helped if they

reside in countries in which a developed rights regime for homosexual couples already exists. Due to severe conceptual difficulties and limitations haunting the discrimination ground 'racial or ethnic origin', a large number of people who *originate from countries outside of the EU, who deviate culturally from established norms, or who merely look different or speak differently*, may not be helped by EU non-discrimination law.

As for *men* and *women*, they appear to be granted equal importance. Yet, intransparencies are huge with respect to this matter. We can say, however, that women who are *mothers* are given special attention. We also saw that *transsexuals* are prioritized highly.

All these features are clearly hierarchical features. Certain people - according to certain categorizations - are prioritized higher or lower. Naturally, these hierarchical features would need to be combined with the hierarchical features derived from the hierarchy of names, while taking into account the particular nature of the respective problematics involved. Thus, an unemployed person who is handicapped or manifestly religious will be positioned lower in the social structure than an unemployed person who is neither - in spite of non-discrimination law. A homosexual person who is the partner of a 'Worker' who has earned pension rights will be positioned lower than a non-homosexual spouse of a 'Worker' with pension rights - in spite of non-discrimination law. An old person who is a 'Worker' will be positioned lower than a young person who is a 'Worker' in so far as the risk of dismissal is concerned.

The 'normal life' - the destiny of today

When thus reconstructed - as a hierarchical structure based on categorizations of people - the social structure displays to us the idea of 'the normal life', its phases and different aspects. 'The normal life' circulates around work and the paths towards work and away from work. For many people, dynamics are accessible; it will be possible to move upwards in the social structure, towards the full grown working life, the full grown memberships of systems of rights, the full grown societal integration, institutionally and mentally and the full grown family life, implying close economic, practical and emotional interdependencies. The normal life can be realized in many different places. This is ultimately the possibility, the freedom, implied in the social structure, apart from the possibility of realizing the normal life as such: the full grown working life, memberships, societal integration and family life is not bound to a particular place, namely the state of which a person is a national citizen, but may be realized in many other states, as long as a certain degree of stability can be

presupposed. - However, for many other people, it will never be possible to move to the higher levels of the social structure and realize the 'normal life' in its full grown sense. Third Country Nationals will never reach the higher layers of the social structure, only the middle layers. Others - such as homosexuals, religious, handicapped or old people, or people who deviate from established norms culturally, historically, or in terms of appearance - may very well reach the higher layers, but they may also be hindered in doing so; the non-discrimination law which supports them is full of holes and escape-routes. Finally, there are those which will neither reach the higher nor the middle levels due to factors in relation to which there might be national regulation (such as institutions and policies of general education), but which are certainly not regulated according to any idea of non-discrimination (rather, institutions and policies will generally enhance and not diminish the discriminatory importance of the differences implied): 'talent', 'intelligence', 'personal appearance', 'social connections', 'social status', 'language', 'property', 'education', 'competences', 'working experience', 'income' and 'political opinion' - just to mention some of the important discriminating factors which are deeply embedded in contemporary structures of power and reproduced by the ideal order of EU-law.

So, this is a social structure which celebrates a certain idea of a normal life. Although freedom, variety and flexibility belong to this normal life, the contents of it are also largely determined. Moreover, the normal life characterizes everybody belonging to the social structure, only to different degrees. More precisely: the lower layers of the social structure are not characterized by *another idea* of the normal life, but simply by a deficient realization of the same idea, in one or more respects. By moving upwards in the social structure, a person will be given the conditions of possibility for realizing this idea in a fuller sense. It is also so, however, that *in order* to move up in the hierarchy, the idea of the normal life must be realized in a fuller sense. Means and ends, contribution and reward are closely connected.

It should be recalled that 'Third Country Nationals' are only given the possibility of realizing the idea of the normal life in its full sense with respect to its *aspects of determination*, not with respect to its aspects of freedom, variety and flexibility. 'Third Country Nationals' who move upwards in the social structure will be rewarded with mobility rights and work access rights and family-related rights (family reunification rights as well as derivative rights for 'Family-members'). But they will never have the free movement rights and the non-discrimination rights connected to the EU-

citizenship. EU-citizens who cannot and will never be able to work will never reach the higher layers of the structure, either. Apart from that, a range of other people will be hindered in realizing the idea of the normal life in its full sense. But as already stated, no other idea of the normal life will describe them instead, they represent deficient lives.

How about the completely excluded, then? The illegal 'Third Country Nationals' as well as legal 'Third Country Nationals' who have found no legal door to the regime of EU-rights. Or those who are practically excluded, the wanderers who move from country to country, or the prisoners of the national systems (those who rely on social assistance). One could say, that through these excluded, forgotten or ignored people, we gain glimpses of lives which are not merely characterizable as deficient lives in relation the idea of the 'normal life', but which are lives of a different nature. But of course, when seen through the prism of the law we have dealt with, these lives are shadow-lives. Whether happy or unhappy (and many of them will be unhappy), we are conceptually blinded with respect to their nature.

As it appears, we are confronted with a social structure which is not without totalitarian aspects - although it is a totalitarianism which is realized as a regime of rights and not as dictatorship. I am not saying that there is no way out. As it appears from the reflections above, the lives of the excluded or ignored are lives which are clearly 'outside'. A person may even choose a life among the excluded or ignored, or a life in the lower layers of the social structure. In this sense, we are not confronted with totalitarianism. But in a deep conceptual sense, we are facing totalitarianism: there is only one vision of the normal life (although it entails many variations); and this vision represents the reward as well as the contribution, that is, it does not only represent the duties which must be performed, but also that which is gained through those duties.

What about human rights, we may ask? Do they not represent a higher, dignified life, do they not represent the unfolding of freedom, not least spiritual freedom, including the forming of new communities and hereby new 'normal lives' (both in the sense of particular communities, and in the sense of being part of reforming the national community)? Truly, this is what human rights represent when looked upon historically as well as ideologically. But as we have seen, within EU-law, human rights function as interpretational aspects in connection with the application of EU-rights. That is, they are not for everyone, but only for those who can claim other rights (namely EU-rights); they require that a person belongs to the social structure and is not excluded from it.

And the higher the position in this social structure, the stronger the interpretational aspect provided for by the integration of human rights. In other words, human rights are being integrated completely in the social structure with respect to its hierarchical aspects. Accordingly, they are being connected to the 'normal life' - as qualifying aspects of it, we might say. The fundamental right to a family life is being connected to the realization of a working life; fundamental rights of the child are being connected to possibilities of being socially integrated; the right to 'a decent existence' is being connected, as well, to the realization of societal integration according to a range of criteria.⁷⁷⁶

In a short while, we shall consider to what extent and in what sense human rights do indeed 'qualify' the meaning of the 'normal life'. In this part we shall merely note that within the context of EU-law, they do not point to the existence of another kind of life. So, if we were to characterize this 'normal life' which dominates the social structure, as its only vision, what would be its essential characteristics? As stated above, the vision of the normal life implies the realization of the full grown working life, full grown memberships of systems of rights, full grown societal integration, institutionally, mentally and politically, and the full grown family life with its manifold asymmetrical internal dependencies. The normal life is not bound to a particular cultural context, but can be realized many different places. A certain degree of stability is required, though. As it appears, the 'normal life' is not essentially about culture (although cultural integration is certainly involved). It is not essentially about the level of income, either (although that plays a part as well with respect to the possibilities of earning rights - and, in the lower layers, with respect to meeting certain conditions of rights). Finally, the 'normal life' is not essentially about the kind or amount of work carried out, in a particular period of a life or over a life course as such (although that obviously plays a part with respect to the possibilities of earning rights). The 'normal life' is essentially about the belonging to different communities which can be qualified as institutional orders. Since there is no alternative vision implied in the social structure, only deficient realizations of the normal life, we may indeed say: *These communities constitute the destiny* for all those subjected to the law we have dealt with (from the point of view of that law). It is a destiny which can be escaped only in a shadow-land the nature of which we are cut off from envisioning.

⁷⁷⁶ Case C-60/00, *Carpenter* (analyzed in chapter 5); Case C-571/10, *Kamberaj* (analyzed in chapter 6); Case C-540/03, *Parliament versus Council* (analyzed in chapter 8)

Above, we have talked extensively about *signifiers of destiny*; we have said that non-names as well as the dominant signifiers of the hierarchy between names and non-names are signifiers of destiny. How are the signifiers of destiny related to the communities that constitute destiny? And what does destiny mean, exactly, in relation to both? These questions will be considered in the following.

The fluid aspects of the social structure - transhistorical aspects of destiny

The social structure of the ideal order is not only characterizable as a hierarchical structure based on categorizations of people. It also contains fluid aspects.

The fluidity of the social structure can be described as follows. A range of rights are not granted to pre-defined right-holders. As we have seen in connection with non-names, but also to some extent in connection with the signifiers in-between names and non-names, precise definitions of rights-holders in the form of fixed categorizations only arise in connection with the particular applications of the law. Continuously, categories arise and die. In other words, it will change continuously which people will attempt to claim and be able to claim the rights in question. In addition to that, as we have also seen, it is not only the right-holders, but also the rights themselves which are vaguely defined with respect to the exemptions and 'justifications of discriminations' which apply and - in the case of signifiers in-between names and non-names - with respect to the particular logic of rights which apply. For these reasons, the rights in question do not only contain certain fixable hierarchical features (as outlined above), they also give rise to fluid hierarchies, hierarchies that change continuously.

Sources of the fluid aspects

Non-names constitute, naturally, the most radical source of the fluidity of the social structure. No right-holders are designated at all. Apart from that, non-names are characterized by unwantedness, they correspond to differences which are meant to be rendered insignificant by the law. Only in the particular applications of the law are names, paradoxically, invented and articulated. On top of that, the discrimination grounds on the basis of which these particular names are created, are, in most cases, caught by deep conceptual problems. And the non-discrimination rights themselves are characterized by multiple escape-routes. We were not even able to determine whether some non-names are stronger than others; we found that they were all weak, but for different reasons, which meant that we could not establish an actual hierarchy, neither a

flat nor an upright hierarchy. Accordingly, non-names are as elusive as can be; the categories they give rise to are highly unpredictable and volatile.

It should be mentioned, though, that the particular names which arise in particular cases will, to some extent, 'stick to the law'. That is, if the CJEU has, in a particular case, made clear that homosexual people are doubtlessly covered by the discrimination ground 'sexual orientation', then the particular name 'a homosexual' will hereafter exist in the case-law, not only as a particular name, but also as general name which can form the basis of future particular names. *Fixations* of the non-names will occur. Some of these fixations are so obvious that they can hardly be avoided. For instance, it can hardly be avoided that the particular name 'a handicapped person' becomes a general name in relation to the discrimination ground 'disability'. Fixations are not only the work of the CJEU. Also those who analyze the case-law of the CJEU (like I do in this dissertation) will tend to create fixations. If it were not for such fixations (partly prepared by the CJEU, partly created by my self), it would not have been possible to conclude, f. instance, that young people are given a higher priority than older people in the social structure - as I did in the last section.

In short: fixations are unavoidable, from the point of view of the law as well as from the point of view of the analysis of the law. Due to fixations, non-names do not only give rise to fluidity, but also to fixable hierarchical structures. However, we should not forget, that fundamentally, non-names are unfixable. In case the CJEU should some day forget it, the court would have abandoned the fundamental logic of the principle of non-discrimination (that is, the non-significance logic) and replaced it with another logic of non-discrimination, based on defined categories of persons (that is, the as-if logic).

Also, the signifiers in-between names and non-names give rise to fluidity. Although the discrimination ground of 'sex' is not given free as a non-names, it is largely flexible. We detected (at least) 6 fixations of the meaning of the discrimination ground, which had given rise to 7 general names, the double-names 'Man in contrast to being woman' and 'Woman in contrast to being man' and the non-name 'transsexuality'. But it is certainly not unlikely that the meaning of the discrimination ground could be further developed through the case-law, resulting in more general fixations. And even if that should not happen, it is not all of the 6 fixations of the discrimination ground which correspond to defined categories of persons. One of the fixations has the form of a qualification of the discrimination ground, namely 'transsexuality'. It is not the category of 'transsexuals',

but the issue of 'transsexuality' which is crucial in the relevant judgments.⁷⁷⁷ Another of the fixations gives rise to the CJEU-established name 'Woman in so far as she is subjected to circumstances which can affect only women'. This name is not only highly flexible, both with respect to its substantial meaning and with respect to the possible particular names which can be established on the basis of it, it is also a metaphysical name in the sense that it is based on a presumption of the existence of fundamental differences between men and women. In other words, it does not as such correspond to a category of person.

Furthermore, the logical inventiveness which characterizes the judgments related to the discrimination ground of 'sex' gives rise to fluidity. Different signifiers (corresponding to different qualifications of the discrimination ground) are combined and replaced for one another. Obviously, this enhances the fluid nature of those signifiers. But logical creativity also renders the rights themselves unpredictable and flexible as far as concerns their material scope and basic logical nature. The 'substantive' interpretation of the principle of non-discrimination - due to which hierarchical features become intransparent and permanently temporary - has the same effect.

So, also some of the signifiers which are established in relation to the discrimination ground 'sex' - especially those in the top of the hierarchy of signifiers in-between names and non-names, 'Woman in so far as she is subjected to circumstances which can affect only women' and 'Transsexuality', but also the most dominant signifiers, the double-names 'Man in contrast to being woman' and 'Woman in contrast to being man', give rise to fluid structures. This is so either because it is not defined in advance who the right-holders are, or because the logical nature of the rights are not given in advance, or finally because the interpretational principles by which they are applied are intransparent.

Relations between the hierarchical and the fluid aspects

How may we assess the meaning of these fluid structure, in what way are they significant to the social structure as such? Do they complement or counteract the hierarchical structures?

As discussed previously, non-names as well as the dominant signifiers of the hierarchy of signifiers in-between names and non-names can be called signifiers of destiny; they concern aspects of human life which cannot simply be chosen. More precisely, these

⁷⁷⁷ - as argued in chapter 17 - but it should be recalled that huge confusion reigns with respect to this matter.

signifiers circulate around *freedom from* or *adjustments of* the cultural significance of those aspects. We have also seen that the signifiers in question mirror the three focal points of the hierarchy of names in the sense that they concern fundamental problematics of citizenship, work and family, but that the mirroring is asymmetrical because it is mainly within the area of work that possibility names are opened for those who can claim the signifiers in question.

As concluded above, 'citizenship', 'work' and 'family' are not only the focal points of the hierarchy of names, but of the social structure as such, when seen as a hierarchy. These focal points are also indicators of the communities which constitute the destiny of those subjected to the law we have dealt with - that is, they are indicators of the institutional orders of work (the labour market and the employment relationship), the order of the national welfare systems, the order of the family and the order of the state as one. Accordingly, we may formulate the relationship between the fluid aspects and the hierarchical aspects of the social structure as follows. The fluid aspects concern certain destiny aspects of human life - captured by the concepts 'racial or ethnic origin', 'age', 'disability', 'sexual orientation', 'religion or belief' and 'sex'. However, these destiny-aspects are in fact destiny aspects of the human communities which constitute the 'normal life' of the social structure, seen as a hierarchy, in the sense that they reflect fundamental problematics of these communities. But since these communities constitute destiny themselves, we may say that the fluid aspects concern destiny-aspects of the communities which are destiny, they concern *destiny aspects of destiny*. - And the meaning of the fluid aspects is that human beings should be freed from, wholly or only in certain respects, the cultural significance of the destiny aspects of the destiny constituted by the human communities, so that they may realize, more fully, destiny in this latter sense.

Two different meanings of destiny

Obviously, we shall need to qualify the concept of 'destiny' - and consider whether two different meanings of 'destiny' are involved.

With respect to both kinds of aspects - the fluid aspects of destiny and the hierarchical aspects of destiny - inescapability is at play. Otherwise, we could not utilize the concept of destiny at all. But apart from that, they are quite different.

The fluid aspects of destiny concern trans-historical aspects of human life. Predominantly, it concerns aspects which are inescapable as such: it is impossible not to be either man or woman, or to be characterized by sex and sexuality, not to have a

certain age, and not to originate from somewhere or being of a family which originates from some or more places. It can be discussed whether it is possible not to have a certain 'religion or belief' (we have discussed that in the Interzone-chapter), but at least it must be acknowledged that this aspect borders on constituting a general and trans-historical condition of human life as well. Only the aspect of 'disability' is different; it is possible not to be disabled. But apart from being predominantly inescapable *as such*, these aspects are inescapable with respect to their *particular manifestations*. A person cannot choose his or her particular age, origin, sex, sexuality, belief and cannot choose not to be disabled. As discussed in the beginning of chapter 19, it could be argued that with respect to some of the aspects, and especially the aspect of 'religion or belief', personal will or at least cultural influences are involved. I argued that although personal will and cultural influences are certainly involved along with forces of social coercion, all of these aspects, in their particular manifestations, are essentially characterized by 'necessity'. In the case of 'religion or belief': if a person did not find that a particular belief was the necessary belief, if he or she did not find that particular belief to be inescapable, then that person would not believe in it at all.

So, the fluid aspects are trans-historical aspects which are, predominantly, inescapable in the double sense that they are inescapable *as such* and inescapable in their particular manifestations. Naturally, the cultural significance of these aspects have varied historically. Especially, the significance of the particular manifestations have varied historically, but also the significance of the aspects *as such* have varied. However, throughout European history, these aspects have recurrently constituted crucial aspects of differentiation (and discrimination) with respect to structures of power, social structure and political ideology. Accordingly, we may conclude that the fluid aspects are transhistorical aspects of destiny in a threefold sense: They have, throughout European history, been inescapable *as such*, in their *particular manifestations* and in terms of *cultural significance*.

The hierarchical aspects of destiny, in contrast, are not transhistorical, but concern the contemporary situation. Hereby I do not mean that communities of work, of the state and of family have not been crucial through out European history. But the hierarchical aspects of destiny are exactly not fluid. That is, they do not merely concern communities (of some kind) of work, state and family, they concern *particular communities* of work, state and family, according to the institutional logics which can be

derived from the law we have dealt with. Only these particular communities are the destiny of the people subjected to the law we have dealt with.

The fluid and the hierarchical aspects are not only different in the sense that the former are transhistorical and the latter are contemporary aspects of destiny. The fluid aspects are aspects of destiny as *event* or *occurrence*. Sex and sexuality, age, origin, disability and belief is something which *happens* to a person. It makes no difference whether the occurrence of sex and sexuality, age, origin, disability and belief is understood to be an occurrence of nature or an occurrence which involves social forces or an occurrence of pure randomness. In any case, we have no access to any underlying, governing laws - neither with respect to the fluid destiny aspects as such, their particular manifestations or their cultural significance. - In contrast, the hierarchical aspects of destiny are aspects of destiny as *regularity*. Certainly, the communities in question are something which happen to the people subjected to EU-law. But they do not merely happen. They happen as inescapable regularity.

Closely related to the distinction between mere occurrence and regularity is the distinction between individual and collective destiny. The fluid aspects of destiny strike *both as individual and collective destiny*. As explained above, the aspects *as such* are common to all people along with the cultural significance of these aspects as such. But in their particular manifestations, they strike both individually and collectively. It is the individual who is a woman, who is disabled or who has a particular belief - in contrast to another individual who is a man, who is not disabled and believes in something different. On the other hand, the fluid destiny aspects in their particular manifestations are of course also collective aspects in the sense that they are shared between many different individuals. And the cultural significance of the particular manifestations will be common to all people who can be said to share the same culture, in a given historical situation. - In contrast, the hierarchical aspects of destiny strike only as *collective destiny*. In short: The fluid aspects of destiny are *transhistorical*, they have the form of *event* or *occurrence*, and they strike as *individual and collective destiny*, - whereas the hierarchical aspects of destiny are *contemporary*, have the form of *regularity* and strike as *collective destiny*.

Eliminating the significance of one kind of destiny for the sake of another

Having qualified the concept of destiny in relation to the fluid and hierarchical aspects, respectively, we may now complete our reflection as to the meaning of the fluid structure in relation to the hierarchical structure.

The destiny of today - particular communities of citizenship, work and family - is marked by certain transhistorical aspects of destiny. These transhistorical aspects strike human beings as events, they merely occur. Furthermore, they strike individually in the sense that they strike differently; they are aspects of differentiation, not of commonness. And finally, as far as their cultural significance is concerned (as such, but especially regarding their particular manifestations), they change over time.

In the ideal order, the present cultural significance of these transhistorical aspects is meant to be either eliminated or adjusted. To be more precise: In the case of the aspect of 'racial or ethnic origin', the cultural significance of this aspect is meant to be eliminated *as such* (since that expression is not meant to have a conceptual meaning at all), but in the case of the aspects of age, disability, sexual orientation and religion, their cultural significance is only meant to be eliminated with respect to their *particular manifestations*, and only in certain respects and under certain circumstances. In the case of the aspect of sex, its cultural significance is only meant to be adjusted (differences between the sexes are assumed to be fundamental and are upheld through the law). In all cases, however, *the cultural significance of the transhistorical aspects of destiny are meant to be eliminated or adjusted* so that they will not prevent human beings from *being part of the destiny of today* - the particular communities of citizenship, work and family.

But what does it mean that the transhistorical aspects appear as fluid aspects of the social structure? What difference would it have made, had we not been confronted with non-names or signifiers in-between names and non-names, but only with names? What difference would it have made, had the law stated: 'there shall be no discrimination of homosexuals, muslims, old people, women (etc...) in comparison to those who are not homosexuals, muslims, old or women (etc...)?

It is clear that EU-non-discrimination law is formulated in accordance with the historical feature of the transhistorical aspects of destiny: The cultural significance of these aspects changes over time, especially as far as their particular manifestations are concerned. Muslims may be subjected to discrimination in certain historical situations whereas in other situations, Christians or Atheists would be the victims of discrimination. Likewise, EU-non-discrimination law is formulated in accordance with the individual nature of the transhistorical aspects in question: Since different individuals are struck by these aspects in a differentiated manner, multifold discrimination within the same historical situation will also be possible.

But by taking the consequence of the historical and individual features of the transhistorical destiny aspects in question, EU-law also *enhances* the processual or 'never-ending' nature of these aspects as well as the element of 'individual destiny' vis-a-vis collective destiny.

Firstly, since both signifiers and rights are fluid (definitions of right-holders and of rights only arise in connection with particular applications), the ideal order becomes, essentially, processual. Naturally, also the hierarchical structure gives rise to continuous developments; it is highly dynamical, as clarified above, both with respect to the scope of names and rights. But the hierarchical structure defines a framework of names and rights on the basis of which developments take place. In contrast, the fluid structure is essentially processual. It belongs to the very nature of it that neither signifiers (substances) nor rights (attributes) can be defined in advance; only logics can be defined in advance, and not even fully so. This implies as well, of course, that forms of discrimination cannot be defined in advance. In the ideal order, new forms of discrimination will continuously arise - and be combatted with respect to their cultural significance. That is, the transhistorical destiny aspects will continuously show new faces, appear in new particular manifestations - and be dealt with as manifestations of the transhistorical destiny aspect. Any presumed order meant to be combatted by a given law is ascribed a 'never-ending' nature by that law (because otherwise the law would be obsolete; as long as the law exist, violation of the law is presumed to be a possibility). But in the case of the transhistorical destiny aspects, they are not only presumed to exist and give rise to discrimination, they are presumed to exist as fluid destiny aspects which will never stop developing into ever new forms.

This enhancement of the 'never-ending nature' of the transhistorical destiny aspects in the ideal order has some obvious advantages seen from the point of view of the potential right-holders. Non-discrimination law becomes extremely flexible - capable of capturing, in principle, a manifold of different and at this point even unknown forms of discrimination. Likewise, there is a liberating element in the fact that the potential victims of discrimination are not defined in advance. No particular groups of people are stigmatized in general, are defined in general as potential victims of discrimination. Conceptualizations - and in particular the conceptualizations of law - are sources of discrimination themselves. - On the other hand, we are confronted with an ideal order which does not only stand in a tensional relationship to a presumed order of discrimination, but which also enhances the never-ending nature of that presumed

discrimination by emphasizing the unfixable and ever-developing nature of it. In the ideal order, the cultural significance of the transhistorical destiny aspects is met and combatted (to different degrees), but transhistorical destiny as such is confirmed. And not only confirmed, but confirmed as blind and unknown - for which reason law itself becomes blind and unknown.

Secondly, since signifiers are fluid, the element of 'individual destiny' vis-a-vis collective destiny is enhanced. It is not only so that it is individuals who are struck by the transhistorical aspects of destiny. There is no general conceptualization of how they are struck. Definitions and concepts arise in the particular application. This means of course that the individual who is struck by the transhistorical aspects of destiny is *alone with his or her destiny* - since that destiny is essentially particular, so particular that it is not fixated in general.

Also, it is worth noting that in the law, the different transhistorical aspects are not connected, neither directly nor indirectly. As analyzed above, internal dynamics between the discrimination grounds in question are limited and largely unimportant. Conceptually, they are not being connected, either - although our analysis has displayed that conceptual relations can certainly be established (the six discrimination grounds mirror, in each their way one or more of the focal points 'citizenship', 'work' and 'family'). In the ideal order, the different transhistorical aspects appear as *disparate life aspects*.

In short: The individual victim of discrimination is alone with his or her destiny - this destiny is particular and unfixable and unknowable in advance, and it is unrelated to other transhistorical aspects of destiny - whether manifested in the life of the same individual, or in the lives of other victims of discrimination.

The fundamental aspects of the social structure

Finally, the social structure of the ideal order contains some fundamental aspects, next to the hierarchical and fluid aspects. It is a structure which is based on presumptions of a *common, human foundation*.

In the Interzone-chapter (chapter 21), we analyzed and developed conceptually this common human foundation. However, as we are now to integrate the conclusions of the Interzone-chapter in the construction of the social structure of the ideal order, we shall have to incorporate, as well, a consideration of the rights which are associated

with this foundation, that is human rights or rights which are in principle ascribed to 'Everyone'.

As explained above, human rights are not - or at least only to a small extent - granted to all humans. If they had been granted to everyone, the common human foundation and human rights would have belonged to the hierarchical aspects of the social structure, that is, the name 'Human' would have been a name in its own right, definable in terms of substance and attributes. But we have found that within EU-law, the name 'Human' (or the more neutral sibling 'Everyone') is a powerless name as such. Nor do the common human foundation and human rights belong to the fluid aspects of the social structure. The common human foundation is not a signifier at all. Not only is it not identifiable with the name 'Human' (although it can be associated with this name), it does not constitute a fluid signifier either.

The common human foundation is not a signifier, but a foundation which pervades the law

So, we are not facing a signifier, characterizable in terms of substance and attributes. What we are facing is, on the one hand, assumptions as to a common human foundation underpinning EU-law as a whole, and, on the other, human rights which function as interpretational aspects of other rights ascribed to more particular names (or other kinds of signifiers) in the sense that they serve to strengthen or limit these other rights.

Again, it would be wrong to understand this complementing role of human rights in the light of the name 'Human'. Not only does the name 'Human' not function as a name in its own right, I do not believe we should see it as a name which is *combined* with other names either. It is not so that, for instance, a combination of the name 'Human' and the name 'EU citizen' is created with the result that the name 'EU citizen' is strengthened in certain respects. That would have the absurd implication that only those who can claim the name 'EU-citizen' or 'Worker' or one of the multiple other names or signifiers of the social structure would be 'Humans'.

Let us dwell on this absurdity for a minute. Certainly, an interpretation of that kind could be pursued: Only those who can claim one of the signifiers of the social structure are 'Humans' whereas all those who are excluded from the social structure are not; illegal 'Third Country Nationals' would not be 'Humans', then, and many legal 'Third Country Nationals' as well as the weakest and most dependent people within the national systems would be on the border of humanity as well. It would be a cynical

interpretation of the law - but certainly feasible in spite of its absurdity. Throughout Western history, different groups of people have been deemed to fall outside of 'humanity' - non-Christians, slaves, pirates and (today) terrorists. Why should EU-law not follow this absurd tradition?

I believe we should pursue another path of interpretation. Firstly, even though the name 'Human' is a powerless name within EU-law, we cannot exclude completely that there could be future cases in which it would be granted a function as a name in its own right, without the support of other names. Secondly, within the case-law of the ECtHR, the name 'Human' (or 'Everyone') does function as a name in its own right. As we have discussed (and seen in connection with several judgments), the CJEU does already build on the case-law of the ECtHR, and it will certainly need to do so in the future. A cynical reduction of the concept of 'humanity' like the one outlined above would constitute a terrible conceptual starting point for possible future interactions between the two courts. Furthermore, and crucially: The concept of 'Humanity' does, ideologically, carry with it this meaning, this hope: 'for Everyone - regardless of other circumstances'.⁷⁷⁸ Finally, a reduction of the concept of 'humanity' according to which only those who can claim one of the signifiers of the social structure are 'Humans' would not bring us any closer to a substance of the name 'Human'; in contrast, the name 'Human' would definitively have to be declared void, it would double other signifiers, nothing else.

Instead, I will suggest another path of interpretation which builds on the common, human foundation which I established in the Interzone-chapter. This human foundation was based on an analysis of a constellation of concepts, 'dignity', 'private life', 'privacy' and 'decency', as well as on presumptions underlying the ECHR-judgments concerning religious freedom. Naturally, we may see this foundation as strongly associatively connected to the name 'Human' or 'Everyone': The concepts of 'human' and 'dignity' are closely connected in the law we have dealt with, and as such, they give rise to a specific temporal logic of law which, I argued, is a universal logic due to the fact that it relies on a inviolable-violable-paradox. According to this universal logic, human dignity has always existed and always will exist, but none the less, it must continuously be instituted, nurtured and protected so as to ensure its realization. The other concepts of the constellation are instances of a similar universal

⁷⁷⁸ See Costas Douzinas: "Human Rights and Postmodern Utopia", in Costas Douzinas and Colin Perrin (ed): *Critical Legal Theory. Volume II: Critical Legal Orientations*, chapter 21

logic. As to the presumptions underlying the judgments concerning religious freedom, I considered to what extent they would apply to all humans, or only to some, and found that only the most moderate presumption implied, that of 'thought and conscience' may be seen as part of a common human foundation, - but we were able to develop the meaning of 'thought and conscience' (positively as well as negatively) on the basis of the whole ambiguous conceptual framework underpinning these judgments.

But even if the human foundation is strongly associatively connected to the name 'Human', we cannot identify the two. The name 'Human' is a signifier (although a largely powerless signifier, both in terms of substance and attributes). The human foundation, in contrast, is exactly a foundation pervading the law, a foundation implied in the multiple manifestations of the law. Even though we found our analytical starting point in the establishment of a close connection between the concepts of 'human' and 'dignity', and that we were able to base an important part of the analysis on indications of the existence of common human features, provided by the ECtHR, the substantial elements of our characterization of a common human foundation as presumed by the law were not at all derived from the concept of 'human' or 'humanity'. It was primarily on the basis of considerations on sex, sexuality, intimacy and family-relations, complemented by reflexions regarding the relationship between human interpretation and law, that we were able to characterize a human foundation.

Human rights are entangled in a double game

So, the common human foundation is not a signifier but a foundation which pervades the law - associated with the name 'Human' (which in turn is a powerless name), but not identifiable with it.

But how may we conceive of the relationship between human rights and the human foundation? It is clear that we cannot say that human rights are *attributed* to this foundation - since it is not a signifier, but a foundation. None the less, we may connect the two - human rights and the human foundation. It is implied in the universal logic of the human foundation that it needs protection, - that it must be continuously instituted, again and again, although it has always existed and will always exist. Accordingly, rights the meaning of which are to protect this foundation are part of the very logic of it.

This raises, however, the question of whether human rights should also be ascribed a universal status, just like the foundation they are meant to protect? Are human rights

an expression of *human law meant to protect a universal foundation*, or are they an expression of *universal law meant to protect a universal foundation*? Naturally, human rights are formulated and instituted by human beings in particular historical situations. But that does not exclude that they could be ascribed a universal status. By being implied in the universal logic of the human foundation, they will necessarily have part in that universality. But only to the extent that it is their meaning to protect that foundation. How may we be sure, at all, that it is in fact this foundation that they protect, and not something else? Of course, we cannot be sure of that. Accordingly, the status of human rights must be specified as follows: According to their particular formulations as rights, and according to their interpretations and applications, they are part of human law. But to the extent that they are meant to protect a common human foundation, they are an expression of universal law.

This is not exactly how human rights are generally presented to us, though. They are generally called ‘universal’, ‘indivisible’ or ‘infrangible’. A variation of this appears in the preamble of the Treaty of the European Union: ‘*Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person [...]*’⁷⁷⁹. ‘Inviolable’ and ‘inalienable’ rights, that is, based on ‘*universal values*’. The preamble of the Charter of Fundamental Rights contain a similar formulation: ‘*Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity*’⁷⁸⁰. In the formulation of the Charter appears only the concept of ‘values’, not the concept of rights, - but due to the context (it is the preamble of the Charter of Fundamental Rights), we may safely conclude that the meaning of the formulation is that those ‘*indivisible, universal values*’ constitute the basis of fundamental rights.

This way of presenting human rights gives rise to two remarks.

Firstly, the fact that human rights are presented as ‘*inviolable*’ and ‘*inalienable*’ means of course that they become subject to the same kind of universal logic as the human foundation. They are called ‘inviolable’ while they clearly are not; human rights are violated all the time. They are called ‘inalienable’ while they clearly are not; human rights are being negotiated all the time, balanced against other concerns and relativized, both within EU-law and within other sources of law. In order to make sense of these paradoxes we would need to understand human rights as rights which, one

⁷⁷⁹ The preamble, recital 3, TEU

⁷⁸⁰ The preamble, recital 2, Charter of Fundamental Rights

the one hand, have always existed and always will exist for which reason they are 'inviolable' and 'inalienable', but which, on the other hand, will need to be instituted over and over again in order for that which has always existed to be realized historically.

I will argue that hereby, human rights are granted a status which is unfeasible. Human rights themselves - qua formulated, instituted rights - are seen as universal. We have to recall that there is a crucial difference between a human foundation the nature of which is in principle ungraspable and unfixable and human rights the nature of which is positive manifestation - as language, as law, as institutionalization, as application etc (no matter how unclear or muddled the rights may be). The common human foundation will continue to escape us; only on the basis of its ungraspability, we can give sense to its violable-inviolable-logic. It is inviolable as a hidden, never fully realized potential of human beings. Human rights, on the other hand, are necessarily part of human law. Only in so far as they are directed towards the protection of the human foundation, they imply an aspect of universal law. But the relationship between the two will need to be a tensional relationship. It can never be claimed - only desired, intended, hoped - that human rights do in fact protect a common human foundation.

But could that not be the meaning of the formulations of the preambles of the Treaty and of the Charter - that human rights are 'inviolable' and 'inalienable' in the sense that they are directed against the protection of a common human foundation? It could not. In those formulations, human rights are not at all being connected to a common human foundation, they are being connected to '*values*'. This brings me to my second remark.

As extensively argued in the Interzone-chapter, '*values*' cannot be universal. Metaphysically speaking, they are completely unfounded. They are not founded in any objective principle regarding the nature of the world or the nature of human being, and neither are they founded in a subjective principle (like '*reason*' or '*reflexivity*' or '*self-consciousness*'). They are immediately subjective; values simply mean '*that which we happen to believe in*' or even '*that which we believe in simply because we believe in it*'. And they represent pure normativity. Within the contexts of the two preambles, the concept of '*value*' is qualified through the idea of a '*cultural, religious and humanist inheritance of Europe*' (or a '*spiritual and moral heritage*'). This founding of '*our values*' in a common history may free them from the nihilism of a coincidental subjectivity, - but it does not free them from their metaphysical unfoundedness. In contrast, the historical foundation rather confirms that values are '*what we have come to believe in*'.

So what does it mean that human rights are being attached to and even based on 'values' rather than a human foundation? It means that human rights have lost their foundation. Obviously, 'values' cannot constitute a foundation since they are unconnected to any dimension of knowledge or insight into the nature of the world. And it means that human rights have been deprived of that very aspect by virtue of which they could be called universal.

In spite of the formulations of the preamble, however, the human foundation is not lost. It is present within and right underneath the law, as a special sub-text which penetrates the law. This is, in any case, the conclusion which was drawn in the Interzone-chapter. And it is clear that whenever we have seen human rights or fundamental rights applied within the case-law of the CJEU (and in the caselaw of the ECtHR), fragments of this foundation was also somehow in play - more or less. In fact, the legal material from which we derived the fundamental features of the common human foundation consisted, to a large extent, of legislation or case-law in which human rights or fundamental rights were being stated or applied. In the law, the connection between the two is persistently in play.

In conclusion: Human rights are entangled in a double game. The first game is the game of representation. According to this game, human rights are without foundation, attached to values which cannot be universal but which are none the less claimed to be so, and they are claimed to be universal themselves, although everyone can see that in their formulations, interpretations and applications, they are as human as can be. But simultaneously, they are part of another game, the game of manifestation. According to this game, human rights are present in the sub-text of the manifested law, as a particular undertone, related to a presumed human foundation which they are meant to protect. As such, they do contain an aspect of universality which in turn pervades the law as a whole. Due to the fact that the connection between human rights and the human foundation can always be questioned (basically, the connection can only be intended or hoped for), the aspect of universality which can be ascribed to human rights is violated over and over again just as it is instituted over and over again - this is part of the living, manifested law.

The role of human rights within the social structure is to protect the conditions of the civilizational self

So much is clarified: We are not facing a signifier, but a common human *foundation* which penetrates the law according to a universal logic; we cannot say that human

rights are attributed to this foundation, but we can say that to the extent that those rights are meant to protect the foundation, they are inscribed in its universal logic; in this sense, human rights are not without foundation, but the connection between the two can always be questioned; since, in their manifested form as rights, human rights are part of human law, not universal law.

On the basis of these clarifications, we may now ask in what way the human foundation and human rights contribute to the social structure of the ideal order? When human rights function as interpretational aspects of other rights and serve to strengthen or limit them, what is it that they bring to those other rights, what do they add, except for strengthening or limiting them - to the extent that human rights do indeed reflect an intention to protect the common human foundation?

We shall need to recall the conclusions of the Interzone-chapter regarding the crucial features of the common human foundation. We found that a human foundation could be conceptualized according to the following three characteristics: *not being completely controllable or definable by any regulation* (whether springing from political or legal sources or not); *deep connectedness and interwovenness with other human beings*; and a *striving self in terms of a separable and recognizable body*. All three characteristics may be seen as conditions for the becoming of 'the civilizational self', a self which can be named and regulated, a self subjectable to law. Furthermore, we were able to qualify this foundation as a spiritual foundation, but in a poor sense. Human beings in general are assumed to possess some sort of reflexive and interpretative capabilities, expressed as 'thought and conscience'. I argued that without such human capabilities, the law could not function at all, and neither could the institutional orders on which it relies. Interpretations as well as misinterpretations, variations, flexible understandings of rules and logics are indispensable to the living law and to living institutions, - not to mention the investment of passion and, ultimately, some variant of what I have called 'individual integrations'. But obviously, these reflexive and interpretative capabilities do not only nurture the law and institutional orders, they also constitute a potential threat. The presumed common human foundation is only characterized by these spiritual capabilities in the most modest sense. Any powerful potentials are amputated - held back in the 'inner individual'.

In the light of this characterization, we may now qualify what it is that human rights add to other rights - to the extent that human rights are meant to protect the common human foundation? Human rights protect the names of the law - the general names as

well as the particular names which arise on the basis of the fluid signifiers - and hereby the social structure as such. They protect, as well, the regulations of the law, the rights and the duties they imply and the institutional orders on which both rights and duties depend. They protect the names and the regulations of the law in the sense that they protect the conditions on the basis of which naming and regulation is possible at all. Naming and regulation depend positively on *separable and recognizable bodies*, and simultaneously on the *interconnectedness of human beings*. But naming and regulation also depend on the variations and flexibility of living manifested law and hereby on the *spiritual capabilities* of those who are subjected to it - which also implies that naming and regulation can never be complete, something remains which is *never fully defined and controlled*.

In other words: In so far as human rights protect a common human foundation, they protect the conditions of the civilizational self. Hereby they also protect the ideal order of EU-law which defines and regulates, continuously and dynamically, in its own particular ways, the civilizational self. They complement the rights of this order to the extent that these rights are not capable, in themselves, of guaranteeing their own foundation.

The protection of the foundations of civilization through human rights is only actualized in connection with the unfolding of civilization. Those who are excluded from the social order are not less human than those who are included. But because they are excluded, they are not protected with respect to 'dignity', 'thought and conscience' (the spiritual, never fully capturable aspects of human beings), 'private life' (the interconnectedness with other human beings), 'privacy' and 'decency' (the striving self as a separable and recognizable body); that is, they are not protected with respect to their becoming and maintenance as civilizational selves. In this sense, human rights enhance the cruelties of the social order, just as they enhance the possibilities and freedom implied in the social order. Human rights mark the borders of the social order in a particular way: those borders are not only manifestations of social exclusion, they are also manifestations of civilizational exclusion.

Accordingly, human rights do not represent another vision of life than the vision of the 'normal life' which penetrates the social structure as the destiny of today. Human rights are meant to protect the foundation of this normal life. It is crucial to recall, though, that this foundation is essentially double-sided: it constitutes the conditions of naming and regulation, but also the potential undermining of names and regulation. For this

reason, the realization of human rights do not only mean that the protection of the foundation of the social structure is integrated within this social structure, it also means that the potential undermining of the social structure is integrated. Indirectly, human rights bear witness to the fact that also other names and regulations could have been possible, and indeed, that all names and regulations could lose their power and be left as ruined masks of civilization.

In spite of the fact that we have been able to establish that a common human foundation is presupposed, and that this foundation can be qualified, we shall not talk about 'human destiny'. This is due to the paradoxical features of the universal logic by which it is determined. The human foundation is continuously both there and not there, both inviolable and violable, existing throughout all times, and threatened and undermined over and over again. It is both ideal and real; it constitutes a condition of the ideal EU-order, but a condition which is never fully satisfied. It is a shaky condition of that order, and the order itself shakes with it. The human foundation is not identifiable with a human destiny, rather, it constitutes the possibility as well as the potential downfall of the ideal order. It penetrates the entire social structure - the hierarchical aspects of destiny as well as the fluid, transhistorical aspects of destiny - with hope, turmoil and danger.

By protecting the common human foundation, human rights serve to guard the ideal order against its own undermining, to secure that names and rights will not lose their meaning and life and become stiff, alienated terms. But simultaneously, they point to an essential feebleness of law: Law relies on being recreated by those subjected to it - mirrored, represented, embodied, interpreted, misinterpreted, varied and adjusted. Those who are named and regulated must not only adjust to names and regulations. They must be *interconnected selves* capable of being named and regulated, and they must *live* and *unfold* the names and regulations (those which apply to themselves as well as those which apply to others). Hereby, law relies on recreations which not only threatens its stability and predictability, but also the very meaningfulness of the order which is instituted.

Chapter 26

The means of the ideal order

The means of the ideal order are constituted by 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*. By virtue of what logics of rights is the social structure realized? What kind of understanding of social means do they imply, - that is, how do they affect the possibilities and limitations of human beings? What problematics do they involve, as such?

We shall focus, of course, on non-discrimination rights, but we shall also consider the substantial rights which support and interplay with non-discrimination rights.

First, we shall sum up and analyze the three different overall kinds of non-discrimination rights we have encountered so that we may consider them as means of the ideal order. Afterwards, we shall engage in an analysis of the fundamental problematics adhering to non-discrimination rights.

The *as-if*-logic - simulation serving the realization of the destiny of today

As-if-rights dominate the hierarchy of names, but we also detected them in the hierarchy of signifiers in-between names and non-names.

In relation to the discrimination ground 'nationality' we found three variants of as-if-rights.

The first variant concerns the situation of a person who has moved to (or works in) another EU member state and who is entitled to social rights *as-if* he or she was a national citizen of that state. According to this variant, the logic of the non-discrimination right can be formulated as follows: '*The right-holder shall be treated as-if he or she was a national of the state of residence (or work)*'. It involves the imaginary elimination of the *past* of the right-holder and the replacement of it with another

The second variant concerns the situation of a person who has moved to (or works in) another EU member state and who has earned rights in his or her original state (or in one or more other member states) which are being translated into rights in the new state according to the legislation of that state. The corresponding logic of the non-discrimination rights in question would read: '*The right-holder shall be treated as-if he or she had earned the rights in question in the state of residence (or work)*'. Also this variant

involves the imaginary elimination of the *past* of the right-holder and the replacement of it with another.

The third variant concerns the situation of person who has moved to (or works in) another member state and who is entitled to transport rights from his or her original state (or one of the other member states) to the new state. The corresponding logic would read: *'The right-holder shall be treated as-if he or she had never left the original state, but was still residing or working there'*. This variant involves the imaginary transformation of the *present* situation of the right-holder.

If we are to consider more closely the nature of the as-if-logic in the light of these three variations, it appears that we could capture it in two different ways. It is clear that the as-if-logic implies an *imaginary situation*: the right-holder is to be treated as-if he or she is not the person that he or she really is. But does it imply the imagination that the right-holder is another person than he or she is? Or would it be more accurate to say that what is implied is an imaginary version of the right-holder him- or herself? If we consider the former possibility, the 'other person' would, according to the first and the second variants, be a national of the state of residence (or work), that is, a person of another nationality than the right-holder. According to the third variant, however, the 'other person' would, most likely, be a person who had the same nationality as the right-holder, but it could also be a national of a third member state (to the extent that the right holder was entitled to transport rights from a state of which he or she was not a national). In all cases, the 'other person' would be a person who with regard to a range of other characteristics than those which the respective variants of the as-if-logic concerns (being a national of a given state; having earned rights in a given state; having left or not left a given state) would be identical with the right-holder. It would be a person who could otherwise claim exactly the same national names as the right-holder (on the basis of working history, present working situation or situation of sickness, unemployment, retirement or something different, family situation, earned rights etc).

On the basis of this little reflexion as to the nature of the 'other person', it becomes clear that we shall encounter far less complexities if we seek to capture the nature of the *as-if*-logic according to the second possibility: What is implied is an imaginary version of the right-holder him- or herself, that is, the right-holder *as-if* he or she had had a different nationality, had earned rights in a different state, or had not left his or her original state. Also the *as-if*-rights which we detected in the hierarchy of signifiers in-between names and non-names are most accurately seen as variants of *as-if*-logics involving an

imaginary version of the right-holder him- or her-self. The CJEU-invented name 'Woman in so far as she is subjected to circumstances which can only affect women' gives rise to as-if-logics of the following kind: *'The right-holder shall be treated as-if she had not been subjected to circumstances which can only affect women'* (particular variants could be: *'The right-holder shall be treated as-if she had not been pregnant / as-if she had not undergone in vitro fertilization/ as-if she had not been on maternity leave'*). Clearly, the right-holder who may claim this CJEU-invented name is not to be treated as-if she was a man, nor another woman. She is to be treated as-if she was herself except for the characteristic on which the *as-if-right* focuses. - The same kind of logic springs from the names 'Father on paternity leave' and 'Adopting parent on leave'; it would read: *'The right-holder shall be treated as-if he or she had not been on parternity leave/ adopting parent leave'*.

In the hierarchy of signifiers in-between names and non-names we also detected some modified versions of the as-if-logic. To the names 'Female self-employed workers' and 'Female spouses and life-partners of self-employed workers, taking part in the self-employed activity' is attributed a maternity-right which combines a substantial right and a modified as-if-right. The modified as-if-right in question can be formulated as follows: *'The rights-holder shall be treated as-if she was at least entitled to the lowest possible allowance within a certain group of allowances'*. Similarly, 'Spouses or life-partners establishing a company together' are to be treated no worse than they would have been treated had they not been married or life-partners; formulated directly as an as-if right, this right would read: *'The rights-holder shall be treated as-if he or she was at least entitled to the worst possible conditions granted to people who are not married or life-partners, establishing a company together'*.

As can be seen, in the case of the modified versions of the as-if-logic, it would be more meaningful to say that what is implied is the imagination that the right-holder is *another person* than he or she is. Rather than being treated as him- or herself, except for the characteristics on which the as-if-logics in question focus (being a self-employed mother/ being a married couple or lifepartners, establishing a company together), the right-holder is being placed in the situation of another person (some-one who is at least entitled to the lowest possible allowance/ the worst possible conditions). In fact, the contours of another name is at play (only the contours since the right is formulated as a minimum requirement). However, as indicated above, the borders between 'imaginary version of the right-holder him- or herself' and 'an imagined other person' are delicate.

In any case, an imaginary situation is implied: the right-holder is to be treated as-if he or she is not the person that he or she really is, - and this is what essentially characterizes the as-if-logic.

When considered as a mean by which the social structure is realized, what kind of understanding of social means is implied in the as-if-logic?

The as-if-logic is always connected to names, never to non-names or double-names. Likewise, the standard of comparison is always given in advance. As argued above, that standard can always be captured as some kind of 'imaginary version of the right-holder him- or her-self'. Only in the case of the modified as-if-rights (which, so far, only play a marginal role in EU-law), the standard of comparison would more accurately be captured as 'an imagined other person'.

A peculiar principle of equality is at stake. Equality is not established in the sense that one common name is established which can be claimed by a large number of people because it includes a number of different categories of persons; equality is established in the sense that some categories are dragged towards other categories in order to be treated as-if they were the same as the latter categories, although they are not. Accordingly, as-if-rights may be called *false translation rights*; they are based on the idea that a particular social situation can be translated into another social situation, although the two situations do not correspond to each other. They are based on imagination - on simulating or imitating a particular social situation.

In the case of the discrimination ground 'nationality', the imagination implied in the as-if-right opens the possibility of national replanting. Or - as we learned from the analysis of the social structure of the ideal order - it opens the possibility of realizing the 'normal life' in another place. The imagination implied means that the right-holder maintains all life characteristics in the new place except for a single characteristic; he or she is 'translated' or 'twisted' with respect to a single characteristic, concerning nationality in one variant or the other.

In the case of the discrimination ground sex, the imagination implied in the as-if-logic opens the possibility of taking part, more fully, in 'the normal life'. It is meant to remove barriers springing from the transhistorical destiny aspect of 'sex'. Also in these cases, the right-holder is only twisted or 'falsely translated' with respect to a single characteristic.

So, in all cases, possibilities arise due to an imagined redefinition of the right-holder with respect to a single characteristic. But the right-holder is limited due to all his or

her other characteristics which are not redefined and by virtue of which he or she can claim or not claim national names or other signifiers and the rights attributed to them (characteristics springing from working history, present working situation, education, family situation, history of memberships etc.). Furthermore, the right-holder is limited in the sense that possibilities centers on the realization of the 'normal life' which constitutes the destiny of the social structure - either the realization of it in another place or a more full realization of it at the same place, that is, at a higher level of the social structure when considered as a hierarchy.

The mean constituted by the as-if right is in other words a highly conservative mean. It serves the realization of the destiny of today, and in doing so, it upholds all the characteristics of an individual life which marks the way in which that individual life relates to the destiny of today. All characteristics except for one. The mean implies, in other words, a sort of playing with a particular aspect of a life - playing with it in the sense of imagination or simulation - so as to twist the relationship between an individual life and the destiny of today.

Non-significance rights

- placing human beings in a never ending battle of emancipation

Apart from as-if-rights, we are confronted with non-significance-rights. Non-significance rights are found in the hierarchy of non-names. It is part of their nature to be attributed to non-names, not to names.

In their pure form, non-significant rights are logically similar. There are, of course, five variants, corresponding to the five discrimination grounds. The non-significance right can be formulated as follows: *'The aspect of 'racial or ethnic origin'/ 'age'/ 'disability'/ 'sexual orientation'/ 'religion or belief' shall be insignificant within a certain area of rights'*. When understood according to this pure form, non-significant rights do not only imply that these aspects shall be insignificant in the sense that the right-holder can be categorized on the basis of them. Non-significance-rights imply *in general* that these aspects shall be insignificant - however the relationship between them and the right-holders.

It should be mentioned, though, that also an *indeterminately reduced version of the non-significance-logic* exists, namely in connection with indirect discrimination. This logic does not rely on names; it is not so that particular categorizations of people are established. For this reason, it is not a determinately reduced version of the non-

significance-logic. It is only a reduction in the sense that it does not uphold the *general* meaning of the non-significance-logic; it is presupposed that the right-holders are potential victims of discrimination with respect to the respective discrimination grounds in the sense that they can themselves be categorized on the basis of the aspects referred to by those grounds. Consequently, the indeterminately reduced non-significance right would read: *'to the extent that the right-holder can be characterized by the aspect of 'racial or ethnic origin'/'age'/'disability'/'sexual orientation'/'religion or belief', that aspect shall be insignificant within a certain area of rights'*.

Both in the case of non-significance-rights in their pure form and in their indeterminately reduced form, rights are based on non-names, however. No right-holders are designated in advance, it is only in connection with the *particular applications* of those rights that names arise. Non-significance-rights are marked by the unfinished, unwanted and paradoxical nature of non-names. The differences which they concern are meant to be insignificant; yet, each new application will necessarily emphasize the significance of these differences.

Other paradoxical features springs from the application of non-significance-rights. From the point of view of the non-significance-logic as such, it is not only the particular manifestations of the aspects concerned, but also those aspects as such which are meant to be insignificant. However, as discussed above in connection with the fluid elements of the social structure, if we consider the application of non-significance-rights, including all exceptions and escape-routes created by possible 'justifications of discrimination', it is only the particular manifestations of the aspects brought forward by those rights which are meant to be insignificant, not the aspects as such, except in the case of the aspect of 'racial or ethnic origin'. Hereby, non-significance rights gain another level of paradoxicality. The implications of the non-significance-logic as such stand in glaring contrast to the muddled application of non-significance rights.

But not only the muddled application involving other concerns than non-discrimination, also the fluid nature of those rights give rise to a paradoxical tension. An extreme flexibility is part of the nature of these rights, due to the fact that no right-holders and no standards of comparison are defined in advance. From a statical point of view (and from the perspective of the non-significance-logic as such) the significance of the aspects concerned is being eliminated. But from a dynamical point of view, the significance of these aspects is being eliminated *over and over again*. They become fluid: The particular manifestations of those aspects are constantly new, but the aspects as

such will continuously exist and give rise to ever new manifestations. As argued above, due to the fluid nature of non-significance rights, the aspects concerned become essentially processual, never-ending.

We have learned that the aspects concerned are transhistorical aspects of destiny which are meant to become culturally insignificant so that the right-holders may take part, more fully, in the destiny of today. In the light thereof, we may conclude that the social mean constituted by non-significance rights is a highly paradoxical mean.

The significance of the transhistorical aspects of destiny is both strengthened and weakened by virtue of the non-significance-logic. Non-significance rights create *possibilities* for the right-holders by way of flexible articulation of certain transhistorical aspects of destiny. It becomes clear that the 'normal life' carries with it such transhistorical aspects of destiny. However, the flexible articulation constitutes a *limitation* as well. The significance of those destiny aspects are not only enhanced in terms of their particular manifestations - due to the particular names which arise in each particular application of non-significance rights. The transhistorical destiny aspects as such are strengthened, both positively and negatively, because of the many possible escape routes which dominate the realization of those rights. Finally, the transhistorical destiny aspects gain a peculiar kind of permanence, a 'never-ending' character in the midst of the flow, exactly because of the fluid nature of non-significance rights. This 'never-ending' character of the transhistorical destiny aspects burdens each individual who - as we learned above - must carry his or her destiny alone as far as those aspects are concerned.

In other words, from a statical point of view and in abstractum, non-significance rights eliminate the significance of the transhistorical aspects of destiny. But as applied, they enhance, as well, the significance of those aspects; this happens in each application, as it happens in the flow of applications, and it happens by way of external concerns because of which discrimination is upheld and subjected to justification.

Considered as a social mean, non-significance rights place human beings in a tensional position between determination and non-determination, in a no man's land from which they cannot escape and in which they must continuously fight for non-determination. It is a social mean which presupposes that human beings are driven towards the realization of the 'normal life', and that they accept that this involves a destiny battle which can never be won as such, only in terms of its particular manifestations. The individual must carry the burden of an endless project of emancipation.

Determinately reduced non-significance-rights - placing human beings in a battle against destiny aspects which fundamentally can neither be changed nor varied.

Finally, we are confronted with determinately reduced non-significance rights. Whereas *indeterminately* reduced non-significance rights are most accurately seen as a variation of non-significance rights (for which reason they are dealt with above), *determinately* reduced non-significance rights constitute a logic of their own.

Determinately reduced non-significance rights can be found in the hierarchy of signifiers in-between names and non-names in which they constitute the most dominant kind of rights. They are *determinately reduced* in the sense that they are attributed to the double-names 'Man in contrast to being woman' and 'Woman in contrast to being man'. That is, the *possible* right-holders are designated in advance, as are the *possible* standards of comparison. However, only in connection with particular applications of these rights, we will know whether the right-holder is a 'Man' or a 'Woman' and whether the situations of women are to be compared with the situations of men, or vice versa. In other words, determinately reduced non-significance rights still depend on the formulation of a discrimination ground, namely the discrimination ground of 'sex', for which reason they are still most accurately described as non-significance rights. But they come close to as-if-rights. According to our definitions, as-if-rights depend on the *exact* designation, in advance, of a right-holder who is to be compared with another right-holder.

The logic of determinately reduced non-significance rights can be formulated as follows: '*The aspect of 'being one or the other sex' shall be insignificant within a certain area of rights*'. Obviously, there are two variations. They would read, respectively: '*In so far as the right-holder is a Woman, the aspect of being a Woman in contrast to being a Man shall be insignificant within a certain area of rights*' and '*In so far as the right-holder is a Man, the aspect of being a Man in contrast to being a Woman shall be insignificant within a certain area of rights*'.

Determinately reduced non-significance rights have a paradoxical nature, just like non-significance rights. But the paradoxicality is even deeper. It is not merely in connection with the particular applications that difference between the sexes which - meant to be insignificant - is articulated. This difference is articulated in advance - for which reason it becomes significant. In contrast to the aspects involved in non-significance rights, the aspect of 'being one or the other sex' is not fluid. But it has a 'never ending' character for a deeper reason: it is granted a fundamental status.

Another feature is crucial: Determinately reduced non-significance rights are logically unstable. They are applied in the light of the principle 'substantive and not formal equality'. according to this principle, 'positive discrimination' may be acceptable; that is, determinately reduced non-significance rights may be turned around so as to express the opposite logic: *'The aspect of 'being one or the other sex' shall be significant within a certain area of rights'*. True, we saw the CJEU demonstrate a certain strictness with respect to accepting 'positive discrimination'; this reversed logic can not be randomly applied. And as far as concerns the principle of 'substantive and not formal equality', it was much more influential in relation to the CJEU invented name 'Woman in so far as she is subjected to circumstances which can only affect women' (to which as-if-rights are attributed, not determinately reduced non-significance rights). None the less, this principle, as well as 'positive discrimination', is in play - opening to nuanced contextualizing interpretation, and hereby to logical instability and intransparency.

Also the temporary nature of many of the exemptions laid down shall be mentioned. Apart from the fact that the exemptions serve to enhance the significance of the difference between the sexes, their temporary nature introduces an element of obscurity in so far as the future status of these differences are concerned.

We have learned that the aspect of 'being one or the other sex' is a transhistorical aspect of destiny the cultural significance of which must be adjusted so that the right-holders may take part, more fully, in the 'normal life' which constitutes the destiny of today.

Again, we are confronted with a paradoxical mean which both denounces and enhances the difference between the sexes. In this case, the paradoxicality does not only unfold in connection with the application of the determinately reduced non-significance rights, it is inherent in their logic as such and in the presumptions on which they are based. In addition, we are confronted with a mean haunted by a certain instability and obscurity: it is not completely clear to what extent the logic of the mean will be upheld in the present, and far less is it clear how it will be applied in the future.

Also this mean places human beings in a destiny battle from which they cannot escape. But it is different from the destiny battle implied in non-significance rights. Determinately reduced destiny rights do not place human beings in an endless battle in the sense that they have to fight, continuously, ever new manifestations of transhistorical destiny aspects. Rather, the battle is a battle of powerlessness. The particular manifestations are known and fundamental of nature. Human beings are to

fight manifestations of destiny aspects which fundamentally can neither be changed nor varied.

Also, human beings are blinded in this battle - not because they do not know the particular manifestations of the aspect of 'being one or the other sex', but because they do not know the direction in which the battle will take them. Nor do they know the present status of the battle.

Certainly, possibilities are created. The mean offers a highly differentiated conceptual framework within which fine-grained adjustments of the cultural significance of the difference between the sexes can be carried out. But the view is blocked. It cannot be discerned *in what way* the cultural significance of the difference between the sexes shall ultimately be adjusted so as to make possible the belonging of men and women, in a fuller sense, to the 'normal life' which constitutes the destiny of today.

Other kinds of rights

Above, we have summed up the logics of the three kinds of non-discrimination rights we have encountered: as-if-rights, non-significance-rights and determinately reduced non-significance-rights, including their variations and modified versions. In addition, we have reflected upon the nature of these rights, respectively, considered as social means.

But it should be recalled that we have also encountered rights which are not non-discrimination rights.

Substantial rights play a huge part in the hierarchy of names (supporting the discrimination ground 'nationality'), a small part in the hierarchy of signifiers in between names and non-names (supporting the discrimination ground 'sex' with respect to the qualifications of it which center on motherhood and fatherhood) and no part what so ever in the hierarchy of non-names.

But also the non-discrimination Directives themselves contain logics of rights which cannot be understood as logics of non-discrimination. The prohibition against harassment (which can be found in all non-discrimination Directives dealing with the discrimination grounds of 'racial or ethnic origin', 'age', 'disability', 'sexual orientation', 'religion or belief' and 'sex') is quite simply *a prohibition*. Although this prohibition is included in the definition of non-discrimination, it does neither imply an as-if-logic, nor a non-significance-logic. Furthermore, *indeterminate access rights* play a minor role in the hierarchy of signifiers in between names and non-names (in

connection with the rights of self-employed women) and a relatively important role in the hierarchy of names (many of the rights granted to 'Third Country Nationals' are not proper non-discrimination rights, but only indeterminate access rights).

Finally, fundamental rights or human rights (granted to 'Everyone') should be mentioned. According to their formulations, they will either be substantial rights or indeterminate access rights. However, due to the fact that they function as interpretational aspects of other rights, rather than as independent rights themselves, they constitute a special kind of rights. In fact, since they are not attributed to a signifier, as argued above, it could be asked whether they constitute 'rights' at all, and not rather interpretational principles? However, in their particular applications, they are attributed to a right-holder. Although the name of this rights-holder stems from another right, we shall accept the notion of 'rights' in connection with human rights and fundamental rights.

**The problematic of 'the presupposition of a certain level of equality'
(or 'multi-layered discrimination')**

We shall now turn to some fundamental problematics of non-discrimination rights.

First and foremost: As discussed on many occasions already, non-discrimination rights presuppose that a certain level of equality already exists.

This is due to the fact that non-discrimination rights depend on comparisons between two situations which are similar, only not with respect to the single aspect which the non-discrimination right in question concerns. If, for instance, discrimination in relation to 'racial or ethnic origin' exist within the area of work, then non-discrimination rights may not be able to meet the problem. 'Immigrants' or 'roman people' might be discriminated against not only because they are 'immigrants' or 'roman people', but because their professional competences, experiences, language capabilities or cultural sensitivities cannot compete with those of people who are not 'immigrants' or 'roman people'. Such differences may, in turn be due to discrimination against 'immigrants' or 'roman people' which has occurred at earlier stages and in other areas of law (education, immigration) as well as in areas which are only scarcely regulated by law (personal interactions of various kinds). In other words, present manifestations of discrimination may not be capturable by non-discrimination rights because the situations of 'immigrants' or 'roman people', on the one hand, and people who are not 'immigrants' or 'roman people', on the other, are not 'comparable' with

respect to a range of factors. The fact that the lack of comparability may be due to previous manifestations of discrimination or discrimination within other areas does not help. Non-discrimination rights depend on comparability in all aspects but a single aspect.

This problematic of 'the presupposition of a certain level of equality' could also be called the problematic of 'multi-layered discrimination'. If discrimination does not only take place within a limited area of law, but penetrates society in general, then the victims of discrimination will be haunted by the effects of discrimination in so many different ways that possibilities of establishing 'comparable situations' will be limited.

This problematic applies to all of the discrimination grounds we have dealt with. National differences with respect to the general education provided, industrial, scientific and technologic developments as well as welfare rights may place citizens of some member state in situations which are not 'comparable' to the situations of citizens of other member states - for which reason discrimination on grounds of nationality may not be capturable by non-discrimination rights. The situations of old and disabled workers may be 'not comparable' to the situations of young and not disabled workers with respect to their working capabilities and endurance. Homosexual couples may, as we have seen, be in a situation which cannot be compared to the situation of heterosexual couples due to the fact that they have not been able to marry or not been able to enter into registered partnership. People who belong to religious minorities may have been victims of life-long discrimination the effects of which are multifold, just like people belonging to ethnic minorities, or they may be the victims of complex connections between ideology and professional competences. Women may be in a situation which cannot be compared to the situations of men due to multiple and fine-grained differences in the ways in which girls and boys are brought up, respectively. - Just to indicate the contours of how the problematic is likely to unfold. Naturally, it could unfold in multiple ways, and in relation to other particular names than those mentioned.

The problematic of 'the presupposition of a certain level of equality' could be met in different ways. In the following, I shall indicate a range of possibilities, most of them pursued by EU-legislation or the CJEU some way of another.

Most obviously, *the material scope of non-discrimination rights could be extended*; ultimately it could be extended so as to cover all areas of law - also education, family law, immigration law, media law etc. The problem is of course that many areas of law are

not covered by EU-law, but fall under the competences of the member states. But apart from that, many of the factors which would be relevant have their sources in informal institutions and patterns of social interactions. For this reason, even an all-encompassing material scope would still not mean that all kinds of discrimination could be captured. Furthermore, the time-factor must be taken into account. The effects of discriminatory upbringing or education will last for many years *after* a change has been instituted within these areas.

The material scope of non-discrimination rights with respect to 'nationality' cover, in principle, all areas of law which fall under the competences of the EU. However, as we have seen, not for everyone, and not under all circumstances. Non-discrimination rights with respect to the discrimination ground 'sex' cover relatively large areas. But huge exemptions apply, both temporary and permanent exemptions. Also non-discrimination rights with respect to the discrimination ground 'racial or ethnic origin' cover several areas of law, that is, both rights related to working conditions and social rights in a broad sense. In contrast, non-discrimination rights with respect to 'age', 'disability', 'sexual orientation', 'religion or belief' are limited to work-related areas of law.

Another way in which to meet the problematic would be to support non-discrimination rights by substantial rights. Substantial rights of various kinds may contribute to the establishment of more equal conditions. This can both be done in general, by way of granting everyone subjected to non-discrimination law certain rights, or it can be done more specifically, by way of granting special rights to particular groups of right-holders.

This way of meeting the problematic will encounter some of the same problems as those mentioned above. Many areas of law do not fall under the competences of the EU. In any case, the factors which stem from informal institutions and patterns will remain untouched. Issues of time and historical development are in play as well. None the less, substantial rights could in some situations make a huge difference. For instance, if disabled people were granted substantial rights with respect to the availability of certain facilities or special tools they might need, their chances of being able to benefit from non-discrimination rights would be bigger.

Non-discrimination rights with respect to 'nationality' are supported by a whole regime of substantial rights, namely mobility, residence and family reunification rights. Naturally, these rights do not address national differences with respect to the general

education provided, industrial, scientific and technologic conditions or the existence and quality of national welfare rights. But had it not been for EU mobility, residence and family reunification rights, then only those people who would be able to satisfy various national criteria of mobility and residence would have been able to benefit from EU non-discrimination rights. These EU substantial rights establish in a general way a certain level of equality on the basis of which EU-non-discrimination rights can be claimed.

Non-discrimination rights with respect to 'sex' are supported by some substantial rights, but in a specific way. Especially, women who are pregnant or have just given birth are granted substantial rights. But also fathers and parents in general are supported in this way. These rights function as a foundation for non-discrimination rights in the sense that they contribute to the establishment of conditions under which women may more easily reconcile motherhood and work.

Non-discrimination rights with respect to the remaining discrimination grounds are not supported by EU substantial rights.

The problematic of 'the presupposition of a certain level of equality' could furthermore be met by *stretching the concept of 'comparability'*. This is what the CJEU did in the Römer and Maruko judgments⁷⁸¹. The CJEU laid down that 'comparable situation' does not mean 'identical situation'. 'Being married' and 'being in a registered partnership' may under certain conditions be seen as 'comparable situations'. In this way, the CJEU was able to capture more layers of discrimination, that is, to integrate, in its judgments, considerations of certain pre-existing inequalities which would otherwise have meant that the relevant non-discrimination rights (relating to the discrimination ground 'sexual orientation') would have been futile.

Obviously, this is a logically elegant way in which to meet the problematic, - but it will only function under specific and rare circumstances. In any case, the situations in question will still need to be 'comparable' - even if 'comparable' does not mean 'identical'. If the concept of 'comparability' was stretched randomly far, it would undermine the logic of non-discrimination.

There is yet another logically elegant way in which to meet the problematic. We have seen that under certain circumstances, the CJEU lays down that not only shall the non-discrimination right in itself be observed, also *the condition for being able to enjoy this*

⁷⁸¹ Analyzed in chapter 13

right shall be taken into account. In the K.B. and Richards judgments concerning transsexuality⁷⁸², conditions such as ‘being able to marry’ and ‘legal recognition of the new sex of a person who has undergone gender reassignment’ were being considered. In the Zambrano-judgment⁷⁸³, the possibility of being able, in the future, to enjoy fundamental EU-citizen’s rights (which include non-discrimination rights) was being secured by the court in the sense that particular family reunification rights which could otherwise not be derived from EU law were being granted. In other words, this logic means that observing a non-discrimination-right may imply the granting of another right so that the right-holder is capable of enjoying the former right.

Obviously, if this logic was followed consequently, it would lead to an excessive number of ‘extra rights’ which would otherwise not have been granted. Homosexuals would be allowed to marry; people who, for one reason or the other, are not able to compete in a given national labour market would be granted the right to education, training, facilities etc. If taken to its extreme, this logic would imply that unemployed people would have a right to work (in the sense that employers would be forced to employ them) and that people who cannot take care of themselves (physically or financially) would have a right to assistance so as to be able to enjoy non-discrimination rights in another state.

As can be seen, this kind of rights-thinking is not only potentially powerful, but even revolutionary. If taken to its extreme, it would completely transform the legal order it was part of. All existing borders and limitations would be transcended. In truth, this rights-thinking has a utopian aspect to it. It implies that no-one should be prevented from enjoying a right because of other circumstances. As such, it addresses directly the fact that pre-existing inequalities means that different people are not equally capable of benefitting from the rights which exist in a given order of law.

Naturally, the revolutionary and utopian potentials are not realized. On the contrary, the CJEU only makes use of this logic on rare occasions, and only to a limited extent.

Yet another way of meeting the problematic would be *to set aside the logic of non-discrimination in the light of the principle of ‘substantive and not formal equality’*. More precisely, the logic of ‘*positive discrimination*’ may be applied with the purpose of compensating for pre-existing inequalities. The problem is of course that ‘positive

⁷⁸² Analyzed in chapter 17

⁷⁸³ Analyzed in chapter 5 (Also the Carpenter judgment, analyzed in the same chapter, would be an example of the application of ‘*the condition for being able to enjoy the right logic*’)

discrimination' constitutes a complete reversal of the logic of non-discrimination. If not applied very restrictedly, it will undermine completely the logic of non-discrimination. In other words, 'positive discrimination' may certainly be able to meet the problematic that pre-existing inequalities exist, but it does not do so from the point of view of 'non-discrimination', logically speaking. Rather than supporting non-discrimination rights (in their formal meaning), it merely complements them. That is, it does not 'interact' with non-discrimination rights (like certain substantial rights may interact with non-discrimination rights in the sense that they provide a foundation for the possibility of enjoying these rights). Far less does positive discrimination alter non-discrimination rights themselves (like the other ways of meeting the problematic described above alter non-discrimination rights, either by expanding their scope or reflecting their logical meaning).

'Positive discrimination' is in principle allowed according to all the non-discrimination Directives dealing with the discrimination grounds 'racial or ethnic origin', 'age', 'disability', 'sexual orientation', 'religion or belief' and 'sex'. However, only in connection with the discrimination ground 'sex' have we seen this matter discussed and accepted by the CJEU. The court lays down rather strict criteria. Clearly, 'positive discrimination' cannot be applied randomly; it constitutes an exception from non-discrimination rights (in their formal meaning), not the general rule.

Also the prohibition against 'indirect discrimination' constitutes an alternative kind of non-discrimination law which complements basic non-discrimination law. 'Indirect discrimination' does not constitute a reversal of the logic of non-discrimination, but a strong modification of it in the sense that it relies on quantitative comparisons instead of qualitative.

From the point of view of the problematic of 'the presupposition of a certain level of equality', the crucial feature of 'indirect discrimination' consists in the fact that it deals with the intermingling of two kinds of discrimination. That is, 'indirect discrimination' deals with the fact that the kinds of discrimination which are prohibited according to EU-law may be intertwined with other kinds of discrimination which are not prohibited. The latter kinds could be all kinds: discrimination on the grounds of income, working hours, education, residence etc. As discussed in chapter 3, all law is based on discrimination of some kind.

By dealing with the intermingling of prohibited and not prohibited forms of discrimination, indirect discrimination addresses exactly the problem of pre-existing

inequalities. People who have been the victims of ‘multi-layered’ discrimination throughout their life (in relation to the prohibited kinds of discrimination) are often more likely to be characterized by a lower income or education or by fewer working hours (in the past or presently). For instance, in many European countries, women will generally have a lower income than men, and more women than men will be working part-time. Consequently, a national rule which discriminates according to allowed grounds of discrimination such as level of income or number of working hours, is likely to affect women harder than men (place them in a less favorable situation).

This kind of discrimination can be captured by indirect non-discrimination rights. These rights cannot be said to interact with the basic (direct) non-discrimination rights. They do not constitute a foundation for these rights, neither can they be seen as a particular logical reflection of them. Rather, indirect non-discrimination rights constitute an alternative kind of non-discrimination rights which imply that kinds of discrimination which would otherwise not be prohibited may be prohibited if it can be established that they are likely to place a particular group of people (who can be seen as right-holders in relation to the prohibited forms of discrimination) in a less favorable situation. The question of whether the kinds of discrimination in question are ‘likely’ or not to do so will be determined on the basis of quantitative data (or assessments).

Indirect non-discrimination rights are interesting in the sense that they imply the discussion of the legitimacy of *another kind of discrimination* than the kind of discrimination which the right in question concerns. In accordance with the case-law of the CJEU, such discussions must be carried out on the basis of the principle of proportionality, that is, the legitimacy of the purposes involved in the national rule must be evaluated along with the appropriateness and necessity of the means by which the purposes are pursued. That is, in general, the CJEU does not exactly discuss the legitimacy of the other discrimination ground as such (whether it be ‘educational level’, ‘working hours’, ‘level of income’ or another ground); only the purposes and means which it expresses are being discussed. However, it happens that the CJEU comes close to discussing the legitimacy of the other discrimination ground as such. In the Brachner-judgment, the CJEU considered whether it was reasonable to discriminate on the grounds of poverty.⁷⁸⁴

The prohibition against indirect discrimination certainly constitutes a fruitful way in which to meet the problematic of pre-existing inequalities. It has its limitations too,

⁷⁸⁴ Analyzed in chapter 18 (in the section ‘Indirect discrimination’)

though. First of all, indirect non-discrimination rights may always be overridden (if the purposes and means expressed by the national rule under consideration are accepted by the CJEU). Secondly, we must be aware that ‘comparability’ is still required. Only, the ‘comparable situations’ relate to the other discrimination ground, the one which is normally accepted. The two groups which are compared in relation to this ground (for instance pensioners with a low pension versus pensioners with a higher pension) cover or conceal, so to speak, two other groups (for instance women and men). Instead of relying on comparisons in which all relevant aspect must be similar except for the one which the non-discrimination right in question concerns, indirect non-discrimination rights rely on comparisons in which all relevant aspects must be similar except for the *two* aspects involved: the one which the non-discrimination right in question concerns and the other aspect which covers the former aspect in the particular case. This means of course, that the existence of a multiplicity of pre-existing inequalities may still prevent victims of discrimination from benefitting from non-discrimination rights. Indirect non-discrimination rights may be claimed in relation to all the discrimination grounds we have dealt with. However, it is predominantly applied in relation to the discrimination ground ‘sex’.

Furthermore, the *conglomerate of signifiers* which has arisen in relation to the discrimination ground ‘sex’ can be seen as a way of meeting the problematic of ‘the presupposition of a certain level of equality’.

The different signifiers correspond to different qualifications of the discrimination ground ‘sex’ (such as ‘being one or the other sex’, ‘transsexuality’, ‘being subjected to circumstances which can only affect women’, ‘being on parental leave’, ‘being married or life-partners, establishing a company together’). Seen from the point of view of each of these qualifications, the problematic is not solved at all, only moved. Each signifier - with its corresponding qualification of the discrimination ground - implies of course its own standard of comparison on the basis of which ‘comparable situations’ are established. Each different standard of comparison will only function on the condition that a certain level of equality exists. However, when seen from the point of view of the total number of signifiers, the conglomerate does provide for some compensation for pre-existing inequalities. The different qualifications of the discrimination ground complement each other in the sense that they capture different kinds of inequalities (which are none the less related). Ideally, each of them would capture a kind of inequality which would otherwise have functioned as a hindrance from the point of

view of one of the other qualifications, that is, they would capture each others hindrances. I do not find that we would be justified in assuming this ideal scenario; the different qualifications are not that closely and systematically related. Predominantly, they complement rather than support each other. Relations of support can be detected as well, though.

The ad-hoc combinations and replacements of signifiers and logics which we have seen the CJEU unfold in relation to certain sex-discrimination-cases serves to strengthen the complementarity in the sense that it ensures a high degree of flexibility; logical creativity increases the chances that a particular case of discrimination can ultimately be captured by one of the signifiers and one of the logics which are in play.

In principle, this way of developing non-discrimination rights can be expanded even further; more signifiers, logics and qualifications of the discrimination ground 'sex' may arise in the future. Also the discrimination grounds 'racial or ethnic origin', 'age', 'disability', 'sexual orientation', 'religion or belief' could be subjected to such developments; in this case, they would be transformed, though, in the sense that they would no longer constitute the basis of non-names, but of a mix of different signifiers. In any case, however, fixations of this kind will never be able to capture all relevant 'pre-existing inequalities', only those which can be conceptually associated with the discrimination ground. Apart from that, they constitute a logically muddled way of developing non-discrimination rights which can only be pursued to a certain extent. Too many and too disparate fixations of the respective meanings of the discrimination grounds would undermine them. After all: it must be presumed that the possible different meanings of a given discrimination ground can at least be associated with a common conceptual foundation. If not, the meaning of the discrimination ground becomes arbitrary.

Finally, *the establishment of other kinds of elements apart from rights* can be seen as a way in which to meet the problematic of 'the presupposition of a certain level of equality'.

The non-discrimination Directives dealing with 'racial or ethnic origin', 'age', 'disability', 'sexual orientation', 'religion or belief' and 'sex' all contain such elements. It is required that organizations exist which can support victims of discrimination, both legally and in other ways. Also, it is required that research concerning discrimination is carried out in the member states and that the results thereof are disseminated, just like general information regarding national and EU non-discrimination law. 'Best practices' are to be developed and broadly shared.

As previously discussed, the strong presence of these elements in the non-discrimination Directives bears witness to a general acknowledgement of the limitations of non-discrimination rights. But in what way do these elements support or complement non-discrimination rights? They support non-discrimination rights in the sense that they make it easier for the victims of discrimination to take legal action. Dissemination of information regarding non-discrimination law and general patterns of discrimination serves the same purpose - just like it may also have a preventive effect. But none of this concerns the problematic of 'the presupposition of a certain level of equality'.

The *development of best practices* might, on the other hand, relate to the problematic in the sense that such practices could represent nuanced, contextualized and reflexive ways in which to address issues of discrimination - ways which would not be dependent on the establishment of formal 'comparability' in all aspects but one.

To the extent that such nuanced practices are indeed developed, they would complement non-discrimination rights. It is important to note, though, that they would not really support non-discrimination-rights. They would not alter non-discrimination rights, and they would not provide a foundation for them. They would not even complement them in the shape of another right. They would constitute a parallel regime which has nothing to do with rights.

The problematic of 'reproduction of national content rights'

The second fundamental problematic which I would like to bring forward concerns the fact that non-discrimination rights depend on national substantial rights. This problematic has been mentioned several times already. It means that non-discrimination rights are *confirming* existing rights to a large extent; by reproducing national content rights they also reproduce national hierarchies and forms of discrimination.

In fact, by taking into account that EU-law doubtlessly affects national substantial rights in numerous ways, the problem can be described as a double problem: Firstly, EU-non-discrimination rights reproduce the national substantial rights which are in force at a given time. Secondly, EU-non-discrimination rights do not control the ways in which they affect national transformations of rights - that is the future drafting and adoption of rights.

Let me unfold the implications of the second problem. EU non-discrimination rights merely concern the access to national substantial rights, not their content or their existence for that matter; they merely affect who may and who may not claim national substantial rights by laying down that certain factors (corresponding to the discrimination grounds) may not function as factors of exclusion from those rights. However, the fact that they affect who may and may not claim national substantial rights may very well give rise to national transformations of the contents of those rights. National politicians may find that the extended personal scopes of certain rights may have the effect of burdening public finances for which reason the content of the rights in question must be adjusted. Or they might find that due to new categories of right-holders, the purposes served by those rights must be reconsidered. They might even find that the altered personal scopes give rise to a conceptual rethinking and restructuring of a whole area of rights.

National transformations of national substantial rights may be intended or not intended, wished for or unwanted from the point of view of the purposes which are specified or implied in EU law. In connection with the discrimination ground 'sex' it is made clear in the relevant Directives that comprehensive transformations in the national welfare systems are expected as a consequence of the implementation of EU-law (for which reason the implementation of the principle of equal treatment between men and women must be 'progressive'). In connection with discrimination on the grounds of 'nationality', a gradual 'harmonization' of the different national systems is implied as a purpose of EU-law, at least according to the CJEU. On the other hand, national restructuring which serves the purpose of avoiding the implementation of the principle of non-discrimination with respect to certain rights does definitely not follow the purposes of EU-law, according to the CJEU, but is in risk of undermining it, whether deliberately or not.

In any case, however, national transformations of the content, structure and contextual meaning of national substantial rights motivated by EU-law are not controlled by EU-law. In this sense, the problematic of 'the reproduction of national content rights' is a double problematic. Not only will EU non-discrimination rights reproduce national substantial rights due to the logical structure of non-discrimination rights, they will also reproduce the transformations of national substantial rights which they have affected themselves, but without any control as to the directions of these

transformations - transformations which may both serve and undermine the purposes of EU-law.

Conceptual interventions in the organization and purposes of national substantial rights

Is the principle of non-discrimination then a powerless principle seen from the point of view of the *content* of social rights (which doubtlessly constitutes a most crucial aspect of social rights)? Largely, it is, of course. And it is clear that only the adoption of a range of EU substantial rights which could support non-discrimination rights would truly make a difference in that respect. That, in turn, would mean a radical transformation of the existing regime of EU social rights.

However, I will argue that within the context of the current regime, EU non-discrimination rights do not only influence national substantial rights in the sense that they affect who may and may not claim national substantial rights. Definitions and distinctions which have arisen in relation to the material scopes of EU-non-discrimination rights intervene in the very conceptual foundation and organization of national rights.

Throughout part I we have been witnessing the significant role of EU-concepts, established and defined by the CJEU. But also as far as national concepts are concerned (concepts which appear within EU-legislation, but which according to the CJEU are to be interpreted within the context of national law), we have seen the significant role of conceptual considerations on behalf of the CJEU. Even if a given concept is not an EU-concept in the sense that it is granted 'a uniform meaning throughout EU-law', the CJEU will still emphasize that it should be interpreted in a way which does neither undermine general principles of EU-law, nor more specific purposes laid down in the particular legislative act under consideration. In other words, EU-criteria are established with respect to the meaning of national concepts as well, on the basis of general EU-principles as well as purposes and contextual implications derived from particular acts of law. In this sense, a concept appearing in a legislative act of EU-law is never 'a free concept' in relation to national law; even when bound to national law, its possible meaning is subjected to limitations springing from the smaller as well as the larger context in which it appears in EU-law, as defined by the CJEU.

Conceptual definitions and criteria established by the CJEU on the basis of definitions and criteria provided for in legislation (which, in turn, often spring from earlier CJEU-case-law) may concern names or other signifiers. But they also concern material scope.

In relation to the discrimination ground 'nationality', the establishment of conceptual criteria with respect to the different kinds of social security benefits covered by the Social Security Coordination Regulation has been crucial, not only to clarifications of the material scope of the Regulation and to the interpretation of more specific provisions of that Regulation, but also to the possibility of translating a given right which is earned in one member state into a corresponding right within the social security systems of another member state. Also, the distinction between 'social security' and 'social assistance' is crucial, both to the before-mentioned Regulation, and to the Residence Directive and to the Directives which concern the rights of third country nationals. Certain groups of right-holders are not granted the right to equal treatment with respect to social assistance, and they may be expelled from the state in which they reside if they apply for it. As regards the remaining discrimination grounds, we saw that the concept of 'pay' and the notion of 'working conditions' have been thoroughly considered by the CJEU along with a constellation of other concepts and notions circulating around a distinction between social rights springing from or relating to the employment relationship and social rights which do not and merely concern the state. The conceptual clarifications carried out by the CJEU in this respect are crucial to the determination of the material scopes of non-discrimination Directives and (as far as concerns the discrimination ground 'sex') to the relationship between different non-discrimination Directives. As regards the discrimination ground 'sex', clarifications of the meanings of the concepts of 'goods' and 'services' play an important part as well.

I will argue that all these conceptual definitions, distinctions and criteria which are significant to the determination of material scope and to the possibility of translating between different national systems are influential in another way as well. They do not only affect national substantial rights in the sense that they determine whether or not a particular case is covered by EU-law as such, by a particular legislative act or provision, and in the sense that they provide a conceptual framework within which translations can take place. They influence national content rights in the sense that they alter the conceptual foundation and organization of these rights. Naturally, the member states need not replace their own categorizations with those of EU-law. But when implementing EU-law within their own systems of rights, they cannot avoid integrating EU-categorizations.

Categorizations of benefits are not just indications of pragmatic organizational concerns. Categorizations as those referred to above ('social security' versus 'social

assistance'; 'work-related' versus 'state-related'; 'market-related' versus 'state-related'; the risk of 'unemployment' versus the risk of 'sickness' etc.) are intrinsically connected to basic understandings of the nature and purposes of benefits and to institutional orders and logics. Naturally, the member states are in no way obliged to adopt the basic understandings which are implied in the concepts and conceptual criteria established by the CJEU, no more than they are obliged to replace their own categorizations with EU-categorizations. But since they will necessarily need to adjust their own categorizations in the light of EU-categorizations (one way or the other), basic understandings of benefits as well as institutional logics are transmitted to the national systems - even if only in fragments or in muddled and reduced versions, mixed with national understandings and logics.

The influences in question are not exactly controlled by EU-law. The member states are granted huge discretion with respect to the ways in which to implement EU social rights. And these ways will include 'minimal' or 'elusive' ways the purpose of which is to reduce the influences of EU-law as much as possible. But the concepts, criteria and distinctions and the categorizations they imply are controlled by EU-law. They constitute crucial building stones of social order. Indirectly, they affect the contents of national substantial rights.

The problematic of 'arbitrary justification of discrimination'

Lastly, we shall consider the element 'justification of discrimination' which plays a huge role within EU non-discrimination law.

Why such a huge role? Obviously, it has been regarded necessary to provide for some possibilities of escaping the principle of non-discrimination. To some extent, this bears witness to a half-hearted attempt to eliminate (or 'combat') discrimination. To some extent, however, it bears witness, again, to the complexities entailed in applying a purely formal principle within the context of nuanced social regulation. The social order in which we live brings together so differentiated forms of regulation that a rigid prohibition of certain forms of discrimination which have so far been relatively dominant within national welfare systems and in work life would be problematic from the point of view of the functioning of the social order as such. Even if the discrimination grounds we have dealt with correspond to differences which have been crucial to past manifestations of power rather than to present ones, they still permeate our institutions to a large extent.

‘Justification of discrimination’ unfolds according to a particular pattern of argumentation springing from the principle of proportionality. First, it must be considered whether the discrimination in question serves a ‘legitimate aim’. If it does, then it must be assessed whether the means by which this aim is pursued are ‘appropriate’ and ‘necessary’ in relation to the aim.

Aims which are generally⁷⁸⁵ considered ‘legitimate’ by the CJEU are labour market related aims (such as facilitating access to the labour for certain groups of people or balancing the divergent interests within the labour market); aims which concern the particular employment relationship (such as ensuring that employers will be able to require the competences they need as well as the fulfillment of other conditions relevant to the organizational, economic, psychological or ideological management of their organization); public aims such as ‘public security, order and safety’; and social policy aims (such as ensuring the sustainability of existing systems of rights or social policy initiatives). The CJEU is generally reluctant to accept aims that only relate to financial concerns⁷⁸⁶, but to the extent that it can be established that a connection exist between financial concerns and the possibility of providing basic services to the population, financial considerations may constitute a part of a ‘legitimate aim’ (the aim of *‘ensuring sound management of public expenditure on specialized medical care and to guarantee people’s access to such care’* is for instance considered to be a legitimate aim⁷⁸⁷).

Also aims stemming from EU-law (that is, from other EU Directives or Regulations than those under consideration) may constitute ‘legitimate aims’ in the light of which discrimination may be justified. We saw, for instance, that the aims of *‘facilitating the free movement of doctors’* and *‘contributing to a high level of public health protection in the Community’* were capable of overriding non-discrimination rights with respect to sex.⁷⁸⁸

As far as concerns the application of the criteria of ‘appropriate and necessary’, we are facing a rather muddled picture. As a minimum, the CJEU will require that some sort of connection can be established between the national rule or arrangement under consideration and the aim which the rule is claimed to serve. If, for instance, a given

⁷⁸⁵ Depending, naturally, on what possibilities of justification the relevant legislation specifies in relation to the different discrimination grounds. However, in spite of the specificities of legislation, some general features can be detected as far as concerns the CJEU’s ways of approaching the question of what constitutes ‘legitimate aims’ and ‘appropriate and necessary means’.

⁷⁸⁶ Except in the case of the temporary exemptions laid down in Dir. 79/7/EEC

⁷⁸⁷ Case C-226/98, *Jørgensen*, analyzed in chapter 18 (in the section ‘Indirect discrimination’)

⁷⁸⁸ Case C-25/02, *Rinke*, analyzed in chapter 18 (in the section ‘Indirect discrimination’)

rule is claimed (by national authorities or the referring court) to serve the integration of older workers in the labour market, but that the rule itself works to the disadvantage of older workers with respect to their possibilities of remaining in the labour market, then the rule is obviously not 'appropriate and necessary' when seen in the light of the designated aim. A basic inconsistency can be observed. - But apart from requiring a basic level of consistency as well as some sort of connection between mean and aim, the CJEU does not adhere to any general standards. Some times it is enough that some sort of intuitive or thematic connection exists between the rule and the aim it is claimed to pursue. Other times it is required that the rule is likely to actually serve the aim. Or it is required that the rule serves the aim in a precise and differentiated manner, taking into account the specific circumstances of the persons subjected to the rule. Finally, the CJEU may raise the objection that the rule in question is not 'necessary' in the sense that another rule (or another formulation) would have served the aim in question just as well and could have been chosen instead.

As this short sketching of alternatives indicate, there are different degrees of '*appropriate and necessary*' connections between aims and means. In the one end of the spectrum, connections are associative and general (and mainly claimed), in the other end, connections need to be convincing in the sense that the rule relates to the aim in a precise manner and does not regard more people or more matters than necessary. We should be aware, though, that the criterium '*necessary*' is practically never interpreted in a strict logical sense. If it were, then the CJEU would need to consider, in every detail, whether a national rule under consideration could not, in one aspect or in total, be reformulated, replaced or completely avoided. There are very few national rules (if any) that are 'necessary' in the strict sense of the word. It will almost always be possible to present an alternative which *also* serves a given designated aim (especially when aims are as broadly and loosely defined as is the case here). The CJEU hardly ever considers the necessity of a national rule as such; the court merely considers whether it is suited or not for the designated purpose and whether it is formulated in too general terms.

Another kind of regularity

The pattern of argumentation which springs from the principle of proportionality and which is always followed by the CJEU whenever assessing a suggested 'justification of discrimination' certainly involves a high degree of regularity, both in terms of the

course of argumentation and in terms of the criteria involved. None the less, it is too loose in order for us to call it a logic.

It is loose in the sense that formally speaking, it implies no fixated standards. The relationship between means and aims is allowed to vary considerably within a broad spectrum - and does in any case not comply with a determined logical standard. In addition to that, the aims which are regarded as 'legitimate aims' are materially wide-reaching and formulated in highly open terms.

Only in one sense may we say that 'justification of discrimination' implies a logic, namely in the sense that it is not a balancing exercise; non-discrimination rights are not taken into account in the examination of possible grounds of justification. First, it is being established whether discrimination is, 'in principle', at stake. If it is, then the suggested grounds of justification are being examined independently from the first examination - with the possible consequence of voiding the conclusion of the first examination. In other words: non-discrimination rights may be overridden by any aim which is considered legitimate in so far as this aim is pursued in an appropriate and necessary way. And overridden without a balancing or prioritizing exercise which takes non-discrimination-rights into account as an aspect the examination.

As it appears, 'justification of discrimination' is deeply problematic in view of the 'fundamental status' granted to non-discrimination rights. In truth, this 'fundamental status' cannot be upheld, at least not unmodified. First of all, non-discrimination rights may be overridden by any other concern as long as the criteria inherent in the principle of proportionality ('legitimate aim', appropriate and necessary means') are satisfied - without non-discrimination rights being considered themselves as a part of that examination. Secondly, the criteria of the principle of proportionality are interpreted in a very loose way which means that formal standards are not involved, and material standards are broad and open.

But we do not even need to take into account the 'fundamental status' of non-discrimination rights in order for 'justification of discrimination' to be problematic. Clearly, a basic level of certainty and predictability - which, I will argue, is crucial to any law⁷⁸⁹ - seems to be threatened.

So, does this mean that it is largely arbitrary whether or not non-discrimination rights are upheld or not? Are non-discrimination rights basically in the hands of the member

⁷⁸⁹ By the end of the dissertation, when revisiting the sixth anchor of order, 'The state *as one*', we shall engage in an analysis of the meaning of 'rule of law' within EU-law

states which are granted huge discretion within the field of social and employment rights? Or, alternatively, in the hands of the CJEU the judgments of which are lacking any clear standards in so far as 'justification of discrimination' is concerned?

Not necessarily. But we need to look for other kinds of standards. These are the standards which are implied in the horizons within which CJEU-interpretations take place. I will argue that these horizons constitute the 'certainty' and the 'predictability' of non-discrimination rights vis-a-vis the possibilities of justifying discrimination. In these horizons we detect the presence of fundamental principles as well as central EU-concepts. But first and foremost, they are world-visions, visions of the world of the ideal order in its tensional relationship with the presumed order. They comprise the purposes of the ideal order, as challenged by the presumed order.

In other words: in order for non-discrimination rights not to be subjected to complete arbitrariness, they depend, extensively, on the development of strong interpretational horizons.

In the next section, I shall analyze the interpretational horizons we have encountered from the point of view of the purposes they entail. But before doing that, let me sum up what we have learned about the means of the ideal order.

In conclusion: Non-discrimination rights rely on *fundamental principles and rights, conceptual foundations and stabile, developed interpretational horizons*

We have analyzed the logics of non-discrimination rights from two overall perspectives.

Firstly, we have defined the logics of the three overall kinds of non-discrimination rights we have encountered throughout this work. That is, we have defined the formal logics of these rights *as applied* (that is, including the logical implications which arise in connection with their applications), and we have interpreted these formal logics as social means in the light of our knowledge concerning the social structure of the ideal order. In other words, we have asked in what way the formal logics of non-discrimination rights can be said to serve the realization of the social structure.

In this respect, we came up with the following interpretations:

As-if-rights (which can be found in 6 different general variants and two modified variants) imply *a playing with a particular aspect of a life - playing with it in the sense of imagination, simulation or 'false translation' - so as to twist the relationship between an individual life and the 'normal life' which constitutes the destiny of today.*

Non-significance rights (which can be found in five different variants and one modified variant) *place human beings in an endless destiny-battle for the sake of the 'normal life' - a battle which involves the continuous fighting against ever new manifestations of the transhistorical destiny aspects, - that is, in an endless fight for non-determination according to those aspects.*

Determinately reduced non-significance rights (which can be found in two different variants) *place human beings in a powerless and blinded destiny battle for the sake of the 'normal life' - a battle which involves the continuous fighting against manifestations of destiny aspects which fundamentally can neither be changed nor varied, and in which the direction as well as present status of the battle are unknown to those who fight it.*

As it appears, all three kinds of rights circulate around the realization of the 'normal life' which constitutes the destiny of today - the first one through the simulation of *another* social situation, the second and third ones by way of endless emancipatory projects carried by the individual who must either continuously fight against ever new manifestations of certain aspects of destiny or against manifestations which are so fundamental that they can never be eliminated.

The social means expressed by the three kinds of non-discrimination rights are in other words highly tensional seen from the point of view of the temporal logic of historical law: They are deeply embedded in those aspects of the presumed order which they were supposed to eliminate or 'combat'; they drag with them the characteristics of the presumed order into the ideal order as a heavy burden.

Apart from interpreting the logics of the three overall kinds of non-discrimination rights as social means, we also analyzed the logics of non-discrimination rights from another perspective. We identified three fundamental problematics which apply to all non-discrimination rights because they spring from the common formal nature of those rights: the problematic of '*the presupposition of a certain level of equality*' (or 'multi-layered discrimination'); the problematic of '*reproduction of national content rights*'; and the problematic of '*arbitrary justification of discrimination*'.

Crucial is, however, that these problematics are met by the CJEU in multiple different ways. The fundamental problematics cannot be eliminated or 'solved', of course. But we may say that the case-law (and to some extent also legislation) implies various answers to these problematics. Some of these answers are logical answers, some of them are conceptual and yet others are ideological. Some of them are largely insufficient, whereas others are indeed capable of modifying the problematics. In any

case, this variety of answers add whole new dimensions to non-discrimination-rights, either by altering them logically or by complementing them in the form of other rights, or by creating a conceptual and ideological framework within which they can be interpreted. In other words, this variety of answers belong to the logics of non-discrimination rights - when these rights are reflected within the context of what we may call the comprehensive regime of non-discrimination social rights.

It should be emphasized that when I refer to 'a variety of answers', this does of course not imply that EU-law (led by the CJEU) has deliberately developed methods in which to meet the fundamental problematics. Rather, most of these 'methods' - the logical reflections and inversions of non-discrimination rights, the supporting substantial rights, the EU-concepts and conceptual criteria as well as the horizons - have been developed along the way, to some extent ad-hoc, and to some extent on the basis of more overall considerations, but in any case in connection with particular problematics (predominantly legal problematics springing from particular cases).⁷⁹⁰ Crucial is, however, that all the 'methods' outlined above can be seen as reflections of fundamental problematics of non-discrimination, and it is in this respect that I refer to them as answers.

As regards the first problematic, the problematic of 'the presupposition of a certain level of equality', we were able to detect a large number of 'answers', all of them largely insufficient, though. At best, they were able to solve a corner of the problematic - that is, a few aspects of it, and only under certain circumstances. Some of the answers represent ways of *supporting* non-discrimination rights, either in the form of substantial rights which provide a foundation for the possibility of benefitting from non-discrimination rights, or by altering non-discrimination rights themselves (extending the scope of non-discrimination rights, stretching their logic or even adding a new logical dimension to them). Other answers merely *complement* non-discrimination rights - by introducing substantial rights which do not exactly provide a foundation for non-discrimination rights, but which are thematically related to them, or alternative kinds of non-discrimination rights such as the right to 'positive discrimination' and the right not to be subjected to 'indirect discrimination', or by multiplying the meaning of

⁷⁹⁰ Only the substantial rights which support non-discrimination rights with respect to the discrimination ground 'nationality' (mobility and residence rights) and the policy elements contained in a number of non-discrimination Directives are obviously expressions of general concerns. The latter elements (such as 'development of best practices') may be seen as a direct response to the inadequacies of non-discrimination rights, whereas mobility and residence rights belong to the original building blocks of EU-law, just like the principle of non-discrimination itself.

the discrimination ground so that discrimination can be captured on the basis of different standards of comparison and possibly even logically creative ways of combining these different standards. Finally, the introduction of a policy element such as ‘development of best practices’, complements non-discrimination rights in the shape of a parallel regime of regulation which has nothing to do with rights.

We may ask, what governs the possibility of applying the different answers, respectively? And what governs the limitations which characterize their applications?

To some extent, we are confronted with possibilities and limitations which spring from fundamental features of EU-law. Substantial rights and the material scopes of non-discrimination rights are laid down in Directives and Regulations which in turn are adopted on the basis of the competences of the EU as laid down in the Treaties. For political reasons, a range of material areas are so far not covered by EU-law, but remains within the competences of the member states. And for political reasons, non-discrimination rights dominate within the area of social rights, and not substantial rights; substantial rights would constitute direct interferences within the national systems of social rights.

However, most of the answers presented above are CJEU-developed answers. When examining particular cases in which they are applied (or developed), we detect that fundamental EU-principles and rights play an important part. The answer which is based on a logical reflection on non-discrimination rights in the sense that it provides for an interpretation according to which not only the non-discrimination right in itself, but also *the condition for being able to enjoy this right* shall be taken into account, is supported by the fundamental right to marry and by the fundamental status of EU-citizenship (in the particular cases in which we have seen it applied⁷⁹¹). The right to positive discrimination is supported by the principle ‘substantive and not formal equality’ which is laid down as a general principle in connection with the discrimination ground ‘sex’. Also the multiplication of the meaning of the discrimination ground ‘sex’ and the logically creative ways of combining these different meanings rely on the principle ‘substantive and not formal equality’. In connection with ‘indirect discrimination’, the fundamental status of the principle of non-discrimination is emphasized over and over again. As far as concerns the CJEU’s possibilities of extending the material scopes of non-discrimination rights, conceptual

⁷⁹¹ See the analyses of the Zambrano and Carpenter judgments in chapter 5 and the analysis of the K.B.-judgment in chapter 17

developments are obviously central, but those developments are often supported by fundamental principles, such as the EU-citizenship, Treaty based workers rights or statements from the Charter of Fundamental rights concerning basic material conditions.⁷⁹²

If we consider the substantial rights which do exist within the area of social rights, also they are largely based on fundamental EU-principles: The mobility and residence rights of EU-citizens are guaranteed by the fundamental rights of all EU-citizens to move and reside freely within the territory of the Member States. And the substantial rights concerning the state of maternity are supported by the fundamental principle of 'special protection of women'.

In other words, fundamental EU-principles and rights play a crucial role in connection with practically all of the different answers to the problematic of 'the presupposition of a certain level of equality'. This does not mean, exactly, that they govern the application of those different answers. But it appears that these answers need the fundamental principles and rights. They need the support of fundamental principles and rights in order to alter non-discrimination rights (extending their scope or adding new logical dimensions to them) or to introduce substantiak rights. The limitations which characterize the different answers must, on the other hand, mainly be ascribed to fundamental limitations of EU-law as such and to a concern about the formal logic of non-discrimination - that it may not be undermined completely.

As regards the second problematic, the problematic of '*reproduction of national content rights*', we were able to detect a single answer, but a complex and wide-reaching one. Conceptual definitions, distinctions and criteria, developed by the CJEU, are not only significant to the determination of material scope and to the possibility of translating between different national systems. They influence national content rights in the sense that they alter the conceptual foundation and organization of these rights. Conceptual definitions, distinctions and criteria imply categorizations of benefits which in turn are intrinsically connected to basic understandings of the nature and purposes of benefits and to institutional orders and logics. Some way or another - muddled, fragmented, reduced - those understandings and logics are transmitted to the national systems. Indirectly, they affect the contents of national content rights.

⁷⁹² As we saw in the Vatsouras and Koupatantze judgment (analyzed in chapter 7) and in the Kamberaj judgment (analyzed in chapter 6)

Finally, with respect to the third fundamental problematic, the problematic of '*arbitrary justification of discrimination*', we found that in connection with 'justification of discrimination', another kind of standards are involved than the loose standards implied in the principle of proportionality as applied by the CJEU. When only considered from the point of view of the loose standards of the principle of proportionality, the dominant phenomenon of 'justification of discrimination' in non-discrimination law would undermine completely the 'fundamental status' attributed to non-discrimination rights, as it would threaten the upholding of a basic level of certainty and predictability, crucial to any law. But I will argue that the interpretational horizons within which CJEU-interpretations take place constitute another kinds of standards, due to which we need not regard the status, certainty and predictability of non-discrimination rights as threatened or undermined. The interpretational horizons are world visions, comprising the purposes of the ideal order. By virtue of these purposes, the relationship between non-discrimination rights and the possibility of justifying discrimination can be understood according to another kind of regularity.

In other words: Due to their formal nature, non-discrimination rights depend on *fundamental principles and rights*, on *EU-concepts and conceptual criteria* and on *regular interpretational horizons*. Without these foundations, non-discrimination rights would be extremely limited, yes close to being basically threatened, as a result of the fundamental problematics springing from their formal nature.

This does not mean that non-discrimination rights are not still characterized by huge limitations. The analyses of this chapter should leave no doubt of that. But the material extensions and logical reflections of non-discrimination rights supported by fundamental principles and rights, the conceptual definitions and criteria and the interpretational horizons create a highly flexible foundation of non-discrimination rights. By virtue of this foundation, non-discrimination rights are characterized by capabilities which, to some extent, go far beyond those of content rights.

The border between 'flexibility' and 'uncertainty' is delicate, though. If, for instance, interpretational horizons are conceptually undeveloped or haunted by conceptual inconsistencies, and if, in addition to that, they hardly interact with fundamental principles and established concepts, then we are certainly facing a law which is flexible, but also a law which is uncertain. This was largely the situation we confronted when analyzing the rights attributed to *non-names*. In contrast, the non-discrimination rights attributed to *names* are supported by a highly developed conceptual framework and by

fundamental EU-principles and substantial rights. This gives rise to certainty as well as flexibility in the top and the middle of the hierarchy of names. On the other hand, we found that conceptual horizons are not very developed, even on the border of being mysterious, meaning that uncertainty rules in the bottom of the hierarchy of names (where fundamental principles are also partly lacking). As far as concerns the last hierarchy, the hierarchy of signifiers in-between names and non-names, it is characterized by a powerful interplaying of principles, concepts and interpretational horizons, giving rise to extreme flexibility as well as some certainty. However, due to logical creativity and the role of contextual interpretations (both supported by the principle 'substantive and not formal equality'), we may say that the flexibility is driven so far that it comes close to undermining the formal nature of the principle of non-discrimination - hereby threatening 'certainty' as well.

It appears that a high level of flexibility *and* certainty can be obtained if all three - fundamental principles and rights, conceptual foundations and interpretational horizons - are strongly developed and interplay with each other, and that simultaneously, the formal nature of non-discrimination rights is respected.

Obviously, a close connection exist between fundamental principles and rights, established concepts and interpretational horizons. As already mentioned, in the horizons we detect the presence of fundamental principles as well as central EU-concepts. Conversely, the fundamental principles and rights bear witness to the existence of certain purposes characterizing the ideal order, and as such they refer - if ever so vaguely - to certain world visions. In truth, fundamental principles would not be meaningful were they not inscribed within strong interpretational horizons of a certain regularity. But of course, principles and rights may be applied in such formal manners so that it may be difficult to detect the presence of any visions what so ever. Likewise, central EU-concepts as well as conceptual criteria are intrinsically connected to basic understandings of the purposes of benefits and institutional logics - for which reason also they are entangled within more overall purposes of the ideal order.

The interpretational horizons constitute, in a sense, the least clear, the most diffuse of the three factors. Interpretational horizons consist of presumptions which we discern behind the judgments. Some presumptions are articulated, others not. But fundamentally, horizons can only be reconstructed on the basis of the multiplicity of elements of meaning that we encounter - interacting with presumptions of our own regarding our time and historical situation. - However, the interpretational horizons do

not only constitute the most diffuse, but also the most crucial of the three factors. It is on the basis of interpretational horizons that fundamental principles and rights and conceptual definitions and criteria are meaningful at all.

So, in order to finalize the construction of the ideal order, let us investigate the interpretational horizons with a view to the *purposes* which are meant to be realized by the social structure of the ideal order.

Chapter 27

The overall purposes of the ideal order

We shall now seek to bring together the various interpretational horizons we have detected when analyzing the judgments of the CJEU (and of the ECHR) in Part I. To some extent, such horizons have already been clearly articulated and analyzed with respect to the relations between them. That was in particular the case in connection with Part I.2 concerning non-names (reflected in the construction of the hierarchy of non-names carried out in chapter 23). As regards names and signifiers in-between names and non-names, however, the nature of the interpretational horizons involved has merely been indicated. That was due to the fact that other elements, most notably fundamental principles and rights, but also conceptual criteria, captured our attention in relation to these other signifiers. But as explained just above, fundamental principles and rights as well as established concepts are closely connected to interpretational horizons: they are inscribed in them, depend on them and are also expressions of them. In this sense, we are not far away from being able to formulate certain crucial interpretational horizons dominating the interpretation of these other non-discrimination rights as well.

We already know that more than one horizon is in play. We also know that the respective horizons are characterized by internal as well as external tensions. But does this mean that they are characterized by more than one overall purpose?

I will argue that we are in fact facing just one overall purpose, and that the different horizons correspond to different perspectives (different world views) from which this overall purpose can be seen and experienced. However, something is also lacking in so far as this overall purpose is concerned. It is unclear *why* it is an overall purpose; it is unclear what it truly consist in *qua* purpose of the ideal order.

The overall purpose is the national labour market. But we do not encounter it in just one form, and under one perspective. It appears to us as a fragmented and torn purpose. But also as a richly differentiated purpose. The question is whether the different manifestations of the labour market can be integrated or not? And ultimately, the question is what it is that makes the labour market into a purpose at all?

First, let me establish the nature of the horizons dominating the three different hierarchies of signifiers, respectively.

**The hierarchy of names: disparate horizons concerning the labour market
from the point of view of *subjective conditions***

In connection with the *hierarchy of names*, it was not possible for us to reconstruct comprehensive horizons - that is, actual world visions - on the basis of the analyzed judgments. As mentioned above, in the hierarchy of names, fundamental EU-principles and rights, as well as established EU-concepts and conceptual criteria play a dominating role. This does not mean that interpretational horizons are lacking, but they are more difficult to characterize; the CJEU predominantly relies on the other two factors.

Not that we were not confronted with purposes. The EU-principles and rights in question express, more or less directly, fundamental purposes of EU-law (such as the establishment of the internal market and the freedoms which constitute it, and the principles of equal treatment and non-discrimination). Furthermore, we also saw that EU-concepts and conceptual criteria are often established on the basis of an analysis of the purposes of a given particular legislative act. Certainly, such purposes constitute crucial building stones of a social order. But in order for us to be able to visualize, more exactly, the implications of such purposes from a political-philosophical point of view, that is, their *meaning* as building stones of a social order, we need more comprehensive understandings.

Even if we were not able to reconstruct comprehensive horizons, we were certainly given plenty of fragments of horizons as well as indications or contours of horizons. Most notably, of course, possibilities of being able to move, reside, seek work and engage in work within the EU play a fundamental part. Obviously, the vision of some sort of a transnational order characterized by a purpose of 'mobility' seems to be presupposed. It is also clear that 'equality' constitutes an ideal. But for a closer view, 'equality' means 'equality with respect to the purpose of 'mobility'. Not that everyone

are granted equal opportunities with respect to realizing the purpose of ‘mobility’ (we have seen that differences are huge). But as far as concerns the aspect of ‘nationality’ (and in the case of ‘Third Country Nationals’, the aspect of being subjected to the legislation of a particular member-state) a principle of equality based on imitation is constituted. This principle, in turn, serves the purpose of mobility.

In the hierarchy of names, we also detect the contours of a horizon which concerns the concept of rights. ‘Rights’ *qua* ‘rights’ play a crucial role to the CJEU, especially fundamental rights, but also other rights laid down in the Directives and Regulations we have dealt with. If a given right is formulated vaguely - hereby opening the door to huge national discretion and possibly erosion of the right in question - the CJEU will generally seek to ‘secure’ the right so that it ‘is not rendered meaningless’ (by way of EU-concepts or conceptual criteria established on the basis of an interpretation of the legislative act in question)⁷⁹³. Rights of EU-citizens are often extended beyond their literal formulation in the law. In this connection, we have seen that the CJEU will generally apply a combination of a fundamental principle (like the principle of non-discrimination) and a contextual consideration (like ‘*if difficulties are only temporary, then....*’)⁷⁹⁴. Or the material scopes of non-discrimination rights are interpreted in a wide-reaching manner on the basis of fundamental EU-principles and rights.⁷⁹⁵ Likewise, these interpretations are clearly carried by the intention that the rights in question shall be meaningful and useful, and that they shall not be undermined by structural conditions of the national systems or simply by national decisions. Finally, the ‘*condition for being able to enjoy the right*’ logic described above constitutes a powerful manifestation of the overall purpose of securing the meaningfulness of the rights of EU-law.

Lastly, a number of judgments dealing either with residence rights or equal treatment rights in relation to nationality depend on a horizon constituted by the idea that access to the labour market should be *facilitated* by rights as well as institutional arrangements. Various factors are involved: economic support, but also registration and supervision. Potential workers, in turn, are expected to deliver a specific subjective attitude - to demonstrate their ‘will, capability and availability’ with respect to work. Also, they are expected to be relatively stabile, rather than mobile. The ‘real link

⁷⁹³ Like for instance in the Kamberaj and Chakroun judgments concerning the rights of Third Country Nationals analyzed in chapter 6

⁷⁹⁴ See the Trojani and Grzelczyk judgments analyzed in chapter 5

⁷⁹⁵ Like for instance in the Vatsouras and Koupatantze judgments analyzed in chapter 7

criterium' plays an important role within this interpretational horizon as well. The criterium is far from clear, but it circulates around all the mentioned factors, that is, registration, subjective attitude and stability, as it also involves the issue of general societal integration.

So, what is common to these disparate fragments of interpretational horizons? They all relate to the labour market, and they do it in the specific sense that they concern *subjective conditions of the labour market*, that is, conditions for becoming a part of it and conditions under which a person is a part of it. The former conditions circulate around facilitating rights and institutional arrangements as well as subjective attitude, factors of societal integration and a complex relationship between stability and mobility (mobility rights are of course meant to serve work seekers, just like those who are already employed); the latter conditions circulate around mobility and the issue of rights as such - not having one's right rendered 'meaningless' due to its formal formulation or due to special circumstances characterizing the situation of the right-holder.

Naturally, also the principle of 'equality' constitutes a subjective condition of the labour market - and a condition which both serves 'becoming a part of it' and 'being a part of it'. But as we have learned from the analysis of *as-if-rights* (and all non-discrimination rights in the hierarchy of names are *as-if-rights*), it is not a condition which implies that every one (or many) are granted the same rights. As-if-rights are rights of imitation; certain right-holders are to be treated as if they were not themselves, but other right-holders, but in any case in a highly specified manner. In other words, the 'equality' in question does in no way reduce the level of differentiation at the labour market. If anything, differentiation is increased due to the principle of equality of EU-law.

In relation to this conclusion - that the different horizons springing from the hierarchy of names all concern *subjective conditions of the labour market* - it could be argued that 'mobility' and the concept of rights do not only serve the labour market (from the perspective of its subjective conditions), it also serves forms of lives which are outside of the labour market. We have seen that EU-citizens who are not granted the status of 'Workers' are none the less protected by fundamental principles and rights, including rights of mobility (and residence rights without which mobility rights would be practically meaningless). And even in relation to Third Country Nationals, the CJEU attempts to protect the meaningfulness of the rights they are granted, whether they be 'Workers' or not.

This is true - and should not be ignored. The horizons of the hierarchy of names cannot be exhaustively described on the basis of an assumption that the labour market constitutes the one and only purpose entailed in them. The idea of mobility as well as the concept of rights have meanings beyond the idea of the labour market. They are intertwined with an idea of citizenship (the EU-citizenship), but they also have an even more general meaning which reaches out to 'Third Country Nationals'. However, the matter is that we cannot discern any other purposes than the labour market. As unfolded in connection with the analysis of the social structure of the ideal order (the foundation of which is provided by the hierarchy of names), we cannot discern any other visions of life than a particular vision of the 'normal life'. This 'normal life' comprises a number of aspects which ultimately concern the belonging to different communities which can be qualified as institutional orders. The realization of a full grown working life constitutes a crucial element of the 'normal life' which does not only imply a belonging to the labour market, but which is also intertwined with other kinds of memberships such as memberships of systems of rights and 'social membership' in a broader sense, institutionally, mentally and politically.

Accordingly, the fact that also people who can neither claim to be job-seekers nor employed or self-employed are at play in the horizons of the hierarchy of names as well must be regarded in the light of the labour market as an overall purpose, without reducing those horizons to this purpose completely. That is, pensioners must be regarded as former workers who have earned their right to a non-working life through work. Students or people who are not working because of personal difficulties (such as drug abuse, physical or psychological problems) or because they refuse to work, are all potentially future workers. Finally, there are people who never have worked and never will work due to severe diseases or handicaps. This group of people cannot be conceptualized from the perspective of the labour market, except as a residual group. But the rights they enjoy can. It strengthens the concept of rights within EU-law that the status of the concept of rights is maintained also in the case of right-holders who never have worked and never will work (just as it strengthens the concept of rights as such that the CJEU attempts to protect the meaningfulness of the rights granted to Third Country Nationals', and not just of the rights of 'EU-citizens'). Likewise, it strengthens the idea of the internal market - a transnational order of internal mobility - that mobility and residence rights are also granted to right-holders who never have worked and never will work. In this respect it should be noted, though, that these

right-holders would belong to the lower parts of the hierarchy of names, and that their possibilities of realizing transnational mobility are limited by a range of conditions.

**The hierarchy of non-names: horizons concerning the labour market
from the point of view of *objective contradictions***

In the hierarchy of non-names, the dominating role of horizons is very obvious. Non-discrimination rights are largely undeveloped, and they are almost only supported by the fundamental principle of non-discrimination itself, not by other fundamental principles. Established concepts and conceptual criteria do play a certain role in relation to questions of material scope, but as far as concerns the highly important question regarding the respective meanings of the five discrimination grounds, the conceptual foundation of non-discrimination rights are not only undeveloped, but also deeply problematic.

In spite of a shaky conceptual foundation, it was certainly possible to detect the presence of interpretational horizons. We might also say that exactly the absence of a clear conceptual foundation (whether this is the fault of the CJEU itself or whether it is due to deep conceptual problematics) means that the CJEU has, instead, relied on associative or ideological connections. Such connections are generally established 'behind the scene' of the judgment itself and must, to a large extent, be derived by way of indirect readings, but once they are found, they lead us directly into the interpretational horizons on which the judgment depend.

When analyzing the hierarchy of non-names, we found that it is dominated by on overall horizon, namely the idea of 'a socially inclusive labour market', but that this horizon is torn in several ways. Firstly, it is torn in the sense that the employment relationship appears to us as a fundamentally conflictuous relationship; the respective interests of employers and employees do not coincide. Secondly, it is torn in the sense that the 'right to work' and the idea of the labour market as a 'natural balance' confront each other tensionally; they may complement each other, but they may also reduce or even exclude one another. Since the idea of the labour market as a 'natural balance' is itself subject to a differentiation, the overall horizon is scratched in two different ways as far this idea is concerned: the right to work (representing a development of the idea of 'a socially inclusive labour market') is both confronted with the idea of 'natural balances' understood as processes of continuous flexible adjustments on the basis of existing power relations and with the idea of the labour market understood as

something which is created through state intervention. Thirdly, the overall horizon is torn in the sense that the idea of a socially inclusive labour market is confronted with a different understanding according to which not everybody should work and according to which those who are facing special difficulties in life in general deserve economical help.

Consequently, in connection with the hierarchy of non-names, we are facing an overall interpretational horizon which concern *objective contradictions of the labour market*. This does not mean that *subjective conditions of the labour market* are not implied as well. Obviously, there is a subjective dimension to the overall idea of 'a socially inclusive labour market' - a dimension which is manifested in the particular development of this idea in the form of 'the fundamental right to work'. But the subjective dimension is of course also given by virtue of the specification of non-discrimination rights. The principle of non-discrimination which is at stake in connection with the idea of 'a socially inclusive labour market' is, corresponds to the non-significance logic, as we know. No more than the equality principle based on imitation does the non-significance logic imply a reduction of the level of differentiation in the labour market. Only in relation to five aspects - 'racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief' - is differentiation meant to be cancelled. And if we consider the many possible escape routes from the principle of non-discrimination - meaning that sometimes differentiation with respect to these aspects are meant to be cancelled, other times not - then it is clear that altogether, the level of differentiation in the labour market is rather enhanced than diminished. In other words, the subjective dimension expressed by non-discrimination rights consists in a right to cancellation of certain aspects of differentiation under certain circumstances, not in a right to equality as such. Finally, a subjective dimension is present by virtue of the significance of the concept of rights as such. However, in the hierarchy of non-names, the concept of rights is not manifested with the same potency as it is in the hierarchy of names. The 'fundamental status' of the principle of non-discrimination does not have the same weight as the 'fundamental status' of the fundamental rights of EU-citizens, that is mobility, work access and non-discrimination rights with respect to the discrimination ground of nationality.

But even if subjective conditions are certainly implied in the torn overall horizon of the hierarchy of non-names, the subjective conditions constitute but an aspect of that horizon. They constitute an aspect of the idea of a 'socially inclusive labour market'

which in turn stands in contraction to a number of other ideas which correspond to general institutional ideas. In other words, we are confronted with contradictory, or at least tensional, relations between different understandings of the labour market as an institutional order. It is in this sense that the overall interpretational horizon of the hierarchy of non-names can be said to concern *objective contradictions of the labour market*. Subjective conditions are implied in all of the different understandings which confront each other, but only as aspects of these understandings.

Accordingly, within the overall horizon of the hierarchy of non-names, the labour market does not just appear to us as a purpose, but as a highly complex purpose, full of contradictions.

Also other horizons spring from the hierarchy of non-names. A horizon constituted by the idea of material dependencies and obligations between family members complements the overall horizon. Another crucial horizon concerns the ideological foundations of the democratic, pluralistic state. This is a horizon which comprises the historical-conceptual foundations of the European state, and which is marked by deep and inescapable dilemmas. Should the state adhere to an ideal of neutrality, but be in constant risk of breaking this ideal in practice? Should it adhere to ideological secularism? Should an integrating approach be adopted, meaning that the state would embrace and reflect all of the different beliefs which are manifested within the state? Or finally, should an ideological foundation of the pluralistic state be established which is not called 'neutrality'? These problematics do not only concern declared religious and ideological standpoints, they concern any appearances of the 'ideological stranger' - whether imagined or real.

The two mentioned horizons are obviously not horizons which center on the labour market. However, they relate to the overall torn horizon which do. As unfolded in the analysis of the hierarchy of non-names, the three focal points of 'citizenship', 'family' and 'work' are asymmetrically represented in the hierarchy of non-names. Problematics of the order of the family and problematics of citizenship are reflected through problematics of work. Accordingly, the horizon constituted by the idea of material dependencies and obligations between family members and the horizon centering on the ideological foundations of the state *complement* the horizon constituted by the objective contradictions of the labour market - meaning that the latter horizon remains the overall horizon. But while complementing it, they also add even more complexities to our idea of the labour market as an overall purpose.

**The hierarchy of signifiers in-between names and non-names: horizons which
concern *the temporal complexity of the labour market***

Lastly, in connection with the hierarchy of signifiers in-between names and non-names, I shall argue that we are confronted with three different, dominating horizons, namely the following: a horizon constituted by a *concern for the sustainability of the welfare systems* of the member states; a horizon constituted by the vision of a *future societal state in which women are integrated in the labour market as well as being mothers*; and finally a horizon constituted by the presumption that *fundamental differences between women and men exist and that such differences are crucial to the possibility of the 'civilizational self'*.

The two former horizons can be quite easily envisioned on the basis of the case-law, whereas the reconstruction of the third one has required a rather complex analytical journey. The first horizon can be reconstructed on the basis of direct statements which appear repeatedly in the case-law.⁷⁹⁶ It comprises a clearly stated political aim, the aim of securing the future sustainability of the national welfare systems from the point of view of the reforms which are demanded by EU-law. This aim is neither connected to fundamental principles or rights of EU-law, nor to fundamental EU-concepts; rather, it concerns crucial conditions of possibility for the future implementation of EU-law.

The second horizon cannot be reconstructed on the basis of direct statements, but it is none the less quite accessible. It is clear that the CJEU presupposes - as self-evident - that traditional family patterns should be broken with. In addition, it is implied that it is important to prevent women from choosing not to become mothers, as it is important to keep them in the labour market. In other words, not only should there be no opposition between 'being mother' and 'being in the labour market', it is expected that in the future, women shall realize their potentials in both of these respects. This horizon is closely bound to the fundamental principles which dominate the hierarchy of signifiers in-between names and non-names, that is, the principle of equal treatment between women and men, the principle of 'special protection of women' and the principle of 'substantive and not formal equality'.

The second horizon cannot be envisioned in a full and rich sense - however clear the purposes it comprises. It is not clear at all what will characterize this future societal state in which motherhood and the realization of women's potentials in the labour

⁷⁹⁶ More precisely the case-law concerning the application of the dynamical exemptions laid down in Dir. 79/7/EEC, analyzed in chapter 18 (in the section 'Temporary discrimination')

market are reconciled. The nature of the institutional reforms which are required can only be discerned to a certain extent.⁷⁹⁷

The third horizon has been reconstructed by way of a quite extensive analysis, based on a number of different elements. The presumption of an *abstract* difference between women and men (a difference as such) can be derived from provisions and judgments centering around situations and spaces characterized by nakedness or physical intimacy as well as the status of the private home. The presumption of *concrete* differences between women and men can be derived from all the maternity-related judgments. The CJEU-invented name 'Woman in so far as she is subjected to circumstances which can only affect women' speaks for itself. It is important to note, though, that it is not established once and for all what circumstances that might be. It appears to be circumstances related to maternity, but it is clearly presupposed that the meaning of 'maternity' is subjected to historical change due to technological as well as social developments. Finally, the presumption of a somehow intricate relationship between women and violence can be derived from a number of judgments which concern the engagement of women in military positions or positions within the police. - In order to understand the meaning of these presumed differences between women and men, they must be connected to a constellation of concepts which, as argued in the Interzone-chapter, (chapter 21) are entangled within a universal logic, namely the concepts of 'dignity', 'private life', 'privacy' and 'decency'. On the basis of the extensive analysis carried out in the Interzone-chapter, we were able to conclude that the presumption of fundamental differences between women and men - in the sense of abstract differences, differences related to maternity and differences which concern human relations to violence - are crucial to the possibility of the 'civilizational self'.

As it appears, we are facing three different horizons which are not necessarily mutually exclusive, but which certainly concern different issues.

For a closer look, however, the two former horizons complement each other. They both concern institutional transformations within and in-between the institutional orders of the family, the labour market, the employment relationship and the national welfare systems; only, the first horizon reflects the idea of institutional transformations from the point of view of the future roles of women and the second horizon reflects the same

⁷⁹⁷ From the perspective of the law, that is. It could be argued that as far as concerns a number of European countries, we are indeed faced with societies in which motherhood and the realization of women's potentials in the labour market are reconciled. However, even in the more progressive countries, 'reconciliation' has hardly been fully achieved.

idea from the point of view of another concern, that of the sustainability of the national welfare systems.

As far as concerns the third horizon, relations are more complex. It concerns fundamental conditions of the civilizational self. It is clearly not unrelated to the other two horizons; institutional transformations are also conditioned by those fundamental conditions - as are the institutional orders which are meant to be transformed. But clearly, the relationship between 'transformation' and 'fundamental conditions' is highly tensional. In other words: which transformations are possible in the light of the fundamental conditions? And vice versa: To the extent that the 'fundamental conditions' in question are open to continuous historical reinterpretation (and we have seen that they are with respect to all three elements, that of abstract differences, that of differences related to maternity and that of differences which concern human relations to violence), how may institutional transformations cast new light on those fundamental conditions?

Consequently, the horizons of the hierarchy of signifiers in-between names and non-names concern *the temporal complexity of the labour market* in the form of a tensional relationship between fundamental conditions and intentional transformation.

Naturally, subjective conditions of the labour market are implied as well as objective tensions. Subjective conditions are implied in the form of the dimension of rights - in this case in the form of a highly flexible dimension of rights, supported and reflected by the principle of 'substantive and not formal equality' (which certainly enhances the level of differentiation at the labour market) and realized by way of logical creativity and contextualizing considerations. Objective tensions of the labour market are primarily implied in the form of the presumed fundamentally conflictuous employment relationship. Naturally, objective tensions of the national systems of welfare rights and tensions between the order of the family and the order of the employment relationship are implied as well. But all of these tensions merely exist in the light of the overall temporal tension which dominates the hierarchy. The same can be said of the highly flexible dimension of rights. It constitutes a crucial aspect of an overall vision of a future societal state in which 'substantive, and not formal' equality reigns (meaning that women will realize themselves at the labour market *and* as mothers), but in which fundamental differences between women and men are acknowledged - as a condition for modern regulation and temporality as such.

We may even say that in the light of this overall vision, the different aspects contained in it become uncertain. Since we do not know exactly the nature of the institutional reforms required in order for motherhood and the realization of women's potentials in the labour market to be reconciled, and since we do know that non-discrimination rights with respect to the discrimination ground of sex presently constitute a conglomerate of logics of rights and a mixture of formal and non-formal and of permanent and temporary elements, the future characteristics of non-discrimination rights are not entirely certain. And likewise: Since we do not know exactly the nature and depths of the institutional reforms which are required, the future tensions of and in-between the employment relationship, the national systems and the family are uncertain.

It is important to mention that the hierarchy of signifiers in-between names and non-names gives rise to yet another horizon, apart from the three mentioned: a horizon constituted by the idea that the state is responsible with respect to certain general, public concerns, such as public health. It is certainly not a dominating horizon, but it is unmistakably there. In fact, we have sensed the contours of this horizon in connection with the other hierarchies as well, but only in the hierarchy of signifiers in-between names and non-names has it been developed just a little bit. Many of the Directives and Regulations we have dealt with have contained a provision regarding 'public safety, security and order'. And of course, in general, the state is presumed to be the source of at least some of the existing national social rights and ultimately responsible for all national rights - as it is presumed to be characterized by overall social, organizational, ethical and economic goals and concerns.

In connection with the discrimination ground of sex, this horizon concerning the overall role and purposes of the state is developed a little. But only in the sense that it becomes clear that non-discrimination rights may be overridden by a general public aim, such as securing public health services and rights - whether this requires organizational, economic, professional, ethical or even cultural considerations.

All in all, this horizon appears to us as a mystery. Obviously, it must be crucial. Yet, it is not dominating at all, it is hardly developed, only contours and fragments can be discerned. What purposes and visions does it contain? What kind of role of the state, what kind of ways of the state? And how does this horizon relate to the the horizons mentioned above which all concern the labour market - from a subjective, objective or temporal perspective? This is left open.

**The labour market as a torn and fragmented overall purpose,
- but most crucially: what does it mean *qua* purpose?**

A range of interpretational horizons spring from the three hierarchies - some of them partly overlapping, others rather unique. However, all horizons can be said to center around the labour market, but from three different perspectives:

The horizons of the hierarchy of names center around *subjective conditions of the labour market*. The horizons of the hierarchy of non-names unfold certain *objective contradictions of the labour market* (in relation to which subjective conditions constitute but an aspect). Finally, through the horizons of the hierarchy of signifiers in-between names and non-names, *the temporal complexity of the labour market with respect to the relationship between institutional transformation and fundamental conditions* is manifested (in the light of which both subjective and objective aspects of the labour market become uncertain).

But what does this tell us? We were looking for the basic purposes and world visions of the ideal order.

The labour market constitutes the overall purpose of the ideal order - but in a highly tensional way. It is a torn and fragmented purpose. And not only that. Due to the last mentioned tension, the temporal tension, uncertainty reigns with respect to the future characteristics of both subjective and objective aspects of the labour market. Admittedly, this uncertainty only directly concerns the hierarchy of signifiers in-between names and non-names, that is, the aspects of the ideal order which concern the discrimination ground of 'sex'. But all three hierarchies depend on national welfare rights. To the extent that comprehensive national institutional reforms are carried out, it will affect the national systems as such, even if those reforms are only meant to relate to the discrimination ground of 'sex'. In this sense, traces of the temporal tension between transformation and fundamental conditions will be spread out in all the horizons of the ideal order.

However, the crucial problem is not so much the complex, tensional and fragmented nature of the overall purpose, nor is it the uncertainties regarding the future characteristics of the aspects of the overall purpose. All this merely means that we are not confronted with an unambiguous and clearly graspable overall purpose. In truth, one might even see ambiguity and non-graspability as something which belongs intrinsically to overall purposes of social orders. If an overall purpose can be too clearly identified, then it has lost its ideal nature; it is already possessed, dissolved in that

which already exists. Furthermore, from the point of view of the labour market as an institutional order, it is not so surprising that it entails both subjective and objective aspects, and that tensions can be identified within that order as well as in-between that order and other orders.

No, the crucial problem is that it is not possible for us to discern what the labour market means as an overall purpose. Is it indeed *the* overall purpose, and if it is, then why is that? And if it is *the* overall purpose, is it capable, then, of integrating the subjective and objective aspects and tensions, is it capable of creating a connection between transformation and fundamental issues? Will it, as a purpose, imply some standards which may guide transformations? - If, on the other hand, the labour market is not *the* overall purpose, what other purpose does it serve, then?

The previous analyses of the ideal order all point towards the six anchors of order

We have now finalized our analysis of the ideal order according to the three political-philosophical categories. We have established the characteristics of the *social structure*; it contains both hierarchical, fluid and fundamental aspects. We have analyzed the *means* by which the social structure is realized by way of an analysis of the logics of non-discrimination rights, including the fundamental problematics these logics imply and ways in which they can be met. Finally, we have analyzed the interpretational horizons which spring from the three hierarchies in order to establish to what extent the ideal order is characterized by an overall *purpose*.

From this we have gained what could be called 'the ideal order as a machine'. We know the parts it consists of and the way in which they relate to each other as well as the architecture as a whole. We know the mechanisms by which the machine works, including the limitations and problematics of those mechanisms. We know, finally, the time and the space in which the machine is situated and the way in which it mirrors the general concerns of this time and space.

But there is still something we do not know. We do not know what the machine looks like as alive, as a social body. What kind of social world does it create, ideally speaking? This question arises in connection with all three elements, that is, 'social structure', 'means' and 'purpose'.

From the perspective of the *social structure*, a particular understanding of 'the normal life' makes out the focal point of the ideal order. This 'normal life' is essentially about the belonging to different communities which can be qualified as institutional orders -

the labour market, the employment relationship, the national welfare systems, the internal market, the family and the state. The role of the 'normal life' gives rise to a certain totalitarianism. The social structure entails no alternative vision of life. Furthermore, the 'normal life' constitutes both means and ends, contribution and reward: By moving upwards in the social structure, a person will be given the conditions of possibility for realizing the normal life in a fuller sense, - but it is also so that *in order* to move up in the hierarchy, the idea of the normal life must be realized in a fuller sense. The totalitarianism of the social structure is not absolute, though. It is possible to live the life of an excluded person (whether by choice or involuntarily), as it is possible to live on the border of exclusion. Only, we are conceptually blinded with respect to the nature of these lives.

Possibilities of other lives and other orders are reflected by the fluid and fundamental aspects of the social structure, but only negatively. It is by virtue of the transhistorical aspects of destiny that a human being is individualized at all; a human being is essentially alone with his or her destiny. And due to the fluid aspects, determinations of human beings become essentially processual; the transhistorical destiny aspects will continuously show new faces, appear in ever new particular manifestations. As far as concerns the fundamental aspects of the social structure, they are essentially double-sided. Human rights - in so far as they are meant to protect a common human foundation - concern the protection of the conditions of the law, of naming and regulation. But they also concern the potential undermining of names and regulation. They bear witness to the fact that also other names and regulations could have been possible and that all names and regulations could lose their power and be left as ruined masks of civilization. This fundamental instability should not merely be visualized in terms of an external condition - that any order may be threatened from outside. Any order is inherently unstable because it relies on recreations by those subjected to it.

However, in spite of the fact that the totalitarianism of the social structure is negatively reflected by the fluid and the fundamental aspects, those aspects still circulate around the 'normal life', no less than the hierarchical aspects. The cultural significance of the transhistorical aspects of destiny are meant to be eliminated or adjusted so that they will not prevent human beings from being part of the destiny of today - the 'normal life'. Human rights protect the particular social structure with which we are confronted - even if they do this by protecting the foundations of civilization as such. The

protection of the foundations of civilization through human rights is only actualized in connection with the *unfolding* of civilization, that is, in connection with particular naming and regulation. Accordingly, human rights protect the focal point of the particular social structure with which we are confronted, the 'normal life'.

The question we are left with from the point of view of the social structure is simply this: If the 'normal life' is essentially defined by the belonging to different communities which can be qualified as institutional orders, then how may we conceive of these institutional orders, what kind of life do they make possible? This question implies, of course, also the question of how we may conceive of these orders from a negative point of view. What could it possibly mean to stand alone with one's individual destiny, outside of these orders? And how may we conceptualize the respective borders of these orders?

The *means* of the ideal order are constituted by particular logics of rights. We identified three overall kinds of non-discrimination rights: as-if-right, non-significance-rights and reduced non-significance-rights. They are all based on peculiar understandings of 'equality'. According to the first one, 'equality' means the simulation of *another* social situation. According to the second and third, 'equality' means endless emancipatory projects with respect to eliminating or adjusting the significance of particular aspects of differentiation.

Due to their formal nature, non-discrimination rights give rise to certain fundamental problematics. These problematics cannot be solved, but they can be met (and are being met) in a number of different ways. This means, however, that non-discrimination rights become dependent on fundamental principles and rights, on EU-concepts and conceptual criteria and on relatively stabile interpretational horizons.

Accordingly, we must ask: What do these fundamental principles and rights, conceptual elements and horizons mean apart from the fact that they may determine the outcome of judgments? What do they mean as foundations of the ideal order, how are they realized as ordering principles, concepts and horizons? These questions can only be answered if we investigate what they mean to the institutional orders of the ideal order.

Finally, we have seen that the meaning of the *overall purpose* which constitutes the focal point of all the dominating interpretational horizons is not clear to us. But perhaps, we will be able to approach this meaning on the basis of an investigation of the

institutional orders which constitute the foundation of the 'normal life' and in which fundamental principles and rights, concepts and horizons are reflected.

Accordingly, we shall now leave the ideal order from the point of view of a regime of rights and proceed with an analysis of the ideal order from the point of view of institutional orders, more precisely, the six anchors of orders introduced in chapter 20.

Chapter 28

The National Labour Market

As argued in chapter 20, the law we have dealt with presupposes that certain anchors of order - certain institutional orders which constitute the basis of other institutional orders and which serve as final anchors of justification - exist prior to and independently from the law. Six anchors of order were identified along with their basic logics. The orders were the following: 'the national labour market'; 'the national welfare systems'; 'the internal market'; 'the employment relationship'; 'the family' and 'the state *as one*'.

Now we shall revisit these six anchors of order. But we shall do it from a different perspective. We shall analyze to what extent and in what ways the CJEU does not only presume the existence of certain basic logics, but also qualifies these basic logics in particular ways - hereby subtly *altering* those very orders which are presumed to exist prior to and independently from the law.

As discussed thoroughly in chapter 20, the distinction between the basic logics and the qualified logics is not easily drawn. Often, they will be developed simultaneously. And often they will be woven together within the same statement, or even within the same concept, or in assumptions underpinning particular argumentations. That does not affect, however, the importance of the analytical distinction. It only means that the line between the two can only be drawn in a tentative way. In other words, it could be argued that certain aspects of the qualifications which I will be presenting below would rather form part of the presumed order, than of the ideal order; and vice versa, it could be argued that certain aspects of the logics presented in chapter 20 would in fact belong to the ideal order, and not the presumed order.

With these reservations in mind, I shall now present the qualifications which, as I see it, belong to the ideal order, that is, the qualifications by which the CJEU subtly alters the

presumed basic logics. Naturally, this happens in multiple ways, and I cannot analyze them all. Accordingly, the analyses will be given a certain focus. They will be directed against the fundamental problematics which I derived from the basic logics of the six anchors of order. As the reader might recall, these fundamental problematics were formulated by the ghosts of those orders.

So, the first anchor of order confronting us is the 'national labour market'.

In chapter 20, I concluded that national labour markets are presumed to be characterized by the following basic logics: They are presumed to be natural balances, but in two different ways. They are either presumed to be natural balances in the sense that they are identified with processes of continuous flexible adjustments on the basis of the existent power relations between the actors of the labour markets. Or, they are presumed to be natural balances which are created as such through state intervention. Furthermore, national labour markets are presumed to be life integrators. Participation in the labour market means participation in life, in a qualified sense of 'life', that is.

Three different ghosts appear from these basic logics, disturbing their proper functioning. Firstly, if we are caught in a tautological circle of means and ends in which nothing exists but the process itself and the continuous outcomes of it, then the 'natural balance' as such will be characterized by no overall guiding ideals or principles, distinct from the process itself. But can labour markets, then, be part of an ideal order at all? Can the human negotiations and decisions which constitute them be the expressions, at all, of any ideals, apart from those which figure as elements within the process itself? If they cannot, then the ideal order of the law will be undermined as a whole because it depends on the national labour markets.

Secondly, how can a natural balance be created by means of state intervention? This constitutes, naturally, a paradox in itself, although a paradox which is well known from the history of political philosophy.⁷⁹⁸ A concept of 'nature' would be required in order for such creation to take place at all - a concept which could both account for that which the natural balance is by itself (whether real or ideal) and that which it lacks by itself for which reason external interference is necessary.

Finally, what qualifies life outside of the labour market? On the one hand, life is identified with life within the labour market. On the other, it is clear that not everybody

⁷⁹⁸ As briefly mentioned in the Introduction and in chapter 2, modern natural law (as unfolded by Locke and Hobbes) holds that human nature must both be inhibited and protected by society in order to be realized as nature (according to its potentials).

is participating in the labour market. If it cannot be qualified in what sense there can be life outside of the labour market as well, then we are left with an ideal order which essentially drags a large number of those people which are subjected to the law into an abyss of tabooization - an ideal order which has no language for crucial elements of itself.

We shall now attempt to engage in a conversation with these three ghosts from the point of view of the ideal order. In other words: Can the basic logics characterizing the 'national labour market' be qualified somehow so that we would be able to answer the three ghosts - whether satisfactory or not?

The 'natural balance' as a tragical relationship of opposition

The first ghost confronts us with the lack of an overall ideal, distinct from the process of continuous flexible adjustments on the basis of existing power relations. The ghost says that the labour market as a 'natural balance' is nothing but that which happens to exist at a given moment in time.

In a way, this is true. However, it is still possible to ask whether the process of continuous flexible adjustments could somehow itself be seen as constituting an ideal? If it could, then the national labour markets could be qualified as ideal orders themselves, that is, they could be part of the ideal order meant to be realized by the law.

I do believe that the process of continuous flexible adjustments can be said to constitute an ideal. Only, it is not an ideal which reflects any optimism. Let me draw the attention to a formulation from the Rosenbladt-judgment analyzed in connection with the non-name 'Age'. The formulation concerns, more specifically, a clause on automatic termination of employment contracts, and this clause reflects, according to the CJEU, a 'balance' in that it establishes a compromise between stability and flexibility and hereby a compromise between the interests of employers and employees. When seen in the light of the very generalizing way in which the Rosenbladt-case is being dealt with by the court, not least due to the equalization of the three concepts 'agreement', 'flexibility' and 'balance'⁷⁹⁹, I do believe that we can safely understand the formulation as a general characterization of labour market balances and not just as a characterization of a particular balance expressed by the national rule in question. According to this formulation, we are confronted with '*a balance between diverging but*

⁷⁹⁹ - resulting in what I have called the 'agreement-flexibility-balance-triad', see the analysis in chapter 11

*legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment*⁸⁰⁰.

The crucial words are the following: '*diverging but legitimate interests*'. It is assumed that the parties of the labour market have diverging interests. In other words, their interests do not, essentially, correspond to one another, they are essentially opposed. In addition, it is assumed that these diverging interests are legitimate as such, that is, they are legitimate as diverging. This understanding is in fact not at all as obvious as it may sound.

First of all, it is different from the kinds of understandings which are often held within contemporary social science as well as political discourse, namely, that the traditional opposition between employers and employees is largely outdated and essentially, their interests are the same, - or at least, their interests could be rationalized or reinterpreted so as to become the same. The wise employer and the wise employee would know that already, and to the extent that more employers and employees would act in accordance with the logics of contemporary capitalism, more people would know that in the future - this is what these understanding imply. What connects the interests of employers and employees is held to be the common interest in learning (by which both companies and people grow), transitions (by which both companies and people develop and unfold their potentials), ethical standards related to working conditions and environment (from which people benefit and on the basis of which companies can brand themselves), and finally a common interest in meeting the challenges of globalization (which means securing competitiveness for the sake of both companies and jobs).⁸⁰¹

But the understanding of the CJEU is in fact also different from classical left-wing or right-wing understandings. Those classical understandings would certainly hold that the interests of employer and employee are diverging, but they would not both be legitimate. Only the interests of one of the parties would be legitimate; the interests of the other part would not be justifiable, however real. Such understandings would be based either on theories of capitalism according to which the value created by workers is exploited by the owners of the means of production (most notably, of course,

⁸⁰⁰ Case C-45/09, *Rosenbladt* par. 68

⁸⁰¹ A powerful example of such a discourse can be found in "Communication from the Commission: Towards Common Principles of Flexicurity: More and better jobs through flexibility and security" (27.06.2007). I have analyzed this communication in the article "Flexicurity imellem Historiens og Forandringens Mysterier" [Flexicurity in-between Mystifications of History and Change], in Lars Bo Kaspersen, Joachim Lund, Ole Helby Petersen (ed): *Offentligt eller privat? – historiske og aktuelle udfordringer i politik og økonomi*

marxistic theory), or it would be based on theories of capitalism according to which value is created due to the enterprising individual pursuing his or her self-interest, or simply on theories according to which human beings must follow their nature, and who ever is capable of determining the rules of the game is also allowed to benefit from it. In contrast to such understandings, the CJEU holds that the interests of *both parties* are legitimate.

Furthermore, the understanding of the CJEU is different from a discursive-reflexive understanding according to which the parties may not know in advance what their true interests are, and that only by bringing together in negotiation the knowledge, experiences and ideals which each of them possess, a deep and comprehensive understanding of the respective interests can be reached, as well as an understanding of what might not be opposed, but rather common interests. According to this understanding, it is the outcome of negotiations, and not the initial positions of the parties, which is legitimate - on the condition, of course, that the negotiation is genuine and not merely strategical.⁸⁰²

The CJEU understanding resembles more a Schmittian understanding which would emphasize the fundamental nature of conflict, and which would hold that there could never be a third standpoint above the parties themselves which could determine that one was more just than the other, just as it would hold that the result of negotiations would not represent a more legitimate version of the initial positions (it would either represent the transformation of the initial conflict into a new one, or it would represent a repression of the former)⁸⁰³. However, the CJEU understanding does not entail the dialectical element which is crucial to the Schmittian understanding: that the parties will only know themselves because of the opposition to the other part, in fact, that their respective possibilities of existence as world views and interests depend on that opposition for which reason their respective limitations are also mirrored in the other part.

In truth, the CJEU understanding does not exclude a dialectical understanding of that kind. But it does not imply it either. It rather indicates a non-dialectical understanding. The dialectical understanding opens for the possibility of historical transformation of the conflict - and ultimately the reconciliation of the conflict and replacement of it by

⁸⁰² An understanding of this kind can be found in the writings of Charles Sabel, see for instance "Direct-Deliberative Polyarchi. An Institutional Ideal for Europe?", in *European Law Journal*. Obviously, this understanding is related to a Habermasian understanding

⁸⁰³ This is what is implied in Schmitt's 'concept of the political'. (Carl Schmitt: *Der Begriff des Politischen*)

another conflict (constituted by two new parties). This is not what we learn from the CJEU-understanding. Certainly, the CJEU understanding does not necessarily imply that the respective interests of the parties will forever remain the same. But it presents us with a given opposition between employers and employees and emphasizes the legitimacy of that understanding.

So, we are confronted with a relationship which is determined to be a relationship of opposition. It is also clear that it is determined to be a relationship of power - it is on the basis of negotiations and possibly collective actions that agreements will be made. In other words: the 'natural balance' cannot be anything but a power balance; the 'agreement' cannot be anything but a momentary expression of the power balance; and the 'flexibility' which is acquired by means of agreements cannot mean anything but the fact that that power balance is continuously alive and vibrant. As noted in connection with the analysis of the agreement-flexibility-balance-triad in chapter 11, what is lost in the tautological circle of ends and means is the possibility that 'agreement', 'flexibility' and 'balance' might not always serve each other. 'Agreement' could mean the lack of flexibility if no compromise could be found between the divergent interests, or if the compromise which was found did in fact not serve any interests whatsoever. 'Agreement' could also mean lack of balance if one part was always stronger than the other. Likewise, 'flexibility' might correspond to adjustments which served one part more than the other. And so forth. But possible tensions between 'agreement', 'flexibility' and 'balance' can of course only be stated on the condition that each concept is granted a separate meaning. If they are not, if they are apriori equalized, and if 'balance' means power balance, then 'agreement' and 'flexibility' can only refer to certain expressions of that power balance.

The perspective is somewhat brutal. It is a power relationship which is naturalized in the sense that it is deprived of the possibilities of reflexion and transformation. The particular interests of the parties may change over time, but the relationship itself is what it is. None the less, I will argue that this understanding of the 'balance' does constitute an ideal understanding which means that the 'balance' is not simply identical with that which happens to exist at a given moment in time. It is an ideal understanding because the interests of both parties are seen as legitimate *qua* divergent. But it is not an optimistic understanding. It tells us that the national labour market as an anchor of order should be understood as a relationship of opposition which cannot be transformed or redeemed.

An inclusive relationship of opposition

We need to consider another issue as well.

All of the non-discrimination rights we have dealt with constitute interferences in the power relationship which the labour market is. Or more precisely, generally non-discrimination rights interfere in this relationship, but sometimes the CJEU finds that they should not interfere in this relationship (as in the *Rosenbladt*-judgment). In other words, the ideal order is not generally defined by a lack of interference in the national labour markets; labour markets are not to be left alone. Also, it is clear that the ideal order does not only imply interferences in the labour markets in the shape of EU-non-discrimination right. Since non-discrimination rights presuppose the existence of national substantial rights, a range of national substantial rights which interfere in the national labour markets, belong to the ideal order as well. Not to mention a much wider range of rights and rules, stemming from national law, EU law and international law, which are part of the presumed order, but which are assumed in the ideal order as well, as part of a more or less unmodified context.

Accordingly, the national labour markets are not to be understood as 'natural balances' in a pure sense, neither from the point of view of the presumed order nor from the point of view of the ideal order. They are to be understood as 'natural balances' in the moderated sense that they are 'balances' on the basis of a number of regulations which cannot as such be made subjects of negotiations between the parties, that is, they are not elements within the 'balances' themselves (or at least they are not unconditional elements). In fact, this is expressed in the formulation from the *Rosenbladt*-judgment as well: *'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'*.

However, the EU non-discrimination rights which we have dealt with are special in this respect. They form part of the huge basis of regulation on top of which the 'natural balances' unfolds. They may also, in a conditional sense, be seen as elements within the balances, due to the fact that the national implementation of these rights may be carried out by the social partners. But we may regard them from yet another perspective. The EU non-discrimination rights concern the *access* to the labour market as such, as they concern the access to those rights which are negotiated by the parties of the labour markets. In other words, they concern the access to the 'natural balances' at all, the right to be a part of the relationship of opposition.

Seen from this perspective, the EU non-discrimination rights intervene in the ‘natural balances’ in an essential way. We may say that they redefine the ‘natural balances’ which the labour markets are assumed to be. Accordingly, the ‘natural balances’ are not only qualified as relationships of opposition which cannot be transformed or redeemed, they are also qualified as *inclusive* relationships of opposition. In the ideal order, everyone who would otherwise be excluded from being a part of these relationships of opposition on the grounds of nationality, part-time work or fixed-term work, racial or ethnic origin, age, disability, sexual orientation, religion or belief or sex shall now be part of these relationships.

A crippled relationship of opposition

Another element of the law we have dealt with should be mentioned as well, namely the right to strike. Like the EU-non.discrimination rights, the right to strike can be said to essentially define the ‘natural balances’ as such. Whereas the EU non-discrimination rights define the inclusive nature of the balances, the right to strike defines the ways in which they unfold. As we saw in the Viking and Laval judgments⁸⁰⁴, the CJEU holds that the right to strike is fundamental. Yet, it may be overridden by fundamental EU rights, the right to freedom of establishment and the right to provide services. These rights, in turn, may be seen as part of the huge basis of regulation on top of which the ‘natural balances’ unfolds. The fact that a right which essentially defines the way in which the balances can and cannot unfold is conditioned by the right of establishment means that the inclusive relationship of opposition which constitutes the labour market is also a crippled relationship of opposition. Naturally, it would be in any case. The right to strike is itself a manifestation of the fact that the relationship of opposition does not unfold limitlessly, by means of violent battles culminating in civil war. In this sense, the essential crippling of the relationship of opposition has happened long ago in the European countries. But the Viking and Laval-judgments add a new dimension to this development. They do not exactly abolish what was left of the original means of battle, but they transform those remains of the original means so that they are no longer fundamental to the relationship of opposition, but only define it under certain conditions.

⁸⁰⁴ Analyzed in chapter 7

A tragical relationship of opposition characterized by a split temporality

So, we shall conclude that the national labour market as an anchor of order is indeed qualified by the CJEU in a particular way which implies certain ideals. Hereby, this order belongs to the ideal order in a profound way, it is qualified with a view to the ideal order, it is not merely presumed as an order characterized by certain basic logics.

It is qualified in the following way: it is constituted by a relationship of opposition which cannot be transformed or redeemed. Furthermore, this relationship of opposition is inclusive, meant to integrate everyone. Finally, it is a crippled relationship of opposition in terms of the means by which it unfolds.

I mentioned above that this qualification of the ideal nature of the labour market is not a very optimistic one. Let me be more specific. The relationship of opposition in question is a tragical relationship. I understand a tragical condition (in contrast to a merely unhappy condition) as a condition characterized by the collision of two (or more) logics. Pursuing one of those logics will mean infringing the other, and vice versa. In both cases, the result will be unhappy. In addition, a tragical condition is, as I see it, characterized by human blindness. Any attempt to overcome the bindings of the situation will lead to disaster.

The relationship of opposition constituting the labour market as an institutional order is tragical because it implies the collision of two logics. It implies that the interests of the parties are 'divergent and legitimate'. Yet, the parties are continuously driven towards each other; 'agreements' must be made, the relationship must continuously be expressed, serving 'flexibility'. The logic of 'continuously meeting each other, continuously making agreements' can only unfold unhappily due to the fact that the interests of the parties are basically 'divergent and legitimate'. No true reconciliation can ever be reached, only compromises. No matter how many agreements are made, the interests of the parties will remain 'divergent and legitimate'. If, on the other hand, a true reconciliation of the interests of the parties were obtained, then it would mean a violation of the interests of parties. Their fundamental legitimacy as divergent would have been abandoned.

The relationship of opposition constituting the labour market also implies a blindness. We know that the interests of both parties are legitimate, we know that everyone shall be part of this relationship and that it shall unfold in a crippled way. But apart from that we do not know anything as to the development of the relationship of opposition.

Even if the relationship of opposition is not defined by ‘that which happens to exist at a given moment in time’, it still essentially depends on ‘that which happens to exist’. Consequently, the relationship of opposition is characterized by a split temporality. It is both defined as a relation which is strangely disconnected from history - a relation which will eternally remain the same. In this sense, the relation of opposition is like a satellite which has been launched into space and hereafter stays in its orbit. Simultaneously, however, the relationship of opposition is defined as a relation which is all too close to the ground, so to speak, - a relationship which is time-bound to an extreme degree in that it, in its particular manifestations, can only reflect what happens to be the outcome of the relationship at a given moment in time.

The state creates a past and a future for the ‘natural balances’

The second ghost confronts us with the paradox of ‘creation of nature’. Nature as such cannot be created. But nature may be *realized* by human beings - to the extent that nature is not simply that which unfolds by itself, but something ideal which can both be nurtured and repressed by human beings.⁸⁰⁵ The second ghost questions whether such a concept of nature underpins the state’s interventions in the labour markets when seen from the point of view of the ideal order. The second ghost fears that the creations of ‘natural balances’ on behalf of the state is nothing but continuous adjustments from the point of view of what appears to be necessary or merely useful according to some or other political agenda. In other words, the ghost fears that what is created is not ‘natural balances’, but merely politics.

We have already seen that certain ideals are implied in the understanding of the labour markets as ‘natural balances’. In this sense, an ideal concept of nature is already given. In order to answer the second ghost, we will need to examine whether the interferences in the ‘natural balances’ on behalf of the state can be seen as interferences meant to realize the ideal concept of nature we derived above, - that is, as ways in which to complement nature, helping it to realize what it cannot realize by itself.

Accordingly, on the basis of our analyses in part I, we shall ask *what kind of interventions* in the national labour markets are regarded as necessary by the CJEU. Obviously, we have encountered numerous kinds of interventions which are laid down, accepted or otherwise confirmed by the CJEU. Apart from the EU-non-discrimination rights

⁸⁰⁵ Cf. the remarks as to the meaning of ‘nature’ in classical and modern natural law in the Introduction and in chapter 2 (‘nature’ is not necessarily what we immediately are, it may even be hidden from us).

themselves, other EU-principles and EU substantial rights, as well as the national substantial rights which are indirectly confirmed by EU non-discrimination rights, 'justification of discrimination'-arguments have provided us with confirmations of interventions on behalf of the court. However, among all those kinds of interventions, we should distinguish between those which are done for the sake of the national labour markets themselves and those which are done for the sake of something else (like 'public health' or 'public security', the internal needs of the national welfare systems, the basic freedoms of EU-law, or the principle of pluralism and human rights). Only those kinds of interventions which are done for the sake of the labour markets themselves can be said to constitute the kind of 'creation' we are presently interested in - that is, a 'creation' of the national labour markets in accordance with an ideal concept of nature, meant to realize that very concept.

It was in particular in connection with justifications of discrimination on grounds of age that we came across a range of interventions in the national labour markets meant to serve those labour markets themselves. But also in connection with justification of discrimination on grounds of sex, we encountered interventions of that kind. More specifically, these interventions are meant to serve the following labour market purposes: '*checking unemployment*' and '*encouraging recruitment*' with a special view to '*encouraging the recruitment and promotion of young people*'; '*establishing a balance between the generations*', meaning '*sharing employment between the generations*', but also '*the creation of a favourable age structure*' within a profession so that '*an exchange of experiences and innovation*' will be promoted; '*efficient planning of the departure and recruitment of staff*', including '*avoiding disputes relating to employees' ability to perform their duties*' '*which may be humiliating for those who have reached an advanced age*'; '*integration of older workers*' who still have '*a substantial part of their working life*' in front of them; '*enhancing general flexibility for the sake of employers as well as young workers*'; '*regulating relations between education, vocational training and the possibilities of entering the labour market*'; and finally '*rewarding experience and loyalty*'.

When glancing over these declared purposes, we immediately detect that they fall in two overall groups. Most of the purposes relate to the integration of younger workers in the labour markets (at the expense of older workers), but there are also purposes which relate to the maintenance of older workers in the labour markets in general or more specifically, in a given profession. The two purposes are united in the purpose of

'the creation of a favourable age structure' within a profession, serving 'an exchange of experiences and innovation'.

In other words, the interventions in the labour markets for the sake of the labour markets, as accepted by the CJEU, are meant to make the labour markets dynamical. They are meant to ensure exchange of workers and change as such. Young workers do not only represent the danger of unemployment (the danger of never being integrated in the labour markets), they represent development, flexibility and innovation. On the other hand, the interventions which are accepted by the court are also meant to ensure a certain stability. They are meant to ensure that knowledge and experience are not being lost, but kept and nurtured and passed on to the young workers.

The EU non-discrimination rights should also be mentioned. Surely, they do not solely constitute interventions in the labour markets for the sake of the labour markets. In the preambles of the non-discrimination Directives, other purposes are mentioned as well, ranging from fundamental freedoms and the principle of equality over principles of democracy and human rights to more specific concerns. But the idea of 'a socially inclusive labour market' is emphasized strongly, not only in the preambles, but by the CJEU. As we have seen, the CJEU tends to give this idea priority over all other ideas and principles.

In the last section, I argued that the EU-non-discrimination rights contribute to the very definition of national labour markets as 'natural balances' from the point of view of the ideal order. Due to EU non-discrimination rights we were able to understand those 'natural balances' as *inclusive* relationships of opposition, as *inclusive* tragical relationships. This does not mean, however, that we may not examine the possible role of EU non-discrimination rights under the perspective of the 'creation of natural balances' as well. When seen from the perspective of labour markets as 'natural balances', EU non-discrimination rights contribute to the definition of those balances as inclusive relationships of opposition. When seen from the perspective of 'created natural balances', EU non-discrimination rights constitute a kind of intervention meant to serve the labour markets as natural balances.

When seen from the second perspective, the EU non-discrimination rights are in line with the first group of the interventions mentioned above. Also EU non-discrimination rights will make the labour markets dynamical by integrating new groups of people in the labour markets, that is, people who might otherwise not be part of the labour markets. Those people represent unused resources for the labour markets - and in this

sense they represent development, flexibility and innovation. When seen from the second perspective, the ideal 'inclusive' nature of the labour markets is not realized by itself. Helping nature to realize its ideal inclusive nature does not only mean creating the labour markets as inclusive, it means making them dynamical as well, securing exchange and flow.

Consequently, we are facing two different kinds of interventions which complement each other. The meaning of the first kind is to ensure that the labour markets are constantly dynamical by ensuring exchange and flow in the work force. The meaning of the second kind is to ensure a certain stability so that knowledge and experience will not be lost. In other words, the interventions in question create the labour markets *as labour markets which are capable of development on the basis of a history*. They create them as labour markets with a future and a past which can be distinguished from the present.

Both kinds of interventions concern the temporal structure of the labour market. They create history and development - hereby complementing the awkwardly split temporality characterizing the labour markets as 'natural balances', as unfolded above. The ideal definition of the labour markets as 'natural balances' - an inclusive and crippled tragical relationship of opposition - is characterized by a historically disconnected satellite-temporality along with the opposite, an extremely earth-bound temporality. The state interventions in question create a temporality for the labour markets which can be defined as a temporality in-between the two extremes.

Hereby, we may answer the second ghost: When the states intervene in the national labour markets, what is created is certainly politics (in accordance with whatever agenda). But something else is created as well. Temporality is created - a temporality which is neither a disconnected satellite-temporality or an earth-bound temporality by which human decisions drown in the ever-ongoing process of adjustments. The ideal which is implied in the labour markets as 'natural balances' is characterized by a split temporality of that kind. In order for this ideal to be realized, a substantial history (remembered and kept alive) as well as substantial developments are necessary. In this sense, the state interventions examined above can indeed be said to help nature in realizing what it cannot realize by itself.

Whether the answer is truly satisfactory, is, however, another question. Will flows and exchange in the work force, along with rewards of stability and loyalty, suffice? Is history and future to be created by that alone?

Life outside of the labour market: self-realization in lack of material

The third ghost raises the question of what characterizes life outside of the labour market. The ghost fears that nothing does. The ghost fears that although it is clear that life outside of the labour market exists, this life is fundamentally tabooed in terms of its possible meaning. If this is so, then the ideal order will be threatened by itself, so to speak; it will have no language for crucial elements of itself.

Truthfully, the law we have dealt with contains no positive characterizations of life outside of the labour markets. But this does not necessarily mean that it does not imply certain understandings of this life. Only, we shall have to proceed negatively. We shall examine what characterizes life within the labour markets - and subsequently consider whether we, by way of negation, may derive any features which can be said to crucially characterize life outside of the labour markets.

In order to examine what characterizes life within the labour markets, we will need to know, however, who belongs to the labour markets and who does not. This is not unambiguous. We have seen how differentiated and seemingly all-encompassing the name 'Worker' is. In its broadest meaning, it does not only include those people who are temporarily not working for reasons of unemployment, sickness or leave, but also pensioners and people who have never worked and never will. On the other hand, it is clear that not all of these people belong to the labour market. We learned, for instance, that older workers shall not be forced to leave the labour market as such, because if that happened, they would be deprived of their fundamental right to work and thus in their right to participate in economic, cultural and social life. Also, the CJEU emphasizes that a 'worker' according to the Treaty is not the same as a 'worker' according to the Social Security Coordination Regulation. The former concept of 'worker' includes those who actually work as well as those who are only temporarily not working, including unemployed people with no working history. The latter concept includes everybody who are merely insured. On this background, it will be senseful to conclude that those who are either presently working or are temporarily not working, including unemployed with no working history, belong to the national labour market.⁸⁰⁶ We may refer to these people as 'actual and potential workers'.

⁸⁰⁶ This conclusion is furthermore confirmed by the 'real-link'-considerations which occur in connection with unemployed people. These considerations imply, exactly, that unemployed people may be connected to the labour market (they may be 'linked' to it). The real-link-logic shall be examined below

So, what is common to the life of ‘actual and potential workers’? Generally, we have come across characterizations of that life in connection with cases dealing with people the situations of which connect them to the border areas of the name ‘Worker’. Let me direct the attention towards three crucial features.

Being one’s own purpose or having the labour market as a purpose

Firstly, with regard to those who actually work (more precisely, employed workers⁸⁰⁷), we have learned that only ‘*real and genuine activities*’ can be regarded as working activities. But what does ‘*real and genuine*’ mean? The CJEU has qualified that ‘*real and genuine*’ does not in any way refer to the level of productivity of the person concerned, the number of hours worked (full-time or part-time or less than that), the amount of the remuneration or the origin of the funds from which the remuneration is paid. The nature of the employment contract is not important either (whether a permanent or a fixed term contract); in fact, an official employment contract may be lacking all together. As long as the remuneration-criterium⁸⁰⁸, is satisfied, it appears that ‘*real and genuine activities*’ could be anything.

However, the Trojani-judgment⁸⁰⁹ revealed to us that ‘*real and genuine*’ activities cannot be anything. As recalled, the Trojani-case concerns a former drug-addict who did various jobs at a Salvation Army Hostel (about 30 hours a week) in return for board, lodging and pocket money. Surely, one would say that Mr. Trojani would satisfy the remuneration-criterium: he performed services for a certain period of time under the direction of another person, and he received remuneration. We have no reason to assume that the activities performed were not meaningful and useful. And as mentioned above, the level of productivity of Mr. Trojani is not important either. But in spite of all this, the CJEU finds that the activities performed by Mr. Trojani are not ‘*real and genuine*’. They are not because they formed part of a personal rehabilitation and reintegration program. Consequently, they could not be regarded as forming part of the ‘*normal labour market*.’

In other words, activities which are performed for the sake of the working person him- or herself do not belong in the ‘normal labour market’. Apparently, there is a normal

⁸⁰⁷ Obviously, self-employed workers would also be ‘actual workers’. However, the criterium ‘*real and genuine activities*’ is only applied in relation to employed workers.

⁸⁰⁸ The remuneration criterium, as I have called it, reads: Anyone who ‘*for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration*’ may be regarded as a worker. (Introduced in chapter 7)

⁸⁰⁹ Analyzed in chapter 7

labour market, and there is a false one. The false labour market resembles the normal labour market. In the false labour market, employment-relationships exist as well (services are provided in return for remuneration, as ordered by an employer), but the purpose of the work performed is personal, it serves the working person him- or herself.

Who or what should the work have served, then, if not the worker himself? The employer? But it is not implied that the employer does not benefit from the work. Some other particular purposes? It is not implied either that the work does not serve some particular purposes. What is implied, however, is that the job in question has not been open to everyone. The employment relationship in question has been established in a zone of its own, so to speak. Hereby it can be seen as disconnected from the labour market - but only if the labour market is regarded as a coherent whole, as a 'natural balance', that is.

The work of Mr. Trojani should have served that very idea - the idea of the labour market as a 'natural balance' - and not Mr. Trojani himself. It is not enough that a working person relates to an employer; a working person must also relate to the idea of the labour market as a coherent whole in order to belong to the labour market.

Mystical reality and belonging

Secondly, I would like to direct the attention towards the 'real-link'-argumentations, used by the CJEU in connection with discussions of whether unemployed people can be regarded as 'workers' within the meaning of the Treaty or not. They can, says the court, if it can be established that 'a real link' exists between the persons in question and the national labour market in question.

So, what are the criteria on the basis of which a 'real link' can be established? A range of criteria are brought into play by the CJEU. Generally, it is required that the unemployed person in question has been registered as a job-seeker and that he or she has, for a certain period, sought work and continues to do so. In this connection, the subjective attitude of the person is particularly important. '*Capable of working, willing to work and available for work*' - this is the recurring phrase of the court. In a number of ways, it is implied (or directly stated) that the unemployment must be 'involuntary'.

Furthermore, the CJEU brings forward certain criteria all circulating around societal integration within the state in which the labour market in question is situated (referred to as the 'geographic employment market'). Residence in that state appears to be an absolute requirement; seeking work from abroad will never do. Apart from that, the

length of residence matters. Having one's parents residing in the same state 'can be considered as representative of a real and effective degree of connection', but it is not an absolute requirement. Having completed one's education or part of it in the same state will improve the chances of a 'real link' as well - although this is not determining either.

Crucially, we should be aware that none of these criteria are sufficient in order for the CJEU to establish that a 'real link' exists between the 'geographic employment market' and the unemployed person in question. Some of them appear to correspond to necessary conditions, such as residence in the state in question and 'capability, willingness and availability for work'⁸¹⁰. Others do definitely not correspond to necessary conditions, such as having one's parents in the state in question or having completed one's education in that state, - as far as those latter criteria are concerned, their role is to contribute to a more comprehensive picture of the situation of the unemployed person from the perspective of general societal integration. In this respect, the following wording is noteworthy: '*it is not inconceivable*', says the CJEU, '*that a person, like Mr Ioannidis, who [...] pursues higher education in another Member State and obtains a diploma there, may be in a position to establish a real link with the employment market of that State*'.⁸¹¹

'*It is not inconceivable*'. In other words, the CJEU does not know, on the basis of the fact that Mr Ioannidis has completed his higher education in the state in question, whether or not he will be able to establish a 'real link'. Only, it is possible; it is not inconceivable. But since none of the criteria applied by the court are sufficient in order for it to determine whether or not a 'real link' is or can be established, those criteria function only as indications of the likeliness of the same. In truth, the 'real link' in itself is a mystery. The court will never be able to say that a 'real link' exists between an unemployed person and the relevant national labour market. Only retrospectively, after this person has succeeded in finding work, it will be possible to determine that a 'real link' did indeed exist.

⁸¹⁰ Under very special circumstances, we have seen moderations of these requirements as well. In the case of frontier workers who are 'partly unemployed', residence is not required (in stead, those workers are obliged to register as jobseeker in the state in which he or she is a part-time worker). In the De Cuyper-judgment, we learned that an unemployed worker whose future is not clarified (in terms of work versus pre-retirement) will not necessarily have to demonstrate 'capability, willingness and availability for work' in the period during which his future status is being considered by the authorities (but then it could be asked, of course, whether he would in fact be 'linked' to the labour market in that period?).

⁸¹¹Case C-258/04, *Ioannidis*, par. 33 (analyzed in chapter 7)

Thus, it can never be said with certainty that an unemployed person belongs to the national labour market. To the extent that he or she does, that belonging is a kind of mystical belonging, a belonging which cannot be seen or determined, but only assessed as likely or not. More precisely, that belonging consists in an invisible 'link' which is none the less understood to be a 'real link'. Since the link itself is invisible and indeterminable, the 'realness' of it can only mean that it grants reality to the unemployed person in question. But a mystical reality, that is, - a reality which has no external means of expression. We know a little of what it entails, though: a deep regret with respect to the present situation and an eagerness to change it, as well as being integrated in society in a broader sense.

Individual integrations

Finally, let me bring in mind the reflections which emanated from the analyses of the ECHR judgments concerning religious freedom. Those reflections are not only relevant to the state, but also to the national labour market as an institutional order.

As unfolded in chapter 20, it is presumed that the national labour market is *the* institutional orders within which human beings 'realize their potential'. But are there also certain human potentials which are not realized within the labour markets, one might ask?

Clearly, national labour markets are entangled in the same inescapable ideological dilemmas as are the states. These dilemmas were unfolded and reflected upon by the end of chapter 14. The fundamental understanding and the fundamental ideal laid down by the ECtHR - that beliefs are matters of inner conscience, and that the state should assume a formal neutrality towards the differences of beliefs - are undermined by the court itself due to inherent paradoxes in both. On the other hand, taking the full step into ideological secularism or, reversely, assuming a historical integrating approach would violate the conceptual foundation of the modern state. The same can be said of the fourth possibility (which is not in any way articulated by the ECHR), that of establishing an ideological foundation of the pluralistic state which is not called 'neutrality'. There is no way out; the state must stay within the dilemmas, in the tension between all four possibilities.

The inescapable dilemmas of the state are passed on to the labour markets. Employers will need to take decisions which are intertwined with the same ideological alternatives; they will need to interpret the meaning and limitations of pluralism on their own account. To the extent that these problematics give rise to negotiations between the

parties of the labour market (or to the extent that these problematics are generalized), they will form part of the labour markets as such.

Accordingly, in 'life within the labour markets', the relationship between 'inner belief' and 'manifestation of belief' will be interpreted and determined. In life within the labour markets, manifestations will find their limitations and beliefs will be held in place as 'inner beliefs'. From this we may extract an even more general point. In the Interzone-chapter (chapter 21), we distinguished between different kinds of unities of inner conscience and manifestation - corresponding to different kinds of *individual integrations*. On the highest level of unity between conscience and manifestation, we find the 'particular beliefs'. Individual integrations at this level are not merely be particular integrations; they constitute comprehensive understandings of the world. As such, they encompass an overall understanding of the social order as a whole - whether in a confirming sense, or in a denying sense. For this reason, they give life to the existing institutional orders, but they also constitute a threat. But the same may be said about the other levels of unity between conscience and manifestation, the level of 'thought and conscience' and the level of 'believing in a broad sense'. Individual integrations of all kinds - comprehensive or merely fragmented, self-conscious or unconscious - are caught within the ideological dilemmas outlined above; they represent an inherent problematic of 'pluralism'.

In conclusion: There are certainly human potentials which are not realized within the labour markets. What we have called 'individual integrations' are only realized partly, never fully. As unfolded in the Interzone-chapter, 'individual integrations' represent the reflexive and interpretative capabilities of human beings - no matter what dogmas or unreflected elements or even obsessions might otherwise be involved. When I say that individual integrations are only realized partly, never fully, this is not only due to the fact that every employment relationship implies its own purposes, professionally and technically, organizationally, economically as well as ideologically - although this plays a part. First and foremost, it is due to the fact that labour markets are entangles within the same inescapable ideological dilemmas as are the states.

Life within and life outside of the labour market

The three features analyzed above will help us to characterize the life within the national labour markets.

Firstly, in life within the national labour market, a person cannot relate to him- or herself as a purpose, but must relate to the labour market as a purpose. Admittedly, our

analysis concerned an employed person. How about a self-employed person, characterized by 'freedom of establishment'? Can they be purposes to themselves? I will argue that they cannot. Clearly, Mr. Trojani's employer does not act in accordance with the 'normal labour market', no more than Mr. Trojani. He is responsible as well for the creation of a 'false labour market' which constitutes a zone of its own. But self-employed persons need not be employers of other people, they could simply employ themselves? We may look upon such persons in two different ways. Either, this 'employing one-self' can be seen as a special case of the relationship between employer and employee and accordingly as an instant of the 'normal labour market'. In that case, he or she is subjected to the same logic as employed workers and other employers, the logic of the labour market as a purpose in itself. Or, such a person is free of the normal market of employment-relationships, he or she merely manifests 'freedom of establishment'. But in that case, he or she does not belong to the labour market at all.

Secondly, life within the labour market is the manifestation of deep societal integration, as well as social reality. In order for the unemployed to belong to the labour markets, a mystical connection must exist, a 'real link' which is invisible and cannot be determined by any criteria. But the possibility of the existence of such a link will be increased if the unemployed person in question can be said to be integrated in the society in question in a more general sense, and if he or she is directed towards the labour market with all of his or her will-power, and turned against the present situation with the utmost regret. In the case of workers who are not unemployed, the CJEU does not require any proofs of integration in a general sense or attitude, not in the case of any rights. From this we should not deduce that societal integration is irrelevant if a person is presently working. We know already that work-life coincides with 'social, cultural and economic life'. Rather, we must understand it as follows: if a person is presently working, then that person *is already* integrated and inscribed within social reality. Nothing more is required. If, on the other hand, a person is not presently working, then other factors of integration and social reality must be considered instead. These other factors may then point to the possibility that full integration and social reality may be obtained in the future (in the form of work).

Thirdly, life within the labour markets is characterized by the repression of 'individual integrations'; 'individual integrations' are only manifested partly, never fully.

By way of negation, we may then arrive at an understanding of life outside the labour markets. Life outside of the labour markets is life in which *a person is his or her own*

purpose and in which *individual integrations might possibly find spaces of manifestation*. Simultaneously, it is life in which *social integration and social reality is lacking*.

The question is of course whether individual integrations can at all unfold without social reality? And whether 'being one's own purpose' can become a substantial condition of life if not nurtured by social integration? In other words, will life outside of the labour markets not be in risk, then, of becoming an empty self-relation, self-reflexion lacking material?

We cannot say for certain. But we can say that not being part of the inclusive and crippled tragical relationship of opposition carries its own lurking tragedy: being liberated into individuality - a free determination of life purposes and a free unfoldment of one's interpretative capabilities - yet emptied of material through which those interpretative capabilities could unfold and life purposes could be formulated.

So, was the third ghost right after all? Is life outside of the labour market characterized by nothing at all? Not exactly, - but a new problematic has certainly arisen, that of self-undermining freedom.

Chapter 29

The national welfare systems

Under the perspective of the 'presumed order', we found the national welfare systems to be characterized by the following basic logic: they are presumed to be systems of rights and duties (political systems, not natural systems), and as such they are integrators into membership - real, legally guaranteed membership as well as the idea of membership. Or, we may say that they integrate into 'belonging', where belonging means being part of the rights-and-duties-logic.

Social assistance rights represent the ghost within these systems. Social assistance rights are for those who are not insured. As such, they are, in principle, not a part of the rights-and-duties logic, and for the same reason, they are not 'security'. But neither can they be captured by the concepts of mercy and charity. After all, they are called rights, and they are often granted on rough conditions, in exchange for duties. So what are they? Expressions of humanity and decency, of humiliation or reprimand, or something completely different? What does 'assistance' mean?

Are they qualified at all, asks the fourth ghost, or do they merely represent a residual category which can be used strategically by the member states?

Four complementary definitions of social assistance?

As we have seen throughout part I.1, the CJEU does indeed interpret the concept of social assistance. But as explained, a certain unclarity reigns with respect to the status of the concept. Is it an EU-concept or a national concept? To the extent that it is defined on the basis of EU-law, and not national law, may we then generalize the definitions provided (so that the concept would have a uniform meaning throughout EU-law), or is each definition applicable only in connection with a particular Directive or Regulation?

Even in the judgments in which the CJEU declares the concept ‘social assistance’ to be a national concept, the court still interprets the meaning of the concept within EU-law. Generally, the CJEU makes clear that the definitions provided are applicable within the meaning of the particular Directive or Regulation which is relevant to the case in question. Some parts of the definitions appear to have a general status, though. And some parts are overlapping, or represent only slight variations. Finally, it is noteworthy that not only particular Directives and Regulations, but also human rights and primary law, such as certain articles of the Charter of Fundamental Rights and the fundamental freedoms and the status of Citizenship as laid down in the Treaty play an important part whenever the CJEU interprets the concept of ‘social assistance’.

Accordingly, for the purpose of qualifying the basic logic of the institutional order ‘national welfare system’, it is tempting to understand the different definitions of ‘social assistance’ as complementary definitions, rather than just as different definitions. But we shall not do that right away. First, we shall go through the different definitions. Subsequently, we shall consider to what extent we can and to what extent we cannot analyze them together, seeing them as complementary aspects of the same logic.

First definition. In connection with an interpretation of the Family Reunification Directive (which applies only to ‘Third Country Nationals’), the CJEU defines social assistance as ‘*assistance which compensates for a lack of stable, regular and sufficient resources*’. Accordingly, social assistance cannot be ‘*assistance which enables exceptional or unforeseen needs to be addressed*’. Furthermore, it is underlined that ‘*the extent of needs can vary greatly depending on the individuals*’. The determination of what constitutes ‘sufficient resources’ shall be carried out on the basis of individual examinations. The

interpretation is supported by a reference to human rights in general, and more particularly to the right to respect for family life enshrined in both the ECHR and the Charter.

In the same judgment, the CJEU states that *'the concept of 'social assistance system of the Member State' is a concept which has its own independent meaning in European Union law and cannot be defined by reference to concepts of national law [...] that concept must be understood as referring to social assistance granted by the public authorities, whether at national, regional or local level'*. That part of the definition appears to have a general status.⁸¹²

Second definition. In connection with an interpretation of the Long Term Resident Directive (which also only applies to 'Third Country Nationals'), the CJEU interprets the concept 'core benefits'. Within this context, 'core benefits' represent a certain group of social assistance benefits. According to the court, 'core benefits' are benefits which are *'granted by the public authorities, at national, regional or local level, which enable individuals to meet their basic needs such as food, accommodation and health'*. The interpretation is supported by article 34(2) of the Charter according to which 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'*. Hereby, the court confirms the connection established in the Charter between the concept of 'decency', the concept of 'social assistance' and the state of 'lacking sufficient resources'.⁸¹³

Third definition. As far as concerns the concept of 'social assistance' within the meaning of the Social Security Coordination Regulation (which applies to both 'EU citizens' and 'Third Country Nationals'), the CJEU emphasizes that social assistance involves *'an individual assessment of the claimant's personal needs'*. More exactly, the court states that this is *'a characteristic feature of social assistance'* - which seems to imply that the definition is general and does not only concern the Social Security Coordination Regulation. Also, it is enlightening that social security, in contrast, is *'granted to the recipients without any individual and discretionary assessment of personal needs, on the basis of a legally defined position'*. From this we may infer that social assistance are not granted on the basis of a legally defined position.⁸¹⁴

⁸¹² Case C-578/08, *Chakroun*, analyzed in chapter 6 (the last quote stems from par. 45-46)

⁸¹³ Case C-571/10, *Kamberaj*, analyzed in chapter 6

⁸¹⁴ Case C-228/07, *Petersen*, par. 19, 21; Case C-406/04, *de Cuyper*, par. 23

Fourth definition. The fourth definition is negative and springs from an interpretation of the Residence Directive, supported by the EU-citizenship and the general principle of non-discrimination, as laid down in the Treaty. This interpretation applies to EU-citizens only. *‘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’*”, says the court.⁸¹⁵

In addition, the court strongly indicates that also within the context of the Residence Directive, ‘social assistance’ would be assistance which compensates for *‘a lack of stable, regular and sufficient resources’*.⁸¹⁶

Finally, it is worth recalling that the CJEU sometimes defends the residence rights of EU-citizens who are recipients of social assistance by pointing out that the difficulties of these people are likely to be ‘only temporary’.

When comparing the four definitions - corresponding to three different Directives and one Regulation - it is clear that they overlap to a great extent. The first and the second definition resemble each other a lot; separating them would not make any sense. The third definition provides us with an aspect which is also indicated in the first definition, and the last part of the fourth definition repeats what was already stated in the two first definitions.

Apart from that, the overlapping features all appear to have a general status. It is explicitly stated that the feature *‘granted by the public authorities, at national, regional or local level’* has a general status throughout EU-law, and it is strongly indicated that *‘an individual assessment of the claimant’s personal needs’* constitutes a general characteristic of social assistance. As far as concerns the feature *‘compensates for a lack of stable, regular and sufficient resources’*, it does not only appear in three of the definitions, it is confirmed by article 34(2) of the Charter which establishes a general connection between the concept of ‘decency’, the concept of ‘social assistance’ and the state of ‘lacking sufficient resources’.

Consequently, we may safely regard all four definitions, apart from the first part of the fourth definition, as complementary. Together, they make out the basis of a coherent understanding of ‘social assistance’.

The first part of the fourth definition constitutes an important problematic, though. The CJEU’s argument rests on the Treaty. *‘In view of the establishment of citizenship of the*

⁸¹⁵ Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, par 45 (analyzed in chapter 7)

⁸¹⁶ Case C-291/05 *Eind*, par. 29

*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'*⁸¹⁷, the CJEU explains. We must assume that this would have implications for the concept of 'social assistance' within the meaning of the Social Security Coordination Regulation as well, but only in so far as EU-citizens are concerned. The problem is that third country nationals are not covered by those crucial Treaty provisions. Accordingly, the first part of the fourth definition will not apply to Third Country nationals - neither in connection with the Social Security Coordination Regulation, the Family Reunification Directive or the Long Term Resident Directive.

At least the fourth part of the first definition will not apply in the case of third country nationals on the basis of the above-mentioned argument. But could we imagine that it would apply on the basis of another argument - for instance an argument relying on the overall purpose of transforming the rights of third country nationals so as to make them 'comparable to' the rights of EU-citizens? Could we imagine the CJEU arguing that to the extent that a national benefit is directed towards integration in the labour market, the third country national recipients of it cannot be denied the right to family reunification (or other rights, related to human rights)?

At the moment, this is pure speculation. Accordingly, we are facing the following problem. We may very well be confronted with two different concepts of 'social assistance' from the point of view of the ideal order, one which applies to EU-citizens, and another which applies to third country nationals. In principle, the same benefit within the same national system may be categorized as 'social assistance' if granted to a third country national, and as 'social security' if granted to an EU-citizen. Obviously, this undermines the institutional order in question. Not that differentiations between the rights of EU-citizens and the rights of third country nationals are not possible within the same institutional order. But if the distinction between social security and social assistance is crucial to the basic logic of the institutional order (and this is presumed to be the case), then the existence of two different, mutually exclusive ways of making that distinction would disrupt the presumed basic logic.

In order to investigate at least the *possibility* of a coherent qualification of the basic logic of national welfare systems, we shall deal with all four definitions as complementary definitions, including the problematic first part of the fourth definition. In any case, this

⁸¹⁷ Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, par. 37 (analyzed in chapter 7)

will lead us to a qualification of the institutional order in so far as EU-citizens are concerned. Within EU-law, EU-citizens have priority (there can be no doubt about that at this point); we will be justified in understanding the qualification of the institutional order from the perspective of EU-citizens as the primary or even quintessential qualification.

Once this primary or quintessential qualification is established, we shall consider both possibilities: Either the concept of social assistance would not be any different in relation to third country nationals, and the primary qualification would constitute *the qualification*. Or the concept of social assistance would be different, and we would be facing a parallel institutional order, existing next to the primary one.

**The primary qualification of the concept of 'social assistance':
the protection of society against the chaos of raw life**

On the basis of a complementary reading of all four definitions presented above, the concept of 'social assistance' can be qualified as follows.

'Social assistance' is for those who are lacking stabile, regular and sufficient resources - and accordingly are suffering with respect to the most basic needs such as food, accommodation and health. Social assistance is not granted on the basis of a legally defined position, but on the basis of an individual assessment of personal needs. It is always granted by a public authority.

Social assistance is not meant to keep people in poverty. In contrast, social assistance is meant to 'combat social exclusion and poverty'. Preferably, 'social assistance' is not granted to a person over longer periods, but will only be necessary in order to help a person through difficulties which are 'only temporary'.

A benefit which is meant to facilitate access to the labour market cannot be social assistance. This could appear contradictuous. Firstly, it could very well be the case that such a benefit would compensate for the lack of 'stabile, regular and sufficient resources'. Secondly, the purpose of such a benefit would doubtlessly be to 'combat social exclusion and poverty'. However, the apparent contradiction can be solved in the following way: People who are *in the process of becoming integrated*, people who are already 'linked' or likely to be 'linked' to the labour market are not receivers of social assistance. Only those who are not linked, that is, those who are surely not integrated or in the process of becoming it, are receivers of social assistance.

Even if the contradiction is solved, a tension remains. The concept of 'social assistance' entails both static and dynamic elements. 'Social assistance' is assistance which, ideally, will only be granted for a limited period, it is not supposed to define anybody for a lifetime. In fact, it does not even correspond to a legally defined position. The point of social assistance is that it shall become superfluous, that the receiver of it shall no longer need it after a while. In this sense, a dynamic element is build into the concept of social assistance. On the other hand, benefits which are meant to serve the integration of people into the labour market cannot be social assistance. That is, social assistance benefits are not understood as transforming benefits, benefits capable of changing the life situation of a person. In that sense, social assistance benefits are passive benefits.

So, does social assistance represent an escape from the rights-and-duties-logic? In practice, that will rarely be the case; receivers of social assistance are often subjected to rather hard duties - in terms of regularly reporting to the authorities, accepting surveillance, staying in the country or even local area, or job-seeking. The CJEU is aware of that, of course. Yet, if we consider the concept of 'social assistance', as derived above, the rights-and-duties-logic does not play a role. In other words: regardless of the fact that receivers of social assistance are often de facto involved in a rights-and-duties-logic, they are not in any way credited for that; they are not inscribed in the rights-and-duties-logic in the sense of membership and belonging. None the less, it is implied in the concept of 'social assistance' that it is meant to combat 'social exclusion'.

How may we conceive of social assistance, then? Is it mercy, humiliation, a helping hand from the state, reprimand or punishment? As mentioned above, a close connection between the concept of 'social assistance', the concept of 'decency' and the state of lacking sufficient resources is established in the Charter and confirmed by the CJEU. In order to be able to finalize the construction of the concept of 'social assistance' on the basis of the definitions provided by the CJEU, we shall reflect the aspects we have gathered so far in the light of the concept of decency.

In the Interzone-chapter, we analyzed the concept of 'decency' together with the concepts of 'privacy' and 'private life'. We found that all three concepts concern what we called 'the striving self' - that is, the self which is the foundation of the civilizational self and which is fundamentally threatened by the dissolution of the difference between the sexes. More precisely, it is threatened by the dissolution of the distinction between separability of bodies versus inseparability of bodies, and between mutual recognition of bodies versus destruction of bodies. Both distinctions are crucial to

modern European institutionalization - in terms of temporality as well as modes of regulation.

But the concept of decency also occurs - as we know from the analysis above - in connection with an emphasis on the material conditions of human life, namely in article 34(2) of the Charter of Fundamental rights. On the basis of this connection, we concluded that 'the striving self' is not only threatened by the dissolution of the differences between the sexes, but also by the lack of a material basis. Without basic means of subsistence, including 'a home', the possibility of becoming, at all, a 'self', a 'someone' who can be regulated, continuously and dynamically is threatened; that is, the ability to become a civilizational self at all is threatened.

From the perspective of the concept of decency I shall argue that the concept of 'social assistance' concerns exactly this fragile foundation of the civilizational self. 'Social assistance' does not in itself facilitate integration into the labour market (and hereby societal integration in a general sense). But it ensures the foundation of the civilizational self; it ensures that human beings do not disintegrate into something which can no longer be made the subject of regulation - or that they never become 'a someone' who can. Bodies may become inseparable and unrecognizable for material reasons (and not only for symbolic reasons related to the difference between the sexes), as they may lose their 'striving' capabilities with respect to being a particular 'someone' over time - due to hunger, diseases, drugs and continuous struggle for existence.

Hereby, we may approach the question of what 'social assistance' essentially is. Social assistance is not mercy; basically, it serves the general purpose of regulation (a purpose which does not only define the modern state, but everyone who acts within the meaning and logics of institutional orders). Neither is it essentially reprimand or punishment (although it may have such features), because if it were, it would be directed towards a transformation of the situation of the recipient, either in terms of an improvement or towards deterioration. For the same reason, it is not essentially a helping hand, either (although, obviously, it functions as such). Finally, it is not essentially humiliation because it is based on the belief that the recipients of social assistance are fundamentally like everybody else, capable of being 'striving selves' and subjects of regulation, potentially 'civilizational selves'. When that is said, however, it is clear that social assistance implies an important element of humiliation; the recipients

of it are exactly not integrated - they are denied the membership entailed in the rights-and-duties-logic, even if they are de facto a part of it.

Social assistance is essentially a safety net, but not for the sake of the receivers. It constitutes the safety of institutionalized society. Social assistance protects society as a whole (including the excluded themselves) against that which lies beyond civilization. Due to social assistance, society will not need to witness those states of human existence in which human beings are not recognizable as human beings anymore, but only raw life and existential battle is left. Even if not everyone will prove capable of integration, everyone will prove capable of being a civilized self, that is, someone who can be named and regulated, recognized and separated over time. This will guard society against chaos - the state of physical and mental dissolution in which institutionalization as such would fail.

**A second qualification, characterized by the collapse of categories,
giving rise to a parallel institutional order**

This is the primary qualification of the basic logic of the 'national welfare systems' from the point of view of the ideal order: the concept of social assistance is more than a residual concept; it points to a kind of protection which is not essentially a manifestation of the rights-and-duties-logic characterizing social security but which none the less serves this logic in that it guards society against the state of physical and mental dissolution in which human beings are not recognizable as human beings and in which institutionalization as such would fail.

We could imagine that the concept of 'social assistance' would be no different in so far as third country nationals are concerned. As speculated above, we could imagine the CJEU arguing that the general societal integration of third country nationals constitute an overall goal of EU-law, and that the rights of third country nationals are to become 'comparable to' the rights of EU-citizens - for which reason the reception of benefits meant to facilitate access to the labour market cannot be the cause of a denial of rights. But we have to consider, as well, the possibility that the concept of 'social assistance' would be different in so far as Third Country Nationals are concerned. In this case, a benefit meant to facilitate access to the labour market *can* be 'social assistance'. Apparently, that would call of the tension between statical and dynamical elements otherwise characterizing the concept of social assistance, as analyzed above. Social assistance would include benefits meant to integrate people in the labour market; it

would comprise both those benefits meant to ensure a basic level of existence as well as benefits meant to help people to transform their situation. Accordingly, 'social assistance' would not only serve the protection of the society against states of human life lying beyond civilization, it would also constitute means of integration of the excluded, either in the form of punishment, reprimand or a 'helping hand'.

However, when analyzing the meaning of this other concept of 'social assistance', we have to take into account the way in which it arises from the law. In case the concept of social assistance is indeed different in so far as third country nationals are concerned, then it is an expression of the fact that third country nationals are subjected to stricter requirements than EU-citizens. In the case of both third country nationals and EU-citizens, the concept of 'social assistance' has a negative function: its role is to deny certain rights to certain people. When the CJEU chooses, in the case of EU-citizens, to define the concept narrowly, the court simultaneously moves a whole group of people, namely the unemployed, from a zone of potential exclusion into the field of the integrated (and of course, the reference to the Treaty based principle of non-discrimination and the fundamental status of EU-citizenship constitutes a direct and positive manifestation of the fact that unemployed EU-citizens are to be treated according to the fundamental rights of the integrated). In contrast, in the case of third country nationals, we are simply left with a muddled and undifferentiated concept of social assistance as far as the aspect of 'integration' is concerned. The question is not whether the aspect of integration forms part of social assistance or not, the question is whether third country nationals can support themselves or not. To the extent that they cannot, they are seen as recipients of social assistance.

Accordingly, in the case of third country nationals, rather than being faced with a concept of 'social assistance' which includes the aspect of integration, we are witnessing a collapse of categories. In the case of third country nationals, it does not matter whether they are in the process of being integrated or not; all that matters is whether or not they can support themselves or not.

On the basis hereof, I will argue that we would not be confronted with a completely different concept of 'social assistance'. The primary qualification presented above will in any case be relevant in the case of third country nationals. Social assistance represents a safety net meant to guard society against a human state of physical and mental dissolution which lies beyond civilization and which cannot be subjected to any means of civilization. Only, in the case of third country nationals, the distinction

between that which is already in the process of integration and that which is in danger of falling below the threshold of civilization is understood differently than in the case of EU-citizens. Third country nationals are understood to be always nearer that threshold of civilization than EU-citizens; much more are required of them in order for them to have proven their civilizational capabilities.

So, in a certain sense we would be confronted with a parallel institutional order. The same benefit may be categorized as 'social assistance' in so far as third country nationals are concerned, and as 'social security' in so far as EU-citizens are concerned. But this parallel order would not undermine the primary order. The concept of 'social assistance' would basically be the same. Only, it would be applied differently - reflecting a differentiated understanding of when a human being comes close to the threshold of civilization, to the chaos of physical and mental dissolution on the basis of which no regulation is possible.

Accordingly, we may need to take into account a parallel order existing next to the primary order, characterized by its own distinctions - and lack of distinctions. But it would relate to the basic characteristics of the primary order - and repeat them, in its own form.

Would the fourth ghost be satisfied with this answer? Certainly, 'social assistance' does not merely represent a residual category. A qualification of the concept of 'social assistance' and hereby of the basic logic of 'the national systems' has been provided. But we should not ignore that it is a qualification which carries with it two glaring expressions of discrimination. Firstly, receivers of social assistance are regarded as possible subjects of civilization, like everybody else, but they are excluded from the rights-and-duties-logic in so far as it means 'membership' - that is, the rights-and-duties-logic defining the 'integrated'. Secondly, the concept of social assistance is - presumably, at least - applied differently depending on whether the receiver is an EU-citizen or a third country national. As a result, a parallel institutional order arises - implying that third country nationals are always closer to the threshold of civilization, to the point of chaos at which institutionalization and regularity as such will fail.

Chapter 30

The employment relationship

In chapter 20, we found that the employment relationship is presumed to be a 'relationship of subordination', implying a particular rights-and-duties logic. As a 'relationship of subordination', the employment relationship constitutes an event, not a process, and not the realization of an idea. It institutes a particular relation, for a certain period of time.

The particular right-and-duties-logic of the employment relationship (which can be said to be the manifestation of a particular interpretation of the 'balance' of the national labour market in which the employment relationship belongs) is not in itself a logic of 'membership', but it leads to memberships of other orders, namely the 'national labour market' and the 'national welfare systems'. This is true for the one who is subjected to the particular rights-and-duties-logic (the employee) as for the one who establishes it (the employer).

The fifth ghost does not really question the basic logic of the 'employment relationship' as such. In a sense, this logic is unshakeable in its glaring simplicity. But the fifth ghost questions the relationship between the employment relationship itself and the memberships to which it leads. How can something as distinct and simple as the employment relationship lead to 'membership', to collectiveness and societal integration, even to 'life'?, asks the ghost. The ghost fears that the relationship is merely one of definition - that it lacks any substantial foundation.

So, how may we see the connections between the crude logic of the employment relationship - 'an event instituting a relationship of subordination' - and the logics of integration implied in the other two orders?

The relationship between the 'employment relationship' and 'the national welfare systems': the domination of the individual event over the common order

Firstly, regarding the relationship between the 'employment relationship' and 'the national welfare systems', we shall direct our attention towards some of the concepts which mediate between the two, most notably the concept of 'pay'. In connection with analyses of the material scope of the non-discrimination Directives with respect to 'sex', we discussed the colonizing capabilities of the concept of pay. The discussion was

related to the fact that the four Directives correspond to three different areas of social rights, namely *social rights stemming from the legislation of the State*, *social and workers rights stemming from the employment relationship* and *social rights which are goods and services, carrying exchangeable economic value*.⁸¹⁸

More precisely, we have seen that the concept of pay eats its way into the issues of the state. If the CJEU finds that a given social security benefit constitutes ‘pay’, then it belongs within the area of rights stemming from the employment relationship, also if the benefit in question is part of a statutory, public scheme. The state could even be part of the financial foundation of the benefit in question, and the benefit might still constitute ‘pay’.⁸¹⁹ But also the terms ‘dismissal’ and ‘working conditions’ have colonizing capabilities, that is, they are capable of dragging a rule or a benefit which undoubtedly stems from the legislation of the state into the area of rights stemming from the employment relationship. A part-time scheme instituted by the state and a tax advantage (both related to the retirement of older workers) would belong in the area of rights stemming from the employment relationship.⁸²⁰

Let us dwell on the meaning of the concept of ‘pay’ for a minute; to what does this concept owe its colonizing capabilities? 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’. On the basis of this definition, the CJEU lays down that a given benefit scheme must ‘be derived from’ or ‘reflect’ the employment relationship in order to constitute pay. This will be the case if the scheme satisfies three criteria: it 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’.⁸²¹ In other words: if the benefit reflects the particular characteristics of a particular employment relationship (the particular category of work, the particular period of time during which it has existed, the particular salary), then it constitutes pay. The CJEU opens the concept of pay in ways which certainly transgress mainstream understandings, but simultaneously it is noteworthy that the court binds it to *the specificities of the individual employment relationship*. That is, the concept of pay is not being connected to any general

⁸¹⁸ See chapter 15

⁸¹⁹ This is made clear in Dir. 2006/54/EC, but the same conclusion can be drawn from the Maruko and Römer judgments analyzed in chapter 13.

⁸²⁰ As briefly mentioned in chapter 18 (in the section ‘Temporary discrimination’)

⁸²¹ See the analyses of the Maruko and Römer judgments in chapter 13.

features of the employment relationship. We may say, of course, that the concept of pay is being connected to some general categories springing from the general definition of an employment relationship ('kind of work', 'time period', 'level of salary'), but only in the sense that these categories are manifested specifically and individually.

In the Maruko-judgment, the aspects of a given benefit scheme due to which it can be said to reflect an individual, specific employment relationship is being opposed to the fact that '*considerations of social policy, of State organisation, of ethics, or even budgetary concerns*' may have influenced the establishment of the scheme. In other words, a benefit scheme which springs from the legislative power of the state will not only reflect the individual employment relationships to which it applies, it will also reflect some overall purposes of the state. But the CJEU makes it unequivocally clear that the former aspect is more important than the latter as far as concerns the determination of the material status of a benefit. '*Considerations of social policy, of State organization, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail*' if the scheme in question reflects an individual employment relationship, says the court.⁸²²

Regarding the terms 'employment conditions' and 'dismissal' we are not given any actual definitions. However, the CJEU emphasizes that within the Employment Non-discrimination Directive, '*the term 'dismissal' [...] must be given a wide meaning*' (and we have no reason to assume that that would not also be the case within the General Framework Directive and the Race Equality Directive). In truth, we need nothing further. Crucial is what is demonstrated by the Kleist-, Vergani- and Kutz-Bauer-judgments: To the extent that a benefit or rule concerns, at all, the specific, individual employment relationship of the right holder in question, including the way in which it is terminated, then that benefit will be regarded as belonging to the area of rights reflecting the employment relationship - regardless of whether that benefit or rule springs from the legislation of the state and reflects certain overall concerns of the state - and regardless of whether the financial source of the benefit is the state.⁸²³

The pattern is the same: when ever the material status of a given benefit or rule is being established (so that it may be determined whether it falls under the scope of one or the other Directive, or no Directive at all), the aspect of 'reflecting the individual, specific employment relationship' prevails over any aspect related to state legislation (the

⁸²² Case C-267/06, *Maruko*, par. 48

⁸²³ These judgments are briefly dealt with in chapter 18 (in the section 'Temporary discrimination')

legislative aspect as such; overall purposes; the public and/or compulsory nature of the benefit, even (with some modifications) the financial sources of the benefit).

Accordingly, we may conclude the following: The specific, individual employment relationship leads to 'membership' within the national welfare systems. In this respect, it does not only lead to 'membership' of private social security schemes. A person is also, by way of his or her employment relationship, given access to a range of statutory social security schemes, and these schemes are manifestations of overall public concerns of an organizational, ethical, social political or economic nature. The fact that all of these statutory social security schemes are being viewed by the court primarily as schemes which reflect the individual, specific employment relationship and only secondarily as schemes which reflect overall public concerns is interesting. Hereby, the court drags the overall, public concerns into the shadow. The individual, specific employment relationship is the sun in the light of which the schemes most truly appear.

To the extent, therefore, that it can be said that the individual, specific employment relationship gives access to a world of overall, public concerns, a 'common world', this world is already from the outset deemed to be a shadow-world.

The relationship between the employment relationship and the national labour market: the domination of the common order over the individual event

Now, let us turn to the relationship between the employment relationship and the national labour market.

Obviously, a person who is part of an employment relationship (as either employer or employee) will also be a part of the national labour market - which implies a crucial kind of 'membership' as unfolded above. Although the individual, specific employment relationship gives access to membership of the national labour market, it is not the individual, specific nature of the employment relationship which is reflected in that membership. It does not matter whether a person works little or more, earns a high salary or not, or belongs to one or the other profession. Any person who is a part of an employment relationship will be part of the labour market. Naturally, the labour market is infinitely differentiated with respect to sectors, professions, kinds of contracts, levels of salary etc. But the membership in itself does not reflect the specific nature of the individual employment relationship - as does the membership of some of

the national social security schemes, in the eyes of the CJEU. In this sense, we may say that the national labour market constitutes an order which is truly a common order.

I just said that any person who is a part of an employment relationship will be part of the labour market. As discussed earlier, in connection with the qualification of the basic logic of the national labour market, this is only true in a modified sense. There are also employment relationships which are not seen as part of the 'normal labour market' - that is, relationships which satisfy the remuneration criterium and accordingly carries all the characteristics of an employment relationship which are generally emphasized by the court. An employment relationship is only seen as belonging to the 'normal' labour market if the parties of it relate to the labour market as a purpose - instead of relating to themselves (or the individual relationship) as a purpose. That is, they need to see the individual, specific employment relationship in the light of the multiplicity of other employment relationships which belong to the national labour market and on the basis of which the 'natural balance' is presumed to exist *and* to be created. The individual, specific employment relationship constitutes a particular interpretation of 'the natural balance' - an interpretation which can be discussed and criticized, but which none the less relates to the 'natural balance' in the form of a particular interpretation.

This underlines to what extent the labour market is a common, and not an individualized order. Not only does the 'membership' of that order not reflect the specific nature of the individual employment relationship, it is also so that the individual employment relationship cannot be truly individual (it cannot relate to itself as a purpose) to the extent that it belongs to the labour market. The individual employment relationship can only give access to the common order to the extent that it was never truly individual.

Accordingly, we are faced with the opposite picture as before, when concluding our analysis of the relationship between the employment relationship and the national welfare systems: The common order dominates, the common order is the sun; the individual employment relationship is not only placed in the shadow, the aspect of 'individuality' is deprived of any legitimacy what so ever.

**The order of the labour market constitutes
the crucial order of common, overall concerns**

While carrying out the analyses of the two relationships - the relationship between the order of the 'employment relationship' and the order of the 'national welfare system', and the relationship between the order of the 'employment relationship' and the order of the 'national labour market' - it soon became apparent to us that both relationships concern a relation between an individual phenomenon and common concerns. This is not so surprising. As we knew already, the employment relationship is an event - hereby characterized by specificity and individuality - whereas the 'labour market' and the 'national welfare system' both circulate around membership and integration. Our concern was exactly how to understand the transition from the crude logic of the employment relationship into logics of membership and integration.

We saw indeed that by way of the individual employment relationship a person would gain access to a world of common, overall concerns. But in the first case, the case of the 'national welfare systems', it was a common world which was placed in the shadow of the specificity of the individual employment relationship. In the second case, the case of the 'national labour market', we were certainly confronting a common world, but it was a common world in which the specificity of the individual employment relationship had been deprived of any legitimacy what so ever.

Two conclusions can be derived from this. Firstly, the individual phenomenon of the employment relationship and the worlds of membership and integration are indeed connected. It is not so - as feared by the fifth ghost - that no conceptual relations exist what so ever. In the first case, the connection exists in the sense that the individual phenomenon is reflected in the world of membership and integration. In the second case, it is the world of membership and integration which is reflected in the individual phenomenon.

Hereby, the following asymmetries appear: the medium through which the first transition takes place (from the individual employment relationship into the order of the 'national welfare systems') turns out to be the institutional order of the employment relationship, whereas the medium through which the second transition takes place (from the individual employment relationship into the order of the 'national labour market') turns out to be the institutional order of the labour market. The aspect of individuality which dominates the first transition corresponds to the logic of the 'employment relationship' - a relationship of subordination, constituting an event and

qualified in terms of its specific individual features - whereas the aspect of 'the common' which dominates the second transition corresponds to the logic of the 'labour market' - a 'natural balance', qualified as a tragic, inclusive and crippled relationship of opposition.

On the basis of these insights, we must conclude, secondly, that although the individual phenomenon of the employment relationship and the worlds of membership and integration are connected, the connections are in both cases one-sided. Either the aspect of individuality is reflected in the 'common', or the aspect of 'the common' is reflected in the individual phenomenon. - But in the first case, we lack a reflection of the aspect of the 'common' in the aspect of the 'individual'. There is no reflection in the individual employment relationship of the overall concerns underpinning the order of the 'national welfare systems', - that would be the concerns invested in the private occupational social security schemes, as it would be the concerns invested in the statutory, public schemes. We know from the last chapter that those concerns may - when seen on the basis of the conceptual framework of the EU - be captured in the form of a rights-and-duties-logic which is more precisely a logic of insurance implying that 'the integrated' are somehow mutually responsible for each other. We also know that this logic of insurance is guarded against that which lies beyond civilization by the fact that social assistance is granted to those who are not integrated. Those logics are in no way detectable in the logic of the individual employment relationship. - In the second case, we lack a reflection of 'the individual' in the 'common'. In the order of the labour market, there is no reflection of the crude and simple logic of the individual employment relationship; the 'relationship of subordination' seems to have disappeared in the 'natural balance'.

So, the logic of the employment relationship does not in itself touch upon any considerations as to 'insurance' and mutual responsibility, the borders of civilization and the material conditions of the civilizational self. The only 'common' aspect which is reflected in the logic of the employment relationship is the aspect of the tragical, inclusive and crippled relationship of opposition constituting the order of the labour market. By virtue of both of these characteristics it is clear that the employment relationship is really nothing but an event - a particular instance of the logic of the labour market, never a purpose in itself.

Accordingly, we may conclude that the order of the labour market constitutes the crucial order of common, overall concerns, when seen from the perspective of the

individual employment relationship. In contrast, the overall concerns of the order of the 'national welfare systems' - 'insurance' and mutual responsibility, the borders of civilization and the possibility of the civilizational self - are repressed. Furthermore, we shall take note of the fact that the dominating order of common, overall concerns, the national labour market, implies an aspect of totalitarianism in the sense that the multiplicity of individual employment relationships on the basis of which this order is constituted cannot relate to themselves as purposes.

Chapter 31

The internal market

This anchor of order is different from the others in two crucial respects.

Firstly, the tension between presumed and ideal order takes an even more delicate form in the case of the internal market. To a very high degree, it is part of the ideal order. The Treaty-based principle of 'free movement of people' represents one of the four basic freedoms which constitute the internal market. And a range of residence rights, work access rights and social rights are meant to facilitate the internal market. However, it is also a presumed order from the point of view of the law we have dealt with in that this law only deals with a part of the internal market; we have not been investigating the free movement of goods, services and capitals. In other words, we may say that the *idea* of the internal market as such, or as a whole, is *presumed*, as is the existence of the institutional order of the internal market with respect to the free movement of goods, services and capital, - but the institutional order of the internal market with respect to the free movement of people is meant to be realized through the law we have dealt with, it belongs to the ideal order.

Secondly, in the case of the internal market we are in fact not even sure whether we are facing an institutional order or not. In chapter 20, we assumed that we are. We assumed it because the idea of the internal market plays a visible and important role in the law we have dealt with and because we were also faced with certain basic characteristics hereof by virtue of appearances of the concepts of 'goods' and 'services'. Throughout our analyses of legislation and case-law, we had been given the impression that an anchor of order carrying the name 'the internal market' was presumed as an existing order in which the law we had been investigating was meant to be implemented, just

like this order was meant to be realized as such through that law. The basic logic of that order was a simple logic of exchange of entities carrying economic value - so simple and so minimal that it would not even imply the aim of profit-making. It would imply nothing but occurrences of exchange.

The sixth ghost raised the question of whether the internal market is in fact an institutional order at all. Even if the simple logic of exchange could be upheld in the case of all four freedoms, would it then be possible to qualify this logic in a way which would apply to all four freedoms? The more radical alternative would be that the simple logic of exchange could not be upheld at all, that it would be undermined due to the occurrences of other significant logics.

We shall of course only analyze the internal market from the point of view of the 'free movement of people'. First, we shall ask to what extent - and under what circumstances - the principle of 'free movement of people' is at all compatible with a logic of exchange. Secondly, we shall examine some of the other logics which dominate the realization of the principle of 'free movement of people', most notably the 'real link logic' (already analyzed above) and 'the status of EU-citizenship logic', from the point of view of the logic of exchange. Do the occurrences of these other logics undermine the logic of exchange, or do they rather qualify it?

Is the principle of 'free movement of people' compatible with a logic of exchange?

Firstly, we shall dwell on the possible compatibility of the principle of 'free movement of people' with the logic of exchange. This will imply an interpretation of both.

What does 'free movement of people' or 'freedom of movement of workers' mean? More precisely, who are supposed to be 'free', according to this principle? The people? Or is it not the people, but the 'movement' itself which is free, the movement being part of the internal market as one of its dynamics? In other words, there are two different ways of looking upon the principle of 'free movement of people' with respect to the meaning of freedom. Either it is the people who are 'free', or it is the market.

If we look upon the principle from the point of view of the freedom of people, to what extent may this freedom then be compatible with a logic of exchange? In order to answer this we will need to consider what 'the logic of exchange' implies.

If 'logic of exchange' simply means 'occurrences of different exchanges', then we can imagine the people to be free in the sense that they are free to realize *some* kind of

exchange somewhere within the EU - that is, some kind of exchange the nature and characteristics of which they would take part in determining.

If, on the other hand, 'logic of exchange' means that any particular exchange relates, in principle at least, to the multiplicity of all other actual and potential exchanges, then the freedom of the people is not quite as obvious. Then we would be confronted with a proper 'market', and although this market would imply an endless number of different exchanges, there would ultimately only be *one exchange*, one manifestation of 'the logic of exchange'. People would not be able to determine the nature and characteristics of the particular exchanges. Their freedom would merely consist in the fact that they would be able to move around within the EU, that is, they would be able to decide *where* to realize the logic of exchange, - or more precisely, *where* to realize *the one exchange*. Any particular exchange would always be a particular realization of *the one exchange*.

However, we may differentiate between two possible variations of this latter meaning of 'logic of exchange'. Either, 'the one exchange' has the nature of a natural law - a law which may be grasped and formulated by human beings, or may not, which may be subject to dispute, which is complicated or simple, but in any case 'a law'. In that case, the freedom of the people could mean nothing but freedom to decide *where* to realize a law which was already determined and determining. The meaning of '*movement*' would be reduced to the absolute minimal: it would mean 'moving around' within an absolutely determined space. - Or 'the one exchange' does not have the nature of a natural law. Basically, the logic of exchange unfolds chaotically and unpredictably. The multiple exchanges and the relations between them which makes out 'the one exchange' does not comply with any particular logic or mechanism. The 'logic of exchange' is only a logic in the sense that it predicts the occurrence of multiple exchanges relating to one another. In that case, we could grant a little more freedom to the people. Even if they would not be part of determining the nature of the exchanges, they would still influence them. Each particular exchange would, if ever so slightly, transform 'the one exchange'. Since 'the one exchange' would not comply with any law, it would be subjected to continuous displacements. In this sense, the will and actions of the workers would be invested in 'the one exchange'. It would not be freedom in the sense of determination or conscious choice, but freedom in the sense of being part of the unfolding of the logic of exchange, not merely being subjected to it. 'Movement'

would not only mean 'moving around', but also being part of the movement of the logic of exchange; the people would be 'movers' themselves.

In conclusion: if we consider the possible compatibility of the principle of 'free movement of workers' with the logic of exchange from the point of view of the freedom of the people, then we are ultimately confronted with two alternatives. Presuming that 'the logic of exchange' implies the interrelatedness of all the different particular exchanges (otherwise we would not be facing a market at all), then the 'free movement of people' and the logic of exchange are reconcilable *either* in the sense that the people are free to decide *where* to realize the logic of exchange which takes the form of a natural law, *or* in the sense that they are not only free to decide where to realize the logic of exchange, they are also movers of the logic of exchange which unfolds chaotically and unpredictably.

If, on the other hand, we consider the possible compatibility of the principle of 'free movement of people' with the logic of exchange from the point of view of the freedom of the market, then the 'free movement of people' would mean that the movement itself would be free, the movement constituting a dynamic of the market. In other words: the logic of exchange of the market would be able to unfold freely and uninhibited, without certain barriers which used to restrain it. This is a well-known liberalistic idea. However, again we will need to clarify what is meant by 'logic of exchange' - and we will encounter the same tension as we did above. Either the logic of exchange has the nature of a natural law. In that case, the market could be said to be free in the sense that it pursues 'its own' law. It would be freedom in the sense of determination, though. Or the logic of exchange unfolds chaotically and unpredictably. In that case, the market would be free in a quite different sense - in the sense of being untamed, uncontrollable, wild. But we could also imagine a third possibility, namely that the logic of exchange would not comply with any fixated law, but that it was tamed by something different, namely a sort of self-reflexivity. In that case, the market would be free in the sense of being capable of continuously reflecting itself, that is, it would be self-conscious throughout the multiple exchanges on the basis of which it exists.

As it appears, these different ways in which the market could be free are not incompatible with the different ways in which the people could be free. The third possibility - the market's freedom as self-reflexivity - could be conceptualized so that it would imply the investment of the will and actions of the people as well; that is, it could correspond to the second way in which the people could be free. The highest

degree of compatibility between the principle of the 'free movement of people' and the logic of exchange when seen from both perspectives of freedom will be obtained if we presume that the logic of exchange does not have the nature of a natural law - that it unfolds either chaotically and unpredictably, or through self-reflexivity.

The real-link logic - not a qualification of the logic of exchange

Now, we shall examine some of the other logics which dominate the realization of the principle of 'free movement of people' in order to consider the relationship between those logics and the logic of exchange as qualified above. Are these other logics compatible with the logic of exchange, or do they undermine it? Could they even provide us with other qualifications of the logic of exchange?

The first 'other logic' I would like to bring forward springs from the differentiated concept of 'worker'. In the first instance, the kind of 'Workers' which are particularly relevant in connection with the internal market are those workers who are covered by the principle of 'Free movement of workers', that is, article 45 of the Treaty. The workers covered by article 45 are the same as those which we found to belong to the institutional order 'the national labour market': those who are either presently working or are temporarily not working, including unemployed with no working history. We referred to these people as 'actual and potential workers'.

The 'Workers' who are presently working would be defined by the remuneration criterium (from one or the other side, either as an employer or as an employee). Is the remuneration criterium compatible with the logic of exchange, as qualified above? It clearly is - and more than that. It is an accurate expression of the logic of exchange; the remuneration criterium concerns the performance of services, specified in time and nature, *'in return for which'* remuneration is provided. If we add to this that every employment relationship will need to relate to all other employment relationships in order to belong to 'the normal labour market', then we may conclude that the 'Workers' who are presently working are defined by a logic which is not only a clear expression of the logic of exchange in its basic and unqualified version, but also in its qualified version as an actual market logic (implying the interrelatedness of all actual and potential exchanges).

But how about the 'Workers' who are temporarily not working, most notably the unemployed? Just like the 'Workers' who are presently working, they can be said to be directed against the logic of exchange, only not presently. They are potentially defined

by the remuneration criterium and the 'normal labour market'. But presently and actually, they are defined by something else, namely the 'real link' criterium. It is by virtue of this criterium that they are regarded as part of the 'national labour market', even while not working. Accordingly, it is also by virtue of this criterium that they belong to the internal market (since the national labour market is part of the internal market when seen from the perspective of transnational workers). As analyzed above, the real link criterium involves first and foremost the presumption of a mystical connection between an unemployed person and the labour market. It can never be said with certainty whether the link exists or not; only retrospectively, it will be clear whether it was actually there. However, certain circumstances function as indicators with respect to the likeness of the existence of a 'real link'. Signs of general societal integration constitute important indicators, but the most crucial indicators are those which concern the subjective attitude of the unemployed person in question.

Now, is the 'real link' criterium compatible with the logic of exchange? Clearly, it is not a direct expression of it. Even if we would go as far as saying that the 'real link' criterium concerns an exchange (the unemployed person provides a certain subjective attitude along with certain actions in return for being covered by article 45 of the Treaty which implies certain rights), then it would not be an exchange which relates to all other exchanges; it is not a market exchange. To the extent that an exchange is implied at all, it is an exchange of a political nature (concerning the rights and duties of the individual vis-a-vis the state). We will have to say, therefore, that the 'real link' criterium constitutes a logic which supplements the logic of exchange, rather than being an expression of it. On the other hand, since it is directed towards the logic of exchange, it is not unrelated to that logic. Consequently, it does not qualify, exactly, the logic of exchange, but it adds to it another dimension, the dimension of belonging to this logic in a way which is partly determined by subjective attitude, partly not quite definable at all.

We shall need to dig a little deeper into the question of compatibility between this partly subjective, partly mystical dimension and the logic of exchange. Above, the logic of exchange was qualified from the perspective of the freedom of the people and the freedom of the market. When seen from the point of view of the freedom of the people, we may say that the extra dimension, the 'real link' dimension, reduces the freedom of the people in the sense that it reduces their freedom to decide *where* to realize the logic of exchange; the 'real link' dimension concerns the connection to a particular national

labour market and it emphasizes the element of societal integration as such. Likewise, the 'real link' dimension reduces the freedom of the people in the sense that it binds them subjectively to that labour market. On the other hand, we may also see a certain relation between that subjective element and the other possible understanding of the freedom of the people. That other understanding implied that the will and actions of the people would be invested in the logic of exchange - and due to this, the logic of exchange would be subjected to continuous transformations and displacements. From this point of view, it could be said that the subjective element added by the real link dimension does not reduce but enhances the freedom of the people. In order to be truly invested in the logic of exchange - and accordingly, truly a part of its continuous transformations - a person would need to invest all of his or her will power and capabilities in that logic. That would be true on a general level, at least. But the question is of course whether the subjective attitude required by the 'real link' criterium is too distinct in order to enhance the 'moving' capabilities (in the sense of transformation and displacement capabilities) of people vis-a-vis the logic of exchange? In other words, the problem would not so much be the requirement of a subjective element as such as it would be the requirement of a distinct subjective attitude - a distinct subjective attitude which can be summed up in the phrase '*capable of working, willing to work and available for work*' along with the notion of '*involuntariness*' ('involuntary unemployment')⁸²⁴ and which obviously reduces immensely the spectrum of possible subjective attitudes towards the logic of exchange, even if we would require those attitudes to be expressions of passion and dedication. When seen from the point of view of the freedom of the market, it is possible to conceive of the 'real link' dimension in more constructive terms. To the extent that the logic of exchange is understood to be untamed, uncontrollable and wild, it is also necessarily mysterious. If it is mysterious, a person may only be part of it by *actually* being part of it; there would be no definable doors of access for those who are only potentially part of it. For this reason, the potential workers can only be part of the logic of exchange by way of a mysterious - invisible and indeterminable - link about which it can be said, though, that the subjective attitude is crucial. But again, the distinctness of the subjective attitude required would represent a problem. How could the access to an untamed, uncontrollable and wild logic be conceived of in so limited subjective terms?

⁸²⁴ These elements - along with the other criteria connected to the 'real link' logic - are described in chapter 7 (in the section 'Rights attributed to unemployed without a working history')

To the extent that the logic of exchange is understood to be tamed by a certain self-reflexivity of the market itself, it is no less mysterious than were it uncontrollable and wild. Also in that case, potential workers could only be part of it by way of a mysterious connection - which, in turn, would have to be conceived of in more extensible subjective terms.

**Differentiations with respect to the meaning of 'belonging'
to the internal market and two particular logics of rights
- none of which can be said to qualify the logic of exchange**

The other logics I would like to bring forward concern the EU-citizenship. It is not only 'Workers', but all 'EU-citizens' who belong to the internal market. The gradual historical extension of the concept of 'Worker' has culminated in the EU-citizenship. In a certain sense, the EU-citizenship represents a residual category in relation to the concept of 'worker'. Since the concept of 'worker' is so immensely differentiated and even covers those persons who have never worked and never will work, but who are merely insured, it might be difficult to see who would not be 'Workers' and 'only' 'EU-citizens' in the terminology of EU-law. They do exist, though: that would be those EU-citizens who are not entitled to social security, only to social assurance or nothing at all - the people who are closest to the threshold of civilization, according to the qualified logic of the institutional order 'the national system'. On the other hand, as mentioned above, it is only some and not all 'Workers' who are covered by article 45 of the Treaty; that is, it is only some and not all 'Workers' who are granted mobility, residence and work access rights by virtue of the fact that they are 'Workers'.

In any case - whether or not the EU-citizenship should be seen as a residual category in relation to the concept of 'Worker' or not - EU-citizens who are not 'Workers' within the meaning of article 45 do belong, by definition, to the internal market. This raises an obvious problem when seen from the point of view of the basic logic of the internal market: A number of people who do not take part in any exchanges of work and are not potentially going to are none the less a part of the internal market. However, the problem can be easily solved in the sense that those people will inevitably take part in other exchanges, relating to services, goods and capital, at least as consumers. There is a certain difference, though. A 'Worker' covered by article 45 sells something which is intimately connected to his or her own body and mind and which gives meaning to his or her life as such (as we learned from the logics of the order of the labour market). A

‘Worker’ comes close to making him- or herself the object of exchange. That will be the case for ‘Self-employed workers’ as well, if we are to take seriously the notion of ‘self-employment’. A consumer of goods or services does not make him- or herself an object of exchange; exchanges are carried out on the basis of a distinction between the object of exchange and the person who buys and consumes it (at least in general and in principle - there would also be cases in which a bought and consumed good would be intimately connected to the body, mind and life of the consumer). Accordingly, the internal market is based on the free movement of people who are themselves the objects of exchange (and as such comparable to goods, services and capital) as it is based on the free movement of people who exchange something which is distinct from themselves. It should be noted, though, that a consumer represents an economic value just like a worker, - so even if the consumer is not him or her-self being exchanged, the consumer can certainly be seen as part of the market not only by virtue of the particular objects which are being exchanged, but also by virtue of him- or herself.

Apart from bringing to the forefront such difficult distinctions between different ways in which a person can be said to belong to the internal market, the EU-citizenship introduces certain particular logics of its own. The EU-citizenship constitutes a ‘fundamental status’ - this is emphasized by the CJEU over and over again. But what does it mean that the ‘EU-citizenship’ constitutes a ‘status’? Does ‘status’ imply something more than the fact that certain rights are granted to all EU-citizens? It does, - as it appeared from certain judgments analyzed in chapter 5, most notably the Zambrano-judgment. The Zambrano-judgment is interesting because it implies an isolated consideration on the meaning of that status, that is, a consideration which does not depend on any particular rights granted to EU-citizens. According to the Zambrano-judgment, the status of EU-citizenship implies that an EU-citizen should *not to be deprived of the possibility* of enjoying the rights attributed to EU-citizens. That is, the status of citizenship may, under certain circumstances, give rise to other rights (which are not included under the rights granted to EU-citizens) to the extent that these other rights function as conditions of possibility for enjoying the rights attributed to EU-citizens.⁸²⁵

We may draw a similar conclusion from another judgment in which the EU-citizenship is also not being considered in connection with the particular rights which it implies,

⁸²⁵ In the Zambrano-case, the parents (who were third country nationals) of small children (who were EU-citizens) were granted residence rights in the EU so that the small children should not be deprived of the possibility of enjoying their rights as EU-citizens

but where it serves to enhance the rights attributed to 'Workers'. In the *Vatsouras and Koupatantze* judgment, the EU-citizenship and the concept of 'Worker' are brought together in the argumentation of the CJEU. The court finds that '*in view of the EU-citizenship*' a an EU-citizen job-seeker covered by article 45 of the Treaty must not be denied a benefit intended to facilitate access to the labour market of a Member State.⁸²⁶ If we analyze the role of the EU-citizenship in this judgment we will see that also here it serves to secure that the two Greek men in question are not being *deprived of the possibility* of enjoying the rights attributed to EU-citizens. The benefit in question is exactly a benefit which functions as a *condition* in relation to a persons possibilities of gaining access to the labour market of a given state. That is, it functions as a condition in relation to a person's possibilities of enjoying the rights of EU-citizens - namely seeking work in a different member state and becoming a 'Worker' in that state, residing there and being treated according to the 'Principle of Non-discrimination'. Finally, the *Carpenter* judgment entails an example of a similar logic, that is 'the condition for being able to enjoy the right logic'. Also in this case, an EU-citizen is granted a particular right (in this case a family reunification right) which would otherwise not be a right of EU-citizens, by virtue of the fact that it functions as a *condition* for his possibility of enjoying a fundamental EU right, namely the right to provide services.⁸²⁷

In other words, the EU-citizenship implies two crucial features in relation to the internal market. A number of people who do not take part (with their own body, mind and life) in the exchange of work, are still part of the internal market, as consumers or in other roles by which exchanges are carried out. This gives rise to *differentiations with respect to the way in which people belong to the internal market* - to different degrees of distance between the object of exchange and the person who exchanges this object and accordingly also to different degrees of belonging to the internal market. Furthermore, the EU-citizenship *enhances the dimension of rights* which was already there due to the principle of 'the free movement of workers' which historically preceded the EU-citizenship. This enhancement of the dimension of rights contains two aspects of interest to us.

⁸²⁶ Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, par. 37 (analyzed in chapter 7)

⁸²⁷ Analyzed in chapter 5. The 'condition for being able to enjoy the right logic' is discussed in chapter 26 in connection with the analysis of the fundamental problematics adhering to non-discrimination rights

The enhancement of the dimension of rights does not only mean the introduction of more rights (more people are granted rights at all as well as better rights). It means the introduction of an *equality logic* based on citizenship alone: all EU-citizens are granted certain fundamental rights, no matter who they are. I said above that if they were not 'Workers' then they would certainly be consumers. And this is true in practice; existing in modern Europe entirely outside of the logic of exchange would hardly be possible. But EU-citizens can claim fundamental rights by virtue of the fact that they are EU-citizens, not by virtue of the fact that they take part in the logic of exchange.

The enhancement of the dimension of rights also means that the dimension of rights unfolds in two dimensions; a '*second order*' of rights is introduced, so to speak. The 'status of citizenship' means 'the right to be able to enjoy one's rights', 'the right to be facilitated with respect to the conditions of possibility for enjoying one's rights' - a kind of 'right to one's rights'.

So this is what 'EU-citizenship' means in comparison to being a 'Worker': the possibility of belonging to the internal market in the sense of taking part in exchanges without one-self being the object of exchange; a dimension of equality in relation to other citizens; and a second order of rights - a 'right to one's right'.

Now, are these three logics implied in the EU-citizenship compatible with the logic of exchange? The first one clearly is; only, it establishes that there are different degrees of belonging to the internal market. This first logic can be seen as a qualification of the logic of exchange. But the other two - the two logics of 'rights' - are of a different nature. Neither the citizenship-equality logic nor the 'right to one's right'-logic have anything to do with a logic of exchange.

It could be argued, of course, that the element of equality as well as the element of securing the possibility of enjoying one's right are given *in return for something*. It is expected that EU-citizens will use their rights so that they can unfold as workers or consumers and hereby serve growth and wealth in Europe. In fact, that could be said in general about the rights by which the principle of 'free movement of people' is realized (mobility, residence and work access rights along with equal treatment rights). But I will argue (similarly to how I argued in relation to the 'real link' criterium) that it would make no sense to understand these rights as instances of the logic of exchange. Even if we would go as far as saying that these rights imply exchanges (that they are given in exchange for something else - certain conditions must be satisfied, certain duties performed, and certain overall economic results are expected), then it would not

be an exchange which relates to all other exchanges; it would not be a market exchange. Whatever market purpose might be involved, the nature and characteristics of the exchange is politically determined. This is of course also true with respect to the particular logics of rights analyzed above; equality and 'the right to one's right' are even given without any conditions (although of course not without expectations).

If the citizenship-equality logic and the 'right to one's right'-logic cannot be seen as qualifications of the logic of exchange, how may they be seen, then? Do they undermine it or serve it? If we regard the logic of exchange from the point of view of the freedom of the people, then we may say that the two logics of rights enhance the freedom of the people in the sense that it gives all EU-citizens the possibility of deciding *where* to realize the logic of exchange. However, whether the two logics enhance the freedom of the people in the sense that they enhance their capabilities of continuously transforming the logic of exchange is more ambiguous. These logics (as well as the dimension of rights as such) serve to improve the general situation of EU-citizens as they unfold the logic of exchange, hereby making them stronger vis-a-vis that logic. But this also means that the logic of exchange will unfold according to certain rules; it is more 'settled', so to speak. Huge transformations with respect to the nature and characteristics of exchanges become less likely - for better or worse. - If, on the other hand, we regard the logic of exchange from the point of view of the freedom of the market, then it is clear that the two logics of rights (as well as the dimension of rights as such) serve to limit the logic of exchange to the extent that this logic is seen as unpredictable and wild. On the other hand, EU-citizens' rights serve to provide the logic of exchange (also when understood as unpredictable and wild, and certainly when understood as 'self-reflexion') with ever new material - a flow of 'food', that is workers and consumers.

The fundamentally ambiguous relationship between the logic of exchange and the other logics characterizing the internal market

What have we gained from the disparate analyses above? Will we be able to answer the sixth ghost?

We did indeed qualify the logic of exchange in several ways. We considered the possible compatibility between the logic of exchange and the principle of 'free movement of people' (which constitutes one out of four constituent principles of the internal market) and found that if 'free movement' should both be a manifestation of

freedom on behalf of the people and on behalf of the market, then we would need to presume that the logic of exchange does not have the nature of a natural law - that it unfolds either chaotically and unpredictably, or through self-reflexivity. On the basis of that understanding we could understand the freedom of the people as something more than simply the possibility of deciding *where* to unfold the logic of exchange, but also as the possibility of being movers themselves of the logic of exchange, due to their investment in that logic - with will and actions.

Furthermore, we qualified the logic of exchange in the sense that we established a differentiation with respect to different ways of belonging to the internal market. The internal market both embraces people who are themselves the objects of exchange - people who sell something which is intimately connected to their own body, mind and life - as it embraces people who exchange something which is distinct from themselves. But we also confronted the logic of exchange with some other logics which are undoubtedly part of the manifestation of the internal market, but which cannot be seen as instances of the logic of exchange. In other words, they do not qualify the logic of exchange. None the less, they do interact with the logic of exchange and may accordingly be seen as particular dimensions of it. From the differentiated concept of 'Worker' we extracted the 'real link logic' (which we have also dealt with in connection with the national labour market), and from the 'EU-citizenship' we extracted two logics of rights, the citizenship-equality logic and the 'right to one's right'-logic. Certainly, these analyses are far from exhaustive. A number of other logics which form part of the manifestation of the internal market could have been analyzed - logics related to the (limited) mobility rights of third country nationals, for instance, or other logics of rights, not least the logics which characterize the particular rights (the as-if-logic, the non-significance logic etc).

I have chosen to analyze some logics which are particularly relevant from the perspective of this work since they concern the question of belonging to the internal market or not - and how to belong to it. The real link logic concerns belonging in the strong sense - the kind of belonging which is characterized by the lack of a distinction between the object of exchange and the person who exchanges it. The two logics of rights, on the other hand, concerns belonging in a broader sense - the kind of belonging which does not presuppose that lack of distinction. The real link logic brings forward a mystical as well as a subjective aspect of the issue of belonging in the strong sense;

whereas the two logics of rights bring forward an equality aspect and a 'right to one's right' aspect of the issue of belonging in the broader sense.

Although these logics only constitute three examples out of many possible, we have gained from them the insight we need in order to answer the sixth ghost. First of all, we have learned that the logic of exchange does not reign alone in the internal market, it is supplemented by other - and quite different - logics. Secondly, we have seen that the ways in which these logics play together with the logic of exchange are highly ambiguous. We can neither say that these logics support the logic of exchange, nor that they undermine it.

The mystical and subjective aspects implied in the 'real link' logic can be said to strengthen the logic of exchange in the sense that it gives the logic of exchange a clear ideological dimension: the logic of exchange becomes something more than a logic of exchange, it becomes a mystical force which requires passion and dedication from those who belong to it in the strong sense (with body, mind and life). This does not only serve the freedom of the market (the material through which it unfolds is increased), but also the freedom of the people from the point of view of being part of the continuous transformation of that logic (by investing not only their body, mind and life, but also their will and passion in the logic of exchange, they become part of the unfolding of that logic in an enhanced sense). However, the problem is that the subjective attitude which is required by the real link criterium appears to be a distinct subjective attitude. This means that neither the market, nor the people are being fed with ever new ideological material by which the logic of exchange could expand and transform. In contrast, the ideological dimension is fixated.

The two logics of rights as well as the dimension of rights as such can be said to strengthen the logic of exchange in the sense that they feed the market with workers and consumers and secure the possibilities of people to take part in the logic of exchange. However, the transforming capacities of the logic of exchange will possibly be limited; at least it will unfold according to certain rules; become more 'settled'.

Let me emphasize that when speaking of 'freedom' in this context I neither wish to imply that it is good nor bad. The concept of 'freedom' as developed in this section should be seen as an immanent and descriptive concept. I merely asked what the concept of 'freedom' as stated in the principle of 'free movement of people' could possibly mean if it were to be understood as compatible with the logic of exchange. In particular, we should be aware that the transforming capacities of the people vis-a-vis

the logic of exchange should not be seen as an expression of freedom in the sense that the people have any power over the transformations of the logic of exchange, it is merely an expression of freedom in the sense that the people are not just subjected to laws (laws of the market as well as laws of the state or the EU), but that they are themselves - with will and actions, possibly also with body, mind and life and passionate dedication - invested in the logic of exchange. - The concept of freedom is fundamental to the logic of exchange - understood as a basic logic of the internal market - because the internal market' is based on a principle of freedom. Following the potential manifestations of freedom from the point of view of the people and the market simply means to take seriously that the internal market is based on freedom.

In conclusion: the logic of exchange - qualified as expressions of freedom from two different perspectives - is strengthened by the other logics we have examined in the sense that it gains an ideological dimension, and in the sense that it is being fed with material and possibilities of manifestation. Simultaneously, however, it is inhibited in the sense that it is being legally rooted and subjectively defined. The relationship between the two aspects - the strengthening and the inhibiting aspect - cannot be determined, but will remain ambiguous. The problem is that we will never be able to say to what extent the legal and subjective rooting will actually enforce the transforming capacities of the people and the unpredictable as well as self-reflexive capacities of the market, and to what extent this rooting will stand in the way for more radically transforming, unpredictable and self-reflexive capacities.

For this reason, the 'Internal Market' is not an institutional order. Not only does it imply a conglomerate of logics (and I have only mentioned a few), it is also so that the interplay of these different logics is fundamentally ambiguous. We cannot determine their respective roles towards one another.

The sixth ghost was right - not because the logic of exchange does not fundamentally characterize 'people' in the internal market as it characterizes goods, services and capital. And not because we were able to detect the presence of other basic logics. The sixth ghost was right because the basic logic - the logic of exchange - is both inhibited and strengthened by these other logics in a way which makes it impossible to determine the relationship between them.

Chapter 32

The Family

From the perspective of the 'presumed order', the family is characterized by a basic logic of internal asymmetrical dependencies; some family-members are presumed to be dependent on others, and it is the responsibility of the latter to support and take care of the former. According to this internal logic, the family stands for itself, strangely unconnected to all the rest - the labour market, the national systems, the employment relationship and the internal market. But according to its external logic, it is based extensively on all of those orders.

The family is closely associated with the concepts of 'privacy' and 'dignity - the closest we ever came to anything which appeared to indicate the existence of something sacred. Accordingly, the family itself stands for something sacred - something precious, but highly ungraspable

The seventh ghost asked: If the family stands for a kind of sacred life which does not resemble the integrated life of the labour markets, the membership of the systems, the subordination characterizing the employment relationship or the logic of exchange, how may that sacred life then be preserved - if the family is, simultaneously, dependent on all of those other orders?

In order to answer the seventh ghost we shall ask what kind of life the family represents. The concepts of dignity and private life will be our doors into this ungraspable life sphere. Subsequently, we shall raise the question of the relationship between this sacred internal life of the family and the other institutional orders on which it depends.

The family is the order which exposes the fragilities of the civilizational self

With respect to the first part of the analysis, a large part of the analytical work has already been done. In the Interzone-chapter (chapter 21) we analyzed thoroughly the concepts of dignity and privacy. In the course of these analyses, it became clear that the family would have to be ascribed a very special role. Accordingly, we may begin by summarizing the results of the analyses of the Interzone-chapter in so far as the role of the family is concerned.

We found that the concept of 'dignity' concerns a persons possibilities of realizing independence. Not independence in an absolute sense, but in the relative sense of 'not being completely dependent'. When qualified as a part of a human foundation, 'dignity' means that something remains which cannot be captured completely - something which cannot be completely owned, controlled or determined by other people or the state. This something - which is not a self, but solely that which escapes the civilizational self - needs protection. Whenever particular borders are crossed, dignity is violated. Those borders are physical, mental and sexual.

The intimate connection between the concept of 'dignity' and the order of the 'family' should not be ascribed to the fact that the family is particularly dignified. On the contrary, the family is particularly close to possible violations of dignity, due to its basic logic of asymmetrical dependency. The concept of dignity is crucial to the order of the family because violations of dignity are implied in its basic logic - as a danger which will always threaten it.

When analyzing the concept of 'private life' we found ourselves confronted with two other concepts, 'autonomy' and 'integrity', the meaningfulness of which could not be uphold when seen from the perspective of the law, - or indeed, from a societal perspective at all. I argued that we would need to see the presumption of the existence of self-law-giving and self-integrating individuals as an absurd comedy the meaning of which is the complete undermining of the concepts of 'autonomy' and 'integrity'. What the concept of 'private life' tells us is that we are deeply and inescapably connected and woven together.

The order of the family is the manifestation of this fundamental connectedness and interwovenness in the strongest sense. To the extent that 'autonomy' and 'integrity' would be meaningful at all - that is, if they were founded in a principle external to law and society - the family would be the institutional order in which autonomy and integrity would have the very hardest conditions. Family relations belong to the spheres of intimate relations in which one has to give up some of one's own law in order to open oneself to the other person's law, and extend the reflexion by which one integrates the diverse aspects of oneself and the world in order to open oneself to the other person's ways of integrating. That may happen in different degrees, and more or less asymmetrically. But in any case, family relations are symbols of intimate relations in which one gives something up of one-self, independence, individual freedom, secrets of the mind or secrets of the body.

Also the last two concepts of the constellation analyzed in the Interzone-chapter, 'privacy' and 'decency', are relevant to the order of the family. They are not directly associated with the family, but they are associated with the private home, and with distinctions between the sexes.

As a result of our analyses, we found that the concepts of 'privacy' and 'decency' concern a striving self, a 'self' threatened by the dissolution of the difference between the sexes. More precisely, it is threatened by the dissolution of the distinction between separability of bodies versus inseparability of bodies, and between mutual recognition of bodies versus destruction of bodies. This striving self is the foundation of the civilizational self - a self which can be named and regulated, continuously and dynamically.

It is implied that 'privacy' and 'decency' may be violated in situations connected with nakedness and physically intimate activities, especially if they take place in a person's home. Just like family relations are symbols of intimate relations in which one gives up one's own law and one's own integrations, the naked body and the home can be seen as symbols of spaces in which all the names fall (the names carried by a person by virtue of the law or other sources of names). In truth, the naked body and the home are regulated like all other spaces, but none the less, they are spaces permeated by an atmosphere of 'masks falling off', of 'being exposed beyond societal roles'.

Also, the family is the central order of motherhood. The distinction 'as such' between the sexes on which the striving self depends can be traced back to a distinction between fatherhood and motherhood (as it can also be traced back to the assumption of an intricate relationship between women and violence). The difference between motherhood and fatherhood is the difference between being a body which is separate from other bodies, and being a body which, for a short period, is inseparable from a body of the generation to come. Accordingly, motherhood concerns, in an intricate way, a fundamental condition of the striving self and hereby a fundamental condition of modern temporality: the possibility of separating between bodies and in particular between this generation and the next.

We see that in relation to all four concepts, the order of the 'Family' constitutes an order of difficulties and fragilities. In the family, violations of dignity (in the sense of relative physical, mental and sexual independence) are always likely to happen. In the family, our fundamental connectedness and interwovenness are manifested most strongly, at the cost of self-law-giving and self-integrating approaches. In the family, the striving

self which is the foundation of the civilizational self has the most difficult conditions and unfolds in the most intricate way.

The family concerns our human foundation in a special and ambiguous way. The order of the family is - like relations of sex and sexuality - a symbol of that foundation as it is a symbol of that which threatens that foundation. It is a symbol of our deep and inescapable interconnectedness - physically, mentally, sexually. But hereby it is also a symbol of that which threatens the positive and negative foundations of the civilizational self - the distinctions upon which the striving self relies and the residual of the civilizational self, the aspect of ungraspability and uncontrollability. It is a symbol, as well, of spaces or situations in which the 'masks fall of'. That as well is ambiguous - pointing to the existence of a foundation of the civilizational self, but simultaneously exposing the fragility of the civilizational self.

In short: The 'family' is the order of mental and physical and sexual dependencies, intimacy and exposure - and the order of potential inseparability of bodies. As such, it is the order in which the becoming of the civilizational self is subjected to the most difficult conditions. Simultaneously, however, it is an order which symbolizes the existence of a foundation of the civilizational self. But it is a fragile foundation, always threatened by violation. In this sense, we may understand why the family is understood to be something sacred. It is the order associated with the fragility of the foundation of the civilizational self - and hereby the fragility of the civilizational self.

The order of the family is torn between fundamentalism and particularism

So, this sacred order of the family needs protection. And it is being treated in accordance herewith. Not only is it associated with the universal concepts of 'dignity' and 'private life' (with reference to my definition of 'universal' in the Interzone-chapter), it is also protected as such by fundamental rights in the European Convention on Human Rights and the Charter of Fundamental Rights. *'Everyone has the right to respect for his or her private and family life, home and communications'*, says the Charter (applying almost the same words as the Convention).⁸²⁸ And subsequently, the right to marry and to found a family is guaranteed (in the Charter as well as in the Convention).⁸²⁹

⁸²⁸ The Convention uses the term 'correspondence' in stead of 'communications' (art. 8). This difference is not relevant to our investigation. The relevant provision in the Charter is art. 7.

⁸²⁹ Art. 9, Charter of Fundamental Rights; art. 12, The European Convention on Human Rights

However, we have seen throughout part I (but of course especially in chapter 8) that the sacred order of the family is not always being protected. In fact, the protection of the family depends largely on who the family members are and the characteristics of their situations. More precisely, the protection depends on which names the family-members can claim besides from being family members and the rights attributed to these names (not only rights relating specifically to the family, but also other rights).

This is not only true with respect to social rights - the derivative rights granted to family-members on the basis of EU-law, or the rights to family benefits within the national systems. It is also true with respect to the rights which are crucial to the existence of the order of the family, like family reunification rights and the right to marry. A 'Third Country National' is in no way ensured a right to a family life as such. A number of conditions must be satisfied. Not even children arriving at the EU-borders alone are ensured a right to stay with family-members within the EU. In the *European Parliament vs European Council* case⁸³⁰, the Parliament questioned whether a provision of the Family Reunification Directive according to which an unaccompanied child aged over 12 may be rejected a right to family reunification complies with human rights, in particular the right to respect for family life. In its judgment, the CJEU found that the provision does not violate human rights. Apart from emphasizing the margin of appreciation enjoyed by the member states in matters of immigration, the CJEU also emphasized the particular justification provided for in the preamble of the Directive, namely that the provision in question is intended to reflect that the capacity for integration is smaller in the case of older children than in the case of younger children. The Court found that '*the necessity for integration*' may be regarded as a legitimate objective (in accordance with the European Convention on Human Rights).

So, the right to respect for one's family life - in so far as that would imply the possibility of living together as a family, or at least living in the same part of the world, and hereby being able to realize the basic logic of asymmetrical dependencies along with those aspects of the family life due to which the family is regarded a sacred order, as qualified above - is far from absolute. First of all, this right does not guarantee a 'Third Country National' the right to family reunification, and secondly, it may be weighed against other 'legitimate concerns' among which the Convention explicitly mentions '*national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the*

⁸³⁰ Analyzed in chapter 8

rights and freedoms of others'.⁸³¹ As we saw in the European Parliament vs European Council judgment, the CJEU finds that also the assessed capacity of a person for integration may constitute a legitimate concern on the basis of which intervention in that person's right to respect for his or her family life may be justified.

On the other hand, we have seen that in the case of EU-citizens, the fundamental right to respect for one's family life or the fundamental right to marry has been explicitly supported by the CJEU. But in these cases, other fundamental rights have been at stake as well, corresponding to one of the basic freedoms or to the principle of equal pay laid down in the Treaty. In the Carpenter-judgment, the CJEU considered that Mr. Carpenter's fundamental right to provide services would be infringed in case his wife would be denied residence in the UK. It is crucial to note that although the court emphasizes that a decision to deport Mrs. Carpenter would be harmful to the family-life of the Carpenter-family, it is not the possible infringement of the fundamental right to respect for one's family life, but the possible infringement of the fundamental right to provide services which would be problematic, in the view of the court: '*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*'.⁸³² - Likewise, in the K.B.-judgment, the CJEU found that the fact that it had been impossible for K.B. to marry her transsexual partner constituted a breach of the European Convention of Human Rights. However, the crucial element of the argumentation was constituted by the consideration that in this particular case, the infringement of the right to marry had led to an infringement of the principle of equal pay.⁸³³

All of these examples - whether they concern a neglect of the right to respect for family life (in cases which involve Third Country Nationals) or, on the contrary, a confirmation of that right (in cases which involve EU-citizens and fundamental EU-rights) - are expressions of the same: The protection of the family as an institutional order is not absolute. The protection - also in so far as crucial conditions of that order is concerned - is immensely differentiated according to *other* factors, that is, factors which are not in any way related to the basic logic of the family or to what we may call its 'sacred aspects'.

⁸³¹ Art. 8(2), ECHR

⁸³² Case C-60/00, *Carpenter*, par. 39

⁸³³ Analyzed in chapter 17

Accordingly, the family as an institutional order is torn between fundamentalism and particularism. Due to its association with concepts of universal law, 'dignity', 'private life', 'privacy' and 'decency', it is understood to be a sacred order, - an order which concerns something immensely precious and yet uncapturable, something inviolable which may none the less be violated, and which therefore needs protection. However, the protection provided is immensely differentiated. It appears that the family as an institutional order does not need fundamental protection anyway; it needs protection only from the point of view of a range of other concerns. This means, of course, that all of these other concerns will break into the self-sufficient logics of the order of the family and tear them to pieces. What remains is the particularized order of the family - the family that serves one of the basic freedoms of EU-law, the principle of non-discrimination or the issue of integration in a given state.

None the less, even if threatened by particularization in a range of situations (not only in connection with national immigration laws or marriage laws, but also, from a broader perspective, in connection with national social rights), the order of the family is still generally presupposed as a crucial societal order on which the implementation of EU laws depend, characterized by internal dependencies, - and qualified by EU-law as a sacred order which shall be protected as such. We may say that the order of the family *as such* is being cherished as a fundamental order, but that existing families are being subjected to criteria of differentiation which binds them to the logics of the other institutional orders and to the hierarchies through which those orders unfold.

But what does it mean that other concerns break into the self-sufficient logics of the order of the family? More exactly, what does it mean that the family is being bound to logics of other institutional orders along with the hierarchies through which they unfold? Will the logics of the family - the asymmetrical internal dependencies and the logics of the fragility of the civilizational self to which the family owes its sacredness - be able to survive, at all? If the logics of the order of the family cannot survive in the particular, existing families, then the order of the family as such will not be able to survive either.

Naturally, if an existing, particular family is denied the most basic conditions - such as the possibility of living together or in the same part of the world - then it is clear that the internal, asymmetrical dependencies are likely to break down, along with the aspects of intimacy, exposure and inseparability on which the sacredness of the family depends.

But if an existing, particular family is not being denied the most basic conditions of survival as a family, but on the contrary, is being supported by residence rights, workers rights and social rights, to what extent will these external dependencies then influence the internal logics of the family in the case of this particular family?

First of all, by binding this particular family to the logics of other institutional orders and the hierarchies through which they unfold, these external dependencies mean that the family *as a whole* is being hierarchized in relation to other families. This in itself will not destroy the internal logics of the family, but it will mean that these internal logics serve other purposes, namely the purposes manifested by those hierarchies. The internal asymmetrical dependencies and the aspects associated with the fragility of the civilizational self become servants for particular purposes.

Secondly, the external dependencies might influence the relations *within* the particular family, in the sense that the family members are being hierarchized in relation to each other. This still does not mean that the internal logics of the 'Family' are destroyed, but it means that the internal asymmetrical dependencies will be determined by the hierarchies of other institutional orders. This, in turn, could also influence the ways in which intimacy, nakedness, exposure and inseparability are unfolded in the particular family.

As a consequence of these external dependencies, would not the logics of other institutional orders ultimately defeat the logics of the family, one could ask? Would not the rights-and-duties-logics of the employment relationship or the national welfare systems, the tragical relationship of opposition or the integration logic of the national labour markets, or the logic of exchange of the internal market ultimately influence the order of the family so strongly that its own logics would disintegrate? Of course, it is not impossible that something like that could happen. However, it is not what is implied by the law we have dealt with. The family as an institutional order *in its own right* is part of the 'ideal order' meant to be realized by the law, as it is part of the presumed order.

In conclusion: the family as an institutional order is torn between fundamentalism and particularism. The logic of internal asymmetrical dependencies is upheld along with the logics of the fragility of the civilizational self. In accordance with these logics, the family constitutes a crucial societal order on the basis of which EU mobility, residence and social rights are structured and which is associated with universal law. As such, it is seen as a fundamental order which needs fundamental protection. But the logics of

the family are also particularized in two different ways: They become the servants of other, external purposes, and their manner of manifestation is determined by external hierarchies and orders.

Why is the order of the family apparently resilient to the external pressure?

The logics of the order of the 'Family' could seem paradoxical: they are understood to be fundamental qua internal logics, but they serve other purposes and their ways of manifestation are externally determined.

We may ask whether it is possible to uphold these logics at all? As stated above, it is at least assumed to be possible. Conceptually, we can make sense of this assumption, but only just barely. The undermining of the internal logics of the family lies stumbling near. The stronger the particularization in both respects, the more threatened the fundamental status of the family. To the extent that the aspect of hierarchization of different families would be increased to such a degree so that it could no longer be said that the 'family as such' is being protected and respected by the law, the family as an institutional order would dissolve. Its basic logics (or what was left of them) would merely serve other purposes, they would have become logics belonging to other orders. Likewise, to the extent that the individual members of the family would have become completely independent in relation to one another as a result of their external dependencies, the family as an institutional order would dissolve as well.

But we may also ask *why* the logics of the family are upheld at all? Certainly, many utopian thinkers have envisaged the abolition of the family in favor of more rational ways in which to handle reproduction, upbringing and education.⁸³⁴ The only answer we can give is the following:

The order of the 'Family' concerns, in the most intricate and ambiguous way, the foundation of the civilizational self. It concerns this foundation both constructively and destructively - opening a horizon of the conditions of possibility for the civilizational self as well as a horizon of the possibilities of loosing the civilizational self. In the order of the 'Family' we are in touch with the fragility of the civilizational self. This is why this order is sacred to us, and why we cannot be without it. (- And this is why this order is resilient - to some extent at least - to the huge external pressure it is exposed to.)

⁸³⁴ Plato (*The Republic*) and Thomas Moore (*Utopia*) immediately spring to mind.

We see that the family as an institutional order performs a role which is opposite to the role performed by the national welfare systems. Whereas it is implied in the logic of the national welfare systems that they guard us against that which lies beyond civilization, the family ensures that we shall not loose contact with it.

Chapter 33

The State *as One*

‘The State as One’ constitutes the last anchor of order which we shall attempt to qualify for the purpose of the ideal order. As unfolded in chapter 20, the state is both presumed to be many and one. It is many in the sense that it relates to different institutional orders within which it plays different roles. The different roles of the state are woven together with the different logics of the different orders. It is one in the sense that it is ultimately seen as responsible for the institutional orders adhered to it - both with respect to the implementation of EU-law within these orders, but also with respect to the aspects of those orders which fall under its own discretion, and finally with respect to other orders which may not be covered by EU-law at all.

We found that this ultimate responsibility or accountability of the state could be qualified according to three constitutional principles: ‘rule of law’, ‘democracy’ and ‘human rights’. More precisely, these principles function as conditions of possibility for the responsibility of the state in the double sense that they are necessary for the practical implementation of EU-law, and they are necessary in order for the state to be considered a legitimate political order as such.

We also found that the role of the state as being ultimately responsible could be characterized from the perspective of danger. In connection with mobility and residence rights, we encountered the state in the role of a watchdog looking out for fraud, abuse and danger. But also the constitutional principle of ‘democracy’ is centering on danger. On the basis of judgments from the ECtHR, we concluded that the crucial characteristic of democracy is presumed to be pluralism, and that pluralism is presupposed to constitute a fundamentally dangerous societal state of affairs. This gives rise to a contradictuous logic: Qua democratic, the state will need to turn against its own core principle in order to keep the dangers inherent in pluralism in check.

Consequently, we were faced with the following basic logic of the 'State as one'. The 'State as one' is the common denominator of different institutional orders in the sense that it is ultimately responsible for them. Accordingly, the 'State as one' is 'one' on the basis of being many. A logic of danger adheres to the 'State as one'. This logic of danger does not only concern questions of immigration and external threats. It penetrates deeply one of the core constitutional principles of the state, that of 'democracy'. This means, however, that it also penetrates the other core principles of the state, 'human rights' and 'rule of law' (if the 'State as one' is fundamentally characterized by all three constitutional principles, then they must necessarily complement each other; that is, the latter two principles must complement the principle of 'pluralism' and relate to the dangers in which it is entangled).

On the basis of this characteristic of the basic logic of the state, we established three different scenarios of danger. In other words, we asked: To the extent that the state is the common denominator of different institutional orders, how may we then understand the relationship between the constitutional principles of the state, on the one hand, and danger, on the other? These reflections were inhibited, though, by the fact that only the principle of 'democracy' has been conceptualized in the law we have dealt with.

In short, we established the following three scenarios of danger:

According to the first scenario, 'democracy' in the shape of 'pluralism' would imply the existence of different, powerful institutional orders. The potential danger would exactly lie in the fact that the state is many and not one. *Some or all of the institutional orders could become so strong that it would threaten the stability of the state.*

According to the second scenario, democracy in the shape of pluralism would not mean the existence of different institutional orders; it would mean the erratic forces within those orders. Such forces are necessary for the functioning of those orders at all, but they might also undermine them. In other words: *what is feared is not so much that some of the institutional orders will become too strong, what is feared is that they will not be strong enough.*

According to the third scenario of danger, 'democracy' in the shape of pluralism would mean the existence of a multiplicity of different crosscutting perspectives, that is, different overall perspectives on the totality of institutional orders. This kind of pluralism obviously constitutes a direct threat against the 'state as one'. It means that individuals and/ or communities create a variety of overall integrations on the basis of

which the different institutional orders can be said to belong to the same overall social order at all - or, reversely, a variety of overall deconstructions due to which all unity and coherence collapse. *A multiplicity of different overall integrations or deconstructions will threaten the role of the state as common denominator of the different orders and as ultimately responsible for these orders.*

The eight ghost asked how the 'responsibility' logic of the state is at all possible in the light of these dangers? Furthermore, the ghost was unsatisfied with the fact that only the principle of 'democracy' and not the principles of 'rule of law' and 'human rights' was conceptualized and reflected in relation to the three scenarios of danger. If the other constitutional principles are also penetrated by a logic of danger, how are we to understand their meaning?

Accordingly, what we shall attempt to do in this chapter is to qualify the meaning of the principles 'rule of law' and 'human rights'. Afterwards - on the basis of a consideration of all three constitutional principles - we shall consider which one of the three scenarios of danger outlined above would most accurately capture the responsibility-logic of the 'State *as one*', if any of them? That is, we shall seek to answer the ghost: how is the responsibility logic of the state possible as a logic of danger?

Moving the perspective to EU-law

So, we shall seek to establish what the 'rule of law' and 'human rights' could possibly mean from the point of view of the ideal order. In order to do that we shall need to move the perspective from 'principles of the state' to 'principles of EU-law'. The matter is, exactly, that the law we have dealt with does not entail any conceptualizations as to the meaning of those principles within the context of national law - it is neither conceptualized what they are presumed to mean, nor what they ideally should mean.

Our only option is to analyze what the principles of 'rule of law' and 'human rights' might mean within the context of the ideal order established through EU-law. Hereby, we will of course not be able to establish what these principles should ideally mean as qualifying principles of the 'State *as one*' in an exhaustive sense, but we will be able to establish some aspects of those principles which *will have to* apply to the 'State *as one*' in so far as the 'State *as one*' is responsible for the implementation of EU-law. In other words: *from the point of view of the ideal order*, a high degree of compliance between the meaning of those constitutional principles within the context of EU-law and within the context of national law must be regarded as a condition of possibility for the

implementation of EU-law as such. Otherwise, these principles would be meaningless. However, it should be noted in this connection that respect for national law, that is, reliance on the responsibility of the state not only with respect to the implementation of EU-law, but also with respect to aspects or areas of law which fall under the competence of the state, constitutes an integral part of EU-law. This means that the meaning of 'rule of law' and 'human rights' within EU-law must reflect the fact that the state is both granted discretion with respect to certain issues and is left entirely to itself with respect to other issues.

Accordingly, when I argue that *from the point of view of the ideal order*, a high degree of compliance between the meaning of the constitutional principles 'rule of law' and 'human rights' within the context of EU-law and within the context of national law must be regarded as necessary, this does not necessarily imply that these principles should be given a narrow and fixated meaning. As indicated, they could be given a pluralistic meaning, that is, *the same pluralistic meaning* within the context of EU law and within the context of national law, or they could be given an otherwise complex or at least comprehensive meaning (again the same complex or comprehensive meaning in both contexts of law) so as to make possible, exactly, the unfolding of the responsibility of the state in both of the above-mentioned respects (responsibility with respect to the implementation of EU-law and responsibility with respect to the areas of law which are not covered by EU-law).⁸³⁵

On this basis, we shall turn to the analysis of the meaning of the two constitutional principles within the context of EU-law. As we shall see, the complexities touched upon above will be reflected within this context. We shall begin with the principle 'human rights'.

Fundamental rights

- a living tradition of various sources under continuous construction

Firstly, let me clarify what is meant by 'fundamental rights' vis-a-vis 'human rights' and 'fundamental principles of EU-law'. The application of these different expressions within EU-law is not entirely unambiguous.

⁸³⁵ Obviously, this reflexion touches upon a deep problematic of EU-law, directly related to the issue of legal pluralism mentioned by the end of chapter 3. It should be made clear though, that my analysis concerns the perspective of the 'ideal order'. Whenever EU-law is implemented in the member states (and collides with other forms of rationality) it may very well be so that different presumptions as to the meaning of the two principles are at stake.

In the preamble of the Treaty, the expressions ‘human rights’ and ‘rights of the human person’ are applied: *‘Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person [...]’*; *‘Confirming their attachment to the principles of liberty, democracy and respect for human rights [...]’*.⁸³⁶ These formulations of the preamble tell us that ‘respect for human rights’ are presupposed as a principle which already defines the member states and which, accordingly, is already a ‘common principle’ among the member states; simultaneously, this already common principle is confirmed by the EU. - Likewise, article 2 of the Treaty applies the expression ‘human rights’: *The Union is founded on [...] respect for human rights [...]*.⁸³⁷

But apart from these formulations of the preamble and article 2 of the Treaty, it is the expression of ‘fundamental rights’ which generally reigns within EU-law - also when an explicit reference to the European Convention on Human Rights is made: *‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’*⁸³⁸ This phrase appears in the Treaty, but it is also often repeated in the case-law of the CJEU. In this connection, the CJEU explains, that *‘that provision of the Treaty on European Union reflects the settled case-law of the Court according to which fundamental rights form an integral part of the general principles of law the observance of which the Court ensures’*.⁸³⁹ That settled case-law has, exactly, been based on *‘inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights’, and in particular the ECHR*⁸⁴⁰.

Finally, it should be recalled that the ‘fundamental rights’ of the Charter are defined as rights which *‘result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights’*.⁸⁴¹

⁸³⁶ Recital 3 and 5, preamble, TEU

⁸³⁷ Art. 2, TEU

⁸³⁸ Art. 6(3), TEU

⁸³⁹ Case C-571/10, *Kamberaj*, par. 61

⁸⁴⁰ Case C-540/03, *European Parliament versus Council of the European Union*, par. 35.

⁸⁴¹ Recital 5, preamble, Charter of Fundamental Rights

On the basis of these various formulations, we can conclude the following. The crucial expression is 'fundamental rights', not 'human rights'. The 'fundamental rights' which are respected within EU-law are laid down in the Charter which - with the entry into force of the Lisbon Treaty - has acquired Treaty-status. But the 'fundamental rights' of the Charter do not exhaust the meaning of 'fundamental rights'. In truth, 'fundamental rights' are something which *'result from the constitutional traditions common to the Member States'* and which have been interpreted as such in the case-law of the CJEU, guided by various international instruments and in particular the ECtHR. This means that we cannot identify exactly and in advance the 'fundamental rights' of EU-law; 'fundamental rights' amount to a living tradition, a tradition which is continuously being constructed by the CJEU on the basis of interpretations of what is *'common to the constitutional traditions of the Member States'*. Clearly, it is highly dubious which rights are *'common to the constitutional traditions of the Member States'*. Firstly, the 'constitutional tradition' of a single state may in itself be the subject of intense contestation; fundamental rights are not always written down, or agreed on, and they may have varied over time. Secondly, even if the 'constitutional traditions' of the respective member states could be identified, it would be highly controversial to what extent a common core of those traditions could be identified. Consequently: 'fundamental rights' amount to a construction carried out by the CJEU, not once and for all, but continuously and step by step - a construction which never fully exhausts the meaning of 'fundamental rights'. The charter certainly represents an important codification in this connection, - but not a codification that eliminates the living and never fully exhaustible historical source of 'fundamental rights'.

It should be recalled, though, that the Charter of Fundamental Rights both contains fundamental rights *'as they result from the constitutional traditions common to the Member States'*, and fundamental EU-rights, that is, rights which are specific to EU-law. For our analyses of the constitutional principles of the 'State as one', this distinction is obviously crucial. The latter rights, most notably the fundamental rights of EU-citizens, are naturally not part of those fundamental rights which are presumed to constitute a general constitutional principle of the member states. Accordingly, we shall reserve the expression 'fundamental rights' to the former kind of rights and call the latter kind of rights 'fundamental EU-rights' or 'fundamental principles of EU-law'.

Finally, the expression 'human rights' may have two different meanings. Either, it means the same as 'fundamental rights', that is, a living tradition of various sources

under continuous construction (this is clearly what 'human rights' mean within the context of the preamble and article 2 of the Treaty), or it may refer explicitly to the European Convention on Human Rights.

Examining the implications of the double foundation and of the mediating role of EU-rights

So, the 'fundamental rights' the meaning of which we are about to analyze, correspond to a never completely identifiable range of rights which are presumed to spring from *'the constitutional traditions common to the Member States'* and which are continuously constructed as such by the CJEU, guided by international instruments, especially the ECHR. The Charter of Fundamental Rights represents a codification of this living tradition - a codification which has been granted Treaty-status, but which none the less does not exhaust the content of that tradition.

These 'fundamental rights' may also be called human rights - as it happens, on a few occasions, within EU-law. They may be called 'human rights' because they, in contrast to the fundamental EU-rights, are rights which in principle apply to everyone, and not just to EU-citizens.

These fundamental rights have a double foundation in the sense that they are already presumed to constitute a common principle among the member states and that this already common principle is confirmed by EU-law. The double foundation is more complicated than one should think: The presumption that a common foundation already exists depends on a continuous construction mediated through the confirmation of this presumption by EU-law. This means that an obligation to respect 'fundamental rights' is created which is not simply identical with the already existing respect for 'fundamental rights' in the individual member states, but which amounts to a reflexion thereof. On the other hand, the construction on which the confirmation through EU-law depends cannot be seen as an isolated event of creation either.

We shall now examine the implications of this double foundation. How is the complicated interplay between national understandings of fundamental rights and EU-criteria with respect to these understandings carried out by the CJEU? And which roles are granted to the Charter and the European Convention of Human Rights and Fundamental Freedoms in this respect?

In addition: we already know that 'fundamental rights' function as interpretational aspects of other rights, namely EU-rights of various kinds. This basic feature of the role

of ‘fundamental rights’ within EU-law is in fact closely connected to the problematic of the double foundation described above. So far, ‘fundamental rights’ only play a role within EU-law in connection with the national implementation of EU-rights. EU-law does not intervene in the national understandings of fundamental rights except in cases in which EU-rights are at stake.⁸⁴²

In other words: the relationship between national understandings of fundamental rights and EU-criteria with respect to these understandings is always mediated through EU-rights. But in what ways, more precisely? And what does this mean to the status of ‘fundamental rights’ vis-a-vis EU-rights?

Roughly speaking, we have encountered three different kinds of judgments in so far as the two interrelated problematics are concerned: judgments which concern a conflict between a national ‘fundamental right’ and a fundamental EU-principle or -right; judgments which concern a conflict between the national implementation of an EU-right and a ‘fundamental right’, (seen in the light of the Charter and the ECHR); and judgments which concern the strengthening of an EU-right through a ‘fundamental right’. Accordingly, we shall embark on a three-step investigation.

First study: Judgments which concern a conflict between a national ‘fundamental right’ and a fundamental EU-principle or -right

The controversial Viking and Laval judgments both concern a conflict between a national ‘fundamental right’, namely the right of workers to take collective action, and a fundamental EU-right, namely the right to freedom of establishment (‘Viking’) and the right to provide services (‘Laval’), respectively. In both judgments, the CJEU 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. But this is not all. An interesting shift in the argumentation occurs which means that this so called ‘fundamental right’ to take collective action is quickly forgotten and reduced to a mere *mean* which serves a general EU-purpose.

The shift of argumentation which occurs in the Viking- and Laval-judgments becomes strikingly clear when seen in the light of two other judgments which also concern a conflict between a national ‘fundamental right’ and a fundamental EU-principle, namely the Schmidberger- and Omega-judgments. In both of these cases, the CJEU

⁸⁴² ‘Article 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law.’ Case C-571 / 10, *Kamberaj*, par. 62

accepted a particular national application of a fundamental right, in spite of the fact that this application had the effect of restricting the exercise of a fundamental EU-right. That is, in these cases, fundamental EU-principles were in fact overridden by particular national understandings of fundamental rights. However, these judgments are not only interesting in the sense that they are different from the Viking- and Laval-judgments in terms of their outcome; especially, we should take note of the argumentations provided.

The argumentations inherent in the Schmidberger and Omega judgments are practically parallel. In the Schmidberger case, a national understanding of the fundamental rights to freedom of expression and freedom of assembly collides with the fundamental EU-principle of the free movement of goods. In the Omega-case, a national understanding of the fundamental right to 'dignity' collides with the fundamental EU-principle of the free movement of services. In both cases, the CJEU investigates the fundamental rights in question *in the light of their implications for the fundamental EU-principles*. Can the fact that they function as restrictions on the exercise of fundamental EU-freedoms be justified, the court asks? The investigation is structured by the principle of proportionality. Since the fundamental rights in question are also recognized as fundamental rights by EU-law, and since '*both the Community and its Member States are required to respect fundamental rights*'⁸⁴³ they constitute a 'legitimate aim' capable of justifying a restriction on fundamental EU-freedoms. The particular national applications of those rights are also assessed to be 'appropriate and necessary'. The latter assessments are based on the assumption that 'a balance' needs to be struck between the colliding principles. That is, the 'appropriateness and necessity' of the national applications of fundamental rights are not evaluated as such, but vis-a-vis the fundamental EU-principles. When that is said, the examinations contain two elements: an element of 'discretion' (member states should be allowed a margin of discretion in so far as fundamental rights are concerned; 'fundamental rights' may be interpreted differently in different member states) and an element of contextual interpretation carried out by the CJEU (seeking to establish whether the particular national applications of the rights in question were in fact reasonable when seen within the context of the particular national situations at stake).⁸⁴⁴

⁸⁴³ Case C-36/02, *Omega*, par 35; Case C-112/00, *Schmidberger*, par 74

⁸⁴⁴ Case C-36/02, *Omega*, par. 31, 35-40; Case C-112/00, *Schmidberger*, par 81-93

Accordingly, the Schmidberger- and Omega-judgments demonstrate that it is indeed accepted by the CJEU that fundamental rights may be interpreted differently in different member states and that the member states should be granted some discretion in this respect. But simultaneously, we should be crucially aware of the following features. Firstly, particular fundamental rights are only accepted as 'legitimate aims' within the context of national law to the extent that they are also granted a fundamental status within the context of EU-law; that is, the 'double foundation' of 'fundamental rights' must be in place. Secondly, although some discretion is granted to the member states, it is the CJEU which evaluates whether or not a particular national application of fundamental rights is 'appropriate and necessary' or not. In other words, the CJEU does indeed intervene in national understandings of fundamental rights. Thirdly, this intervention (as well as the confirmation of the double foundation of the right in question) is mediated through the national implementation of a fundamental EU-principle. In this sense, the fundamental rights in question only appear as interpretational aspects of fundamental EU-principles.

Now, if we return to the Viking- and Laval-judgments, one should think that they would follow the same structure of argumentation. But as mentioned above, a shift occurs. The CJEU begins by recognizing that the right to take collective action does constitute a fundamental right within EU-law as well as national law. But immediately afterwards, this 'fundamental right' disappears from the argumentation. What steps in instead is the principle of 'protection of workers' which is recognized within EU-law as an 'overriding reason of public interest', supported by overall social policy purposes laid down in the Treaty. The balance that needs to be struck is suddenly no longer a balance between a national understanding of a fundamental right and a fundamental EU-principle, but a balance between one EU-principle ('the protection of workers') and another ('the free movement of goods', and 'the free movement of services', respectively). As far as the examination of this balance is concerned, the right to take collective action is being reduced to a mean, not a purpose in itself. In the Viking-judgment, the CJEU asks whether 'collective action' does in fact serve 'the protection of workers' under the particular circumstances, and whether other measures could have been applied instead? This will be for the national court to decide. In the Laval-judgment, the CJEU leaves no openness what so ever: 'Collective action' cannot - even

if it serves ‘the protection of workers’ - be justified if the national context in question is characterized by a lack of precise provisions with respect to minimum rates of pay.⁸⁴⁵

When compared to the the Schmidberger- and Omega-judgments, it becomes clear that the Viking and Laval-judgments do in fact undermine the double foundation of fundamental rights. Admittedly, the right to take collective action is recognized as a fundamental right within EU-law as well as national law. But this is not the role it plays within the argumentation of the CJEU. It is subordinated a general EU-purpose, the ‘protection of workers’, and plays the role of any national mean by which such a purpose could be pursued. That is, this ‘fundamental right’ is treated as if it had been any national rule meant to serve the ‘protection of workers’ or another legitimate social policy aim. We may still say that it functions as an interpretational aspect of fundamental EU-rights, only on a lower level: It is not balanced against fundamental EU-rights; it plays the role of a possible mean in relation to the purpose of ‘protection of workers’ which is balanced against fundamental EU-rights.

Second study: concerning a conflict between an EU-right with respect to its possible national implementations and a ‘fundamental right’, seen in the light of the ECHR

In connection with the analysis of the name ‘Family-member’ in chapter 8, we encountered a highly interesting case from the point of view of uncovering the relationship between EU-rights, national discretion and ‘fundamental rights’.

In the Parliament versus Council case, the Parliament contends that a particular provision of the Family Reunification Directive does not respect certain fundamental rights, namely the right to family life and the right to non-discrimination, as guaranteed by the European Convention on Human Rights. Accordingly, the case concerns a potential conflict between EU-rights and ‘human rights’ as guaranteed by the Convention. However, since the potential conflict is a *negative* conflict, the case simultaneously concerns a potential conflict between national implementation of EU-law and ‘human rights’. The problem is not what the Directive regulates, but what it *does not* regulate. The provision in question grants a high degree of discretion to the member states as far as concerns the rights of a child aged over 12 who arrives at the borders independently from the rest of his or her family.

⁸⁴⁵ See the analysis of both judgments (C-341/05, *Laval*, and C-438/05, *Viking*) in chapter 7 (in the section ‘Fundamental rights of workers’)

In other words: Should the member states be allowed this kind of discretion, or would that open the door for national implementations which would violate 'fundamental rights'? The relationship between 'fundamental rights' and 'EU-rights' is purely negative in this case; 'fundamental rights' constitute an interpretational aspect of 'EU-rights' only in the sense that they concern a possible derogation from these rights.

The discussion of the CJEU is rather complex. When closely analyzed, it consists of two different parts which are based on two different kinds of criteria.

The first part of the discussion⁸⁴⁶ is based - primarily but not exclusively - on criteria derived from the case-law of the ECtHR. In other words, the CJEU examines whether a discrepancy exists between the EU-law-provision in question and the European Convention of fundamental rights, according to the interpretation of the ECtHR. That is, 'fundamental rights' are understood within the meaning of the Convention and the case-law of the ECtHR, not within the meaning of EU-law or national law. The CJEU does refer to its own case-law, but only in order to establish that the CJEU-case-law generally demonstrates a respect for 'fundamental rights' within the meaning of the Convention.

More precisely, 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. Importantly, in 2006, when the judgment was delivered, the Charter was not yet a binding source of law within EU-law. In its judgment, the ECJ does not treat the Charter as an important source of EU-law, hardly as a source of EU-law at all. The Charter is only mentioned briefly after an extensive discussion of the ECtHR-caselaw and after a consideration of The Convention on the Rights of the Child, and it is referred to as one of among 'various instruments'. That is, the Charter is seen as an international law instrument next to others.

Naturally, it is senseful that 'fundamental rights' are primarily understood as 'fundamental rights' within the meaning of the Convention, since this is the meaning of 'fundamental rights' which the Parliament refers to when questioning the formulation of the provision under consideration. None the less, it is worth noticing that the CJEU does not emphasize any particular development of 'fundamental rights' within EU-law, - and neither does the court underline that the member states are expected to respect

⁸⁴⁶ See the analysis in chapter 8 (in the section 'Family reunification rights of third country nationals seen in the light of the fundamental right to family life'). The first part of the discussion runs from par. 53-65 (Case C-540/03, *Parliament versus Council*)

‘fundamental rights’ by virtue of their ‘constitutional traditions’. The fact that the CJEU relies on the caselaw of the ECtHR means, in turn, that the CJEU *interprets the implications of the caselaw of another court, or, more precisely, derives criteria as to the meaning of particular fundamental rights from the case-law of another court.*

As the reader might recall, the CJEU concludes that the contested provision cannot be regarded as running counter to the fundamental right to respect for family life. First of all, the right to respect for family life does not, according to the interpretational criteria derived from the case-law of the ECtHR, 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 12. Secondly, according to the derived interpretational 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 does indeed contain a number of provisions which correspond to those obligations.

The second part of the discussion⁸⁴⁷ is based on more muddled and diversified criteria. However, what is particularly interesting from our point of view is the fact that internal EU-law criteria are introduced, and that according to those criteria, the right to family reunification as well as the right to non-discrimination are reduced to *means* in the light of an established EU-purpose.

The second part of the discussion concerns the fact that according to the wording of the contested provision, ‘capacity for integration’ appears as a condition for the right to family reunification in the case of children over the age of 12. A number of different arguments for this condition are given by the CJEU. In this part of the discussion, the European Convention on Human rights 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*’. 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, just as it is meaningful to distinguish between children under and over the age of 12.

⁸⁴⁷ The second part of the discussion runs from par. 66-69 (Case C-540/03, *Parliament versus Council*)

On the basis of the judgment as a whole, we must conclude that the member states are granted a high degree of discretion with respect to interpreting the fundamental right to a family life and the right to non-discrimination on grounds of age in so far as concerns children aged over 12 who arrives independently to the territory of an EU-member state. The CJEU argues for this discretion on the basis of the case-law of the ECtHR. This means that the 'double foundation' of fundamental rights (as discussed above) is not directly reflected. It can be said to be indirectly present, though, represented by particular codifications of international law which are presumed to be binding for EU-law as well as national law. This representation of the double foundation - the 'living tradition' - has the consequence that the CJEU must interpret and draw conclusions on the basis of the case-law of *another court*, namely the ECtHR. However, there is an additional dimension to the discretion granted to the member states. The member states are not only granted discretion, they are granted discretion on the basis of a particular line of reasoning, namely the 'capacity for integration' reasoning. As far as this reasoning is concerned, it is not supported by the ECtHR, but by a particular purpose of EU-law, more precisely the purpose which is presumed to lie behind the Family Reunification Directive, namely the purpose of 'integrating third country nationals'. In relation to this purpose, the right to family reunification as well as the right to non-discrimination are reduced to *means*.

Third study: Judgments which concern the strengthening of an EU-right through a 'fundamental right'

Finally, we have encountered quite a number of judgments in which 'fundamental rights' have the effect of strengthening EU-rights. With respect to the law we have dealt with, this kind of role for 'fundamental rights' is definitely the predominant role. At least seven judgments can be pointed out in which 'fundamental rights' have the role of strengthening EU-rights, and to those should be added a number of judgments in which a particular fundamental right plays this role in an implicit manner.

The judgments which concern the strengthening of an EU-right through a 'fundamental right' are obviously different from the judgments discussed above in the sense that they do not concern a conflict between an EU-right (or principle) and a 'fundamental right'. This time, EU-rights and fundamental rights work together, not against each other. They strengthen each other, rather than requiring a 'balancing' of respective rights. But this does not mean that potential conflicts of rights might not be lurking. We need to

ask to what extent national understandings of fundamental rights are integrated in the examination of the ECJ, and whether they are ultimately respected, and to what extent ‘fundamental rights’ require their meaning from other sources, such as the European Convention on Human Rights and the Charter of Fundamental Rights.

Let us consider the judgments in which ‘fundamental rights’ have the role of strengthening EU-rights. For a closer look, the strengthening role of ‘fundamental rights’ is not exactly the same within these judgments. We may differentiate between different levels of strengthening, so to speak. ‘Fundamental rights’ may strengthen EU-rights in the sense that they are significant to the argumentations of the judgments in the question, or they may strengthen EU-rights in the sense that they merely support the argumentations. Finally, there is one particular fundamental right, namely the right to work, the role of which is even more powerful than being argumentatively significant in particular judgments. The right to work functions as a fundamental criterium which can never be overridden.

On the lowest level of strengthening, ‘fundamental rights’ merely support the argumentations provided by the CJEU in particular judgments, without being significant to them. Apparently, those judgments could have done without any mentioning of ‘fundamental rights’; the interpretations of EU-rights rely on other interpretational approaches such as the highlighting of EU-principles, the establishment of EU-purposes or clarifications of the implications of crucial concepts and of definitions laid down in the relevant secondary legislation.

In the *Chakroun*-judgment⁸⁴⁸, it is the interpretation of the criterium of ‘stable, regular and sufficient resources’ and of the concept of ‘social assistance’ within the meaning of the Family Reunification Directive (that is, in relation to the overall purpose of that Directive) which is crucial to the outcome of the judgment. In this connection, the CJEU points out that the argumentation provided by the national authorities is inconsistent. Likewise, the *O./S.*-judgment⁸⁴⁹ relies on the definition of ‘stable and regular resources’ interpreted in conjunction with the concept of ‘social assistance’. Finally, the *P.*-

⁸⁴⁸ Case C-578/08, *Chakroun*, analyzed in chapter 6 (in the section ‘The subname ‘Third Country National holding a residence permit in the state in question for one year or more, with stable and regular resources’)

⁸⁴⁹ Joined Cases C-356/11 and 357/11, *O./S.*, mentioned in chapter 6 (in the section ‘The subname ‘Third Country National holding a residence permit in the state in question for one year or more, with stable and regular resources’)

judgment⁸⁵⁰ depends on the fundamental EU-principle of equality between the sexes and on an interpretation of the meaning of the discrimination sex.

However, all three judgments emphasize explicitly that the EU-rights or principles which are being considered should be interpreted 'in the light of fundamental rights'. The Chakroun- and O./S.-judgments highlight the right to respect for family life within the meaning of the European Convention and of the Charter⁸⁵¹. The O./S.-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 Charter⁸⁵². The Chakroun- and O./S.-judgments were both delivered after the Charter had acquired Treaty-status. The P-judgment, in turn, being much older, does not mention the Charter. But it does not explicitly mention the European Convention either. It merely states that the right not to be discriminated against on grounds of sex does not only constitute a fundamental principle of EU-law, it is also '*one of the fundamental human rights whose observance the Court has a duty to ensure*'⁸⁵³. In addition, the P-judgment brings forward the concept of 'dignity' as a concept of relevance to the case.⁸⁵⁴ Certainly, the CJEU has the European Convention in mind (since the expression 'human right' is applied). But by not explicitly mentioning the Convention, the CJEU opens for the possibility of a broader meaning of 'fundamental human rights', corresponding to a living, not completely codified tradition.

What does it mean, then, that the EU-rights or principles which are being considered in the three judgments are being interpreted 'in the light of fundamental rights'? Do these 'fundamental rights' just function as unimportant support, as mere decoration? I will argue that they mean much more than that. In all three judgments, it is clearly indicated that the possibility, at all, of the respective interpretations is closely connected to the fact that the provisions in question are seen 'in the light of fundamental rights'. In other words: Interpreting a given provision of EU-law 'in the light of fundamental rights' means interpreting it flexibly so as to secure that its overall meaning is not being

⁸⁵⁰ Case C-13/94, *P v S*, analyzed in chapter 13 (in the section "Sex' versus 'sexual orientation': The establishment of a double distinction') and in chapter 17 (in the section 'Recalling the P.-judgment: Translation into double-name')

⁸⁵¹ Case C-578/08, *Chakroun*, par. 44, and Joined Cases C-356/11 and 357/11, *O./S.*, par. 76-77, 80

⁸⁵² Art. 24(2) and 24(3), Charter of Fundamental Rights, see Joined Cases C-356/11 and 357/11, *O./S.*, par. 76

⁸⁵³ Case C-13/94, *P v S*, par. 19

⁸⁵⁴ *Ibid*, par. 22

undermined; guarding against ‘technical’ interpretations which, deliberately or not, will go against or create escape routes from that overall meaning.⁸⁵⁵

On the next level of strengthening, ‘fundamental rights’ are not argumentatively significant, but they contribute to the argumentation of a judgment. We may say that they have a supplementing role in relation to the argumentation.

The Kamberaj-judgment⁸⁵⁶ entails two examples thereof.

When considering whether the national provision under dispute (which concerns the granting of a housing benefit) would be covered by the material scope of the Long Term Resident Directive, the CJEU makes clear that it would indeed be covered in so far as the housing benefit may be categorized either as ‘social security’, ‘social assistance’ or ‘social protection’ within national law. It is for the national court to determine whether that is the case. However, the CJEU 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 existence for all those who lack sufficient resources’⁸⁵⁷. 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. The meaning thereof appears to be two-fold. First of all, the CJEU is clearly implying that national law should not seek to evade the consequences of EU-law by way of technical national categorizations (like placing the housing benefit in question under a national categorization which is neither ‘social security’, ‘social assistance’ or ‘social protection’). Secondly, the CJEU is presumably implying that the housing benefit in question should in fact be categorized as ‘social assistance’.

We see that the reference to the Charter does not only have the meaning of securing EU-law against undermining by way of narrow or ‘technical’ interpretations, but also the meaning of guiding, in a more precise manner, national implementations with respect to categorizations of benefits.

At a later stage of the same judgment, the CJEU examines whether the housing benefit under dispute constitutes a ‘core benefit’ within the meaning of the Long term Resident Directive. In this connection, the CJEU considers various ways in which to establish the

⁸⁵⁵ Case C-578/08, *Chakroun*, par 44, 63-64; Case C-356/11; *O./S.*, par. 77, 78, 80; Case C-13/94, *P v S*, par. 19-20, 22

⁸⁵⁶ C-571/10, *Kamberaj*, analyzed in chapter 6 (in the section ‘The sub-name ‘Long term resident’’)

⁸⁵⁷ Article 34(3) of the Charter of Fundamental Rights, see C-571/10, *Kamberaj*, par. 80

meaning of ‘core benefit’ on the basis of the Long Term Directive. However, although the CJEU certainly comes closer to an understanding of ‘core benefit’, the court fails to establish a clear connection between a housing benefit and a ‘core benefit’ on the basis of an analysis of the Directive itself. But when seen in the light of the before-mentioned article of the Charter, such a connection becomes evident. The CJEU 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.⁸⁵⁸

In this latter part of the judgment, the fundamental principle of the Charter clearly has an important supplementing role in relation to the argumentation of the CJEU. In fact, article 34 of the Charter provides the ‘missing piece’ so that the argumentation can be completed.

But we may also detect **an even higher level of strengthening** as far as concerns the role of ‘fundamental rights’ vis-a-vis EU-rights. ‘Fundamental rights’ may have a significant, and not just a supplementing role in relation to argumentations provided in CJEU-judgments. Such a significant role for ‘fundamental rights’ can be detected in the Carpenter- and K.B.-judgments. Both judgments are rather complex as far as concerns the relationship between ‘fundamental rights’, EU-rights and national discretion, so we shall discuss them one at a time.

In the Carpenter-judgment⁸⁵⁹, the first part of the argumentation relies solely on a fundamental EU-principle, namely the freedom to provide services. The concern for Mr. Carpenter’s family life (which would be harmed if Mrs Carpenter were to be deported from the UK) rests solely on a concern for Mr. Carpenter’s possibilities of making use of his right to provide services within the EU. In other words: 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.

Accordingly, as far as concerns the initial and crucial part of the argumentation, ‘fundamental rights’ play no role at all. It is certainly emphasized that ‘family life’ should be protected, - but it should be protected ‘*in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty*’, not because the right to family life constitutes a fundamental right in itself.

⁸⁵⁸ Case C-571/10, *Kamberaj*, par. 92

⁸⁵⁹ Case C-60/00, *Carpenter*, analyzed in chapter 5 (in the section ‘Tensions between primary and secondary law’).

However, the second part of the argumentation rests entirely on the right to respect for one's family life, as guaranteed by article 8 of the European Convention on Human Rights. After having established that the deportation of Mrs. Carpenter would indeed obstruct the exercise of a fundamental EU-right as far as Mr. Carpenter is concerned, the CJEU examines whether this obstruction may be justifiable? 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' (an interpretation of the wording of article 8 '*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*'). And the evaluation of the appropriateness and necessity of the measure becomes a balancing exercise between '*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*'.⁸⁶⁰ 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. This overall logical structure is an implication of the fact that the CJEU applies a 'condition of being able to enjoy the right' logic in the first part of the argumentation. The condition is, initially, secondary vis-a-vis the right it serves, but becomes the focal point of attention in so far as possibilities of 'justification' are concerned, since it is the condition, and not the right itself in a direct sense which is being undermined. As it becomes the focal point of attention, another standard of evaluation steps in, a standard derived from the European Convention on Human Rights and the ECtHR.

In other words: Apparently, the fundamental EU-principle at stake (the freedom to provide services) and the fundamental right at stake (the right to respect for one's family life) are not brought together within the same line of argument; we are facing

⁸⁶⁰ Ibid, par. 41-43

two separate lines of argument. However, there would be good reason to ask whether we should not see the two lines of argumentation as dependent on one another, after all?

First of all, the contrast between the outcome of the balancing exercise conducted in the Carpenter-judgment and the outcome of the one conducted in the Parliament versus Council judgment (discussed above, under the second study) is striking. In the latter case, the CJEU found that member states are not obliged to secure that close family members can live together, even in so far as children are concerned. Notwithstanding that the two cases are different in a number of respects, it would still be hard to deny that we are facing two quite different ways of applying article 8 of the European Convention, one very strict, and another rather loose. It would be reasonable to assume that the strict interpretation which we find in the Carpenter-judgment is due to the fact that this interpretation concerns possibilities of justifying a derogation from a fundamental EU-principle. If this is so, then it is not only so that EU-rights are interpreted 'in the light of' 'fundamental rights', then 'fundamental rights' are also interpreted 'in the light of' EU-rights.

And vice-versa: as discussed in chapter 26, the 'condition for being able to enjoy the right' logic is not uncontroversial. It is very seldomly applied. It would be senseful to ask: Is the application of this logic in the Carpenter case possibly supported by the fact that the 'condition' at issue is not just any condition, but correspond to a 'fundamental right'? If that is so, then it would be an instance of EU-rights being interpreted 'in the light of' 'fundamental rights'.

It is not clear whether we should see the two parts of the argumentation as dependent on each other, or whether we should keep them separate. I will argue that since we are after all facing one overall argumentation (dealing with one overall question, namely whether or not the deportation of Mrs Carpenter would constitute an infringement of Mr. Carpenter's right to provide services), it would be reasonable to see the two parts as connected. This means that we are confronted with a judgment in which various relations between a fundamental EU-right and a 'fundamental right' can be detected: the two kinds of rights are both kept separate in the sense that they are responsible for two different standards of evaluation; simultaneously, they are also connected in the sense that the standard constituted on the basis of the EU-right is seen in the light of the 'fundamental right', and the standard constituted on the basis of the 'fundamental right' is seen in the light of the EU-right.

Let us turn to the K.B.-judgment⁸⁶¹. From the point of view of our present concerns, the K.B.-judgment resembles the Carpenter-judgment a lot. Also the K.B.-judgment concerns a violation of a fundamental EU-principle, namely the principle of equal pay. And also in this judgment, a ‘condition for being able to enjoy the right’ logic is applied by the CJEU. And the ‘condition’ at issue corresponds to a fundamental right, as guaranteed by the European Convention on Human Rights, namely the right to marry. The case concerns the grant of a widower’s pension. K.B.’s transsexual partner was being denied the right to a widower’s pension due to the fact that the couple was not married. Only, they had not been able to marry according to national marriage laws. The CJEU finds that in the present case, the right to marry constitutes a *condition* for the possibility of enjoying a fundamental EU-right, the right to equal pay. Accordingly, the fact that K.B. and her partner had not been able to marry constitutes an infringement of a fundamental EU-right.

The K.B.-judgment is different from the Carpenter-judgment in the sense that the possibility of justifying this infringement is not discussed at all. On the other hand, the ‘condition for being able to enjoy the right’-argument does not stand alone. It is supported by the argument that a breach of a fundamental right, the right to marry, is at stake. In other words: In this case, the two different standards at issue relate to exactly the same question, not to two different aspects of the same overall question.

So, the question is: which one of the two standards is the significant one? Clearly, the ‘condition for being able to enjoy the right’-argument is necessary (‘fundamental rights’ are only discussed when mediated through EU-rights). But could this argument have been sufficient in itself? Could it have done without ‘the breach of a fundamental right’ argument?

We cannot say, of course. We can only say that according to the wording of the judgment, the two arguments are closely tied together. This makes sense from the point of view of the controversial nature of the ‘condition for being able to enjoy the right’-argument - especially when national marriage laws are under dispute. Accordingly, we must assume that both arguments are crucial - but together, and not separately. Again, a fundamental EU-right is seen in the light of a ‘fundamental right’, and a ‘fundamental right’ is seen in the light of a fundamental EU-right.

⁸⁶¹ Case C-117/01, *KB*, analyzed in chapter 17 (in the section ‘Translation rendered impossible’)

On the highest level of strengthening, one particular fundamental right functions as a fundamental criterium which can never be overridden, namely the right to work.

This implication of the fundamental right to work became evident in the judgments concerning discrimination on grounds of age. Interestingly, this fundamental right is rarely mentioned directly, but it is doubtlessly presupposed. It is presupposed in the sense that it qualifies the principle of non-discrimination in relation to the discrimination ground 'age'. But apart from that it also appears as a fundamental right in itself the status of which is almost absolute.

In the Fuchs/Köhler-judgment, it is explicitly emphasized that the prohibition of discrimination on grounds of age '*must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union*'. This means, in general, that '*particular attention must be paid to the participation of older workers in the labour force*'.⁸⁶² But it means more than that. If we analyze the discussion carried out in the Fuchs/Köhler-judgment as well as the discussions of all the other judgments dealing with discrimination on grounds of age (and especially those which concern discrimination against older workers), it becomes clear that the fundamental right to work in its minimal or naked version is never overridden by other rights, purposes or concerns. Certainly, as understood in a more substantial version (such as not being dismissed from a particular position, being facilitated with respect to finding new employment, or having one's situation considered in a nuanced and individualized manner), the right to work is being balanced against other concerns. But understood as a naked right to work which simply implies the right to remain in the labour market as such, the fundamental right to work functions as a fundamental criterium which is never overridden as a result of the complex balancing exercises carried out in those judgments.

It is interesting that this particular 'fundamental right' which appears to be the most fundamental of all 'fundamental rights' is the one which is least mentioned. Only in the Fuchs/Köhler and Ingeniørforeningen-judgments, this right is explicitly mentioned⁸⁶³.

⁸⁶² Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 62-63. Article 15(1) of the Charter of Fundamental Rights reads: '*Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation*'. The judgments are analyzed in chapter 11 (see in particular the section 'The crucial factors : the agreement-flexibility-balance-triad and the naked right to work')

⁸⁶³ Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler*, par. 62; Case C-499/08, *Ingeniørforeningen i Danmark*, par. 45

In the Rosenbladt-judgment, it is implicitly mentioned.⁸⁶⁴ But in all the other judgments dealing with the discrimination ground of age, it is not mentioned at all, although it clearly functions as an absolute criterium within these judgments. It is simply taken for granted that a person should not be completely and permanently excluded from the labour market as such. In other words: the fundamental right to work is understood to be so fundamental that it is hardly necessary to mention it.

It is clear that 'fundamental rights' play an important role in terms of strengthening EU-rights. Above, we have discussed this role of fundamental right according to four different levels of strengthening. Obviously, on all levels, EU-rights and fundamental rights work together, not against each other. However, potential conflicts of rights might be lurking in so far as national understanding of fundamental rights are concerned.

Firstly, what are the sources of the 'fundamental rights' which play a strengthening role? As can be seen from the analyses above, 'fundamental rights' are either understood as the rights of the European Convention on Human Rights or of the Charter of Fundamental Rights, or both. Older judgments refer to the Convention, and new judgments (from December 2009 onwards) refer to the Convention and the Charter, and in some cases only to the Charter. In a few cases, we could interpret the lack of reference to a particular legal source as an indication of the existence of a broad, partly uncodified living tradition of 'fundamental rights'. Especially, the most fundamental of 'fundamental rights', namely the right to work, stands out in this respect; the content and status of this right seems to be so obvious that it hardly needs any particular legal source, it simply is.

Accordingly, specific national understandings of 'fundamental rights' play no visual role at all. But do they play a negative role? Are the member states granted any discretion with respect to the interpretation of the 'fundamental rights' which are at issue?

On the lowest level of strengthening, 'fundamental rights' have the role of supporting a particular flexible interpretation of EU-rights which has the purpose of securing them against undermining. That is, 'fundamental rights' have the role of supporting a

⁸⁶⁴ Case C-45/09, *Rosenbladt*, par. 75: '[...] the termination by operation of law of an employment contract ... does not have the automatic effect of forcing the persons concerned to withdraw definitively from the labour market [...] It does not prevent a worker who wishes to do so [...] from continuing to work beyond retirement age. It does not deprive employees who have reached retirement age of protection from discrimination on grounds of age where they wish to continue to work and seek a new job.'

limitation of national discretion in so far as the implementation of EU-rights are concerned. But hereby, national discretion with respect to the interpretation of 'fundamental rights' is also being limited. The CJEU determines what it means to apply EU-rights 'in the light of fundamental rights'.

Likewise, on the next level of strengthening, 'fundamental rights' have the role of contributing to the establishment of particular definitions of national categorizations of benefits - on the basis of which a particular interpretation of EU-rights can be carried out. This means that, again, national discretion with respect to the implementation of EU-rights *and* with respect to the interpretation of 'fundamental rights' is being limited. On the second highest level of strengthening, 'fundamental rights' contribute significantly to the possibility of a particularly powerful interpretation of fundamental EU-rights, namely an interpretation according to the 'condition for being able to enjoy the right'-logic. In this connection, it is not just so that national discretion with respect to the interpretation of 'fundamental rights' is being limited *through* the limitation of national discretion in so far as the implementation of EU-rights is concerned. National understandings of fundamental rights are being corrected directly and separately by the CJEU.

Finally, on the highest level of strengthening, a minimal understanding of a fundamental right, the right to work, is defined (as well as presupposed) by the CJEU. This minimum understanding has an almost absolute status within EU-law. This means that the member states are left no discretion what so ever with respect to the status and minimal meaning of this right. Naturally, the mediation through EU-rights is necessary. But whenever EU-rights are being implemented, the naked right to work functions as an absolute criterium.

As it appears, on all levels, national discretion with respect to the interpretation of 'fundamental rights' is being limited. On the highest levels, this happens directly (although still mediated through the interpretation of EU-rights). On the two lower levels, it happens only indirectly, closely tied together with the limitation of national discretion in relation to the implementation of EU-rights.

The multiple roles of 'fundamental rights' within EU-law

As it appears, 'fundamental rights' play a range of different roles within EU-law. We have studied these different roles from the point of view of two interrelated problematics: the problematic of the '*double foundation*' ('fundamental rights' are both

presumed to exist as a common tradition among the member states and confirmed as such through EU-law), and the problematic of *'mediation through EU-rights'* ('fundamental rights' constitute merely an interpretational aspect of EU-rights)

As to the problematic of the 'double foundation', we have seen various reflections of it. Some times, the 'double foundation' is explicitly expressed in judgments. In the judgments discussed in the first study, it is underlined that the rights under dispute do not only constitute 'fundamental rights' within national law, but also under EU-law. Other times, 'fundamental rights' appear in the shape of 'human rights' within the meaning of the European Convention on Human Rights. In the judgment discussed in the second study, the meaning of the fundamental right to respect for one's family life is primarily derived from the Convention and the case-law of the ECtHR. It is underlined, though, that the rights of the Convention are protected within EU-law as well, and that member states enjoy a certain degree of discretion in so far as the interpretation of those rights are concerned. At times, 'fundamental rights' mean rights springing from the Convention as well as the Charter of Fundamental rights (appearing as two different sources which are always in accordance with one another); other times, only the Charter is mentioned (we saw examples of both in the third study). Finally, it may happen (although seldomly) that 'fundamental rights' seem to refer to a commonly accepted, largely unspecified and uncoded tradition of rights.

National understandings of 'fundamental rights' are not dominating. They only appear when ever the dispute under consideration concerns in a direct way a particular national understanding of a 'fundamental right' - that is, when taking into account a national understanding would be unavoidable. Otherwise, they are only present in the negative sense that some discretion will always be left to the member states no matter how detailed and explicit the obligations they are subjected to. - But of course, it can always be claimed (and it *is* claimed, as we have seen) that national understandings of 'fundamental rights' make out the historical foundation of CJEU- and ECtHR-understandings.

As far as concerns the relationship between the Charter and the ECHR: They are never presented as actually or potentially conflictuous, but always as if basically in accordance with one-another. Older judgments rely on the ECHR, whereas newer judgments (from December 2009 onwards) rely on the ECHR as well as the Charter, or only the Charter. There is a tendency towards an increasing significance of the Charter vis-a-vis the Convention. In the judgments which rely on the Convention, the CJEU

appears in a peculiar role, namely that of interpreting and deriving criteria from another case-law than its own. The judgments which rely on the Charter (or the Charter and the Convention) do not really apply any criteria of an established case-law (neither of the CJEU, nor of the ECtHR). The respective meanings of the 'fundamental rights' under consideration are developed on the basis of contextualizing considerations related to the particular cases, and in close interplay with the EU-rights under dispute.

All in all, we are witnessing a highly flexible interpretation of 'the double foundation' of 'fundamental rights'. It varies from case to case whether it is one or the other legal source of 'fundamental rights' which is dominating. In any case, national sources dominate the least. As far as the respective meanings of the different 'fundamental rights' are concerned, criteria are generally developed within the contexts of particular cases and in close interplay with EU-rights - possibly integrating criteria derived from the case-law of the ECtHR.

After the entry into force of the Lisbon-Treaty, EU-law has been given a new formal foundation in so far as 'fundamental rights' are concerned. The Charter is now legally binding, and the EU is obliged to accede to the Convention. From a certain point of view, this new formal foundation does not constitute any radical change. As we have seen, 'fundamental rights' have played a role within EU-law for decades, and the Convention has been regarded as especially important in this respect. And as we have also seen, the new legal status of the Charter has not abolished the complex 'double foundation' of 'fundamental rights'. In other words, 'fundamental rights' refer to a living, diversified tradition of rights stemming from various legal sources and dependent on continuous reconstruction *and* construction, flexibly understood, case by case, - this is so both before and after the Lisbon-Treaty.

None the less, the prominent role of the Charter in the newer judgments could make us speculate whether a significant transformation of the understanding of 'fundamental rights' might not after all be under way. To the extent that the CJEU would gradually build up a particular EU-law understanding of 'fundamental rights', based on the Charter, it would have the implication of undermining the 'double foundation'. The double foundation would have been replaced with a single foundation, that of EU-law. On the other hand, potential conflicts between the case-law of the CJEU and that of the ECtHR might emerge; it would no longer be possible to presuppose that the two would always be in accordance.

So far, this is not the situation. But already now, national understandings are repressed, and The Charter and the Convention are the dominating sources of 'fundamental rights'. Most importantly, however, it is not the various definitions of 'fundamental rights' which govern the interpretation of 'fundamental rights' within EU-law. First and foremost, 'fundamental rights' find their meaning through the EU-rights of which they appear as interpretational aspects.

This brings us to the next problematic.

Also the problematic of 'mediation through EU-rights' has been variously reflected. 'Fundamental rights' constitute 'interpretational aspects' of EU-rights in a number of different ways.

First of all, 'fundamental rights' may constitute interpretational aspects of EU-rights in the sense that they constitute an *aspect of conflict* in relation to EU-rights. But they may also constitute an *aspect of collaboration*.

The aspect of conflict may be *positive* in the sense that a fundamental right and an EU-right may confront each other directly. Or the aspect of conflict may be *negative* in the sense that a fundamental right may potentially collide with a given national implementation of an EU-right on the basis of something which the EU-right *does not* regulate. The aspect of collaboration, in turn, has only been positive in the judgments we have dealt with. It has supported the positive development of EU-rights, and worked against the discretion granted to the member states.

Moreover, 'fundamental rights' may constitute interpretational aspects of EU-rights on different levels of significance. A fundamental right may be treated as an *aim in-itself*. Or it may be treated as merely a *mean* which serves another aim (such as an established EU-purpose).

If a fundamental right is treated as an aim in it-self, and if it works together with and not against particular EU-rights, then it may do so on different levels of strengthening. It may function as a right 'in the light of which' a particular EU-right shall be interpreted, that is, it may constitute the *horizon* within which this EU-right shall be understood. Or it may be *argumentatively supporting* or *significant* - in which case it will have a more independent status. Finally, it may constitute an absolute criterium which means that it will have a completely independent status (although it is still mediated through particular EU-rights in the sense that it concerns the interpretation of those rights).

Finally, as interpretational aspects of EU-rights, fundamental rights may affect EU-rights in various different ways. As an aspect of conflict, fundamental rights may contribute to the clarification of EU-rights, in particular with respect to the limitations of those rights or lack of the same. In this connection they may have the effect of strengthening national discretion. But they may also contribute to the interpretation and/ or development of particular EU-purposes and to the development of EU-law criteria for the purposes of contextualized interpretation - hereby limiting national discretion.

As an aspect of collaboration, fundamental rights may ensure that EU-rights are not undermined as a result of their national implementation, but rather strengthened through flexible means of interpretation. In addition, they may fill out the gaps in EU-law, the absence of definitions and criteria. Also, they may contribute to the logical development of EU-rights, more specifically in terms of the 'condition for being able to enjoy the right'-logic. Finally, they contribute significantly to the ideological dimensions of EU social rights by instituting the right to work as an almost absolute right.

We see that a range of different roles of 'fundamental rights' can be detected, both with respect to the kind of relationship established between them and EU-rights, the status they are given vis-a-vis EU-rights and the ways in which they affect EU-rights, including the element of discretion granted to the member states.

Predominantly, 'fundamental rights' serve to reduce national discretion, rather than to increase it, as far as the implementation of EU-rights are concerned (and indirectly, national discretion with respect to particular understandings of 'fundamental rights' is also reduced). But even in the cases in which national discretion is increased, EU-law is simultaneously strengthened by virtue of 'fundamental rights', - and not only negatively, in the sense of acquiring a higher level of precision regarding the limitations of EU-right, but also positively, in the sense that particular EU-purposes and interpretational criteria are invented, developed or confirmed.

All in all, when considered as an 'interpretational aspect' of EU-rights, we see that 'fundamental rights' generally serve to strengthen EU-law vis-a-vis national law - by way of strengthening fundamental EU-principles and -rights, particular EU-purposes, concepts and conceptual criteria, the ideological dimensions of EU-law as well the flexible and logically inventive methods of interpretation of the ECJ.

From the point of view of both problematics, the roles of fundamental rights within EU-law are multiple. However, EU-law understandings dominate. They dominate in the sense that the Charter of Fundamental Rights is presently the dominating source of 'fundamental rights'. But even more importantly, EU-law understandings dominate in the sense that 'fundamental rights' find their meaning through the EU-rights of which they appear as interpretational aspects. In this respect, EU-law understandings are not just confirmed by virtue of the interplay between EU-rights and fundamental rights; they are dynamically and creatively developed.

Fundamental rights concern the possibility of law itself
- reflected from two complementary perspectives

Above, we have analyzed the diverse meanings, roles, statuses and effects of 'fundamental rights' within the areas of EU-law we have dealt with. But how does this analysis accord with our previous analysis of fundamental rights, conducted in chapter 22, in connection with an investigation of the fundamental aspects of the social structure of the ideal order?⁸⁶⁵

The two different analyses must be seen as complementary. The analysis conducted just above is based on the appearances of 'fundamental rights' within EU-law, on their functioning within the law. In contrast, the previous analysis was based on an assumption - the assumption that fundamental rights are historically established in order to protect a common human foundation. In the Interzone-chapter, I have argued that the existence of a common human foundation is indeed presumed within the law we have dealt with. But we can only assume, only imagine, that 'fundamental rights' will actually serve to protect this common human foundation. In other words, the previous analysis was based on an imagination, - not a coincidental imagination, though, but an imagination deeply engraved in the conceptual foundations of the law. According to this imagination, 'fundamental rights' protect the possibility of the civilizational self and hereby of the law itself. We may say that this imagination reveals to us what 'fundamental rights' essentially are, - whereas the appearances of 'fundamental rights' within EU-law merely provide us with a multiplicity of roles and functions.

⁸⁶⁵ Chapter 22 (the section 'The fundamental aspects of the social structure')

When considered as complementary, the two different analyses can be brought together in the following sense. The analysis conducted just above tells us that ‘fundamental rights’ support and develop the clarification, efficiency, conceptual foundation, logical creativity and ideological dimensions of particular parts of EU-law. The analysis conducted in chapter 22, in its turn, tells us that ‘fundamental rights’ concern the possibility of naming and regulation, that is, the possibility of the civilizational self as regulated by law. According to this perspective, human rights protect the very foundation of the law in a double sense. They protect *the law as such* (by protecting the conditions for subjecting human beings to law), but since they protect the law as such, they also protect the *particular legal order* in question, that is the parts of EU-law we have dealt with. However, the protection of the particular legal order is dubious. Fundamental rights serve to guard the particular law by securing the possibility of particular names and rights. But they also point to the essential fragility of any particular law: All names and regulations could lose their power and be left as ruined masks of civilization - replaced by other names and regulations or by the lack of the same. This essential fragility of any particular legal order springs from the fact that any particular legal order is dependent on those who are subjected to it. Particular legal orders rely on being *lived and unfolded* - which means that they rely on being *recreated by those subjected to it* - mirrored, represented, embodied, interpreted, misinterpreted, varied and adjusted.

Accordingly, both analyses tell us that ‘fundamental rights’ concern the possibility of the law itself. They concern the possibilities of strengthening and developing, dynamically, the particular legal order in question, as they concern the foundations of the law as such, including the foundations of the particular legal order. Essentially speaking, they have a formal meaning in relation to the particular legal order (they secure the possibility of a particular legal order at all). But as far as concerns their multiple roles and functions within the law, it is clear that they are deeply engraved in the substantial aspects of the law we have dealt with. For a closer look, they reflect the anchors of order we have analyzed in this section, either directly or indirectly. The fundamental right to respect for one’s family life reflects, directly, the order of the family. The fundamental right to work reflects, directly, the order of the national labour market as well as the order of the employment relationship. The fundamental right to take collective action reflects, indirectly, the same two orders in that it reflects the qualified logic of the national labour market (a tragical and crippled relationship of

opposition) and the basic logic of the employment relationship (a relationship of subordination). The fundamental right to a decent existence for all those who lack sufficient resources reflects, indirectly, the order of the national systems in that it reflects a crucial element of the logic of that order, as qualified above. Finally, we may say that the fundamental rights to freedom of expression and freedom of assembly⁸⁶⁶ reflect, indirectly, the state *as one* in that it reflects a crucial element of the logic of that order, namely the element of 'pluralism'. The concept of 'dignity', in contrast, does not reflect any particular order, but rather all of them, in that it fundamentally concerns the possibility of institutional order as such; it has a formal nature.

We see that all of the the anchors of order we have analyzed above are reflected by 'fundamental rights' except for the order of the internal market (which, as we know, has its own fundamental rights, namely fundamental EU-rights). In other words, an intimate connection exists between 'fundamental rights' and the anchors of order related to the state. 'Fundamental rights' reflect those orders in the sense that they are meant to give access to them, either directly, by granting everyone the right to participate in a given order at all (like granting everyone a right to a family life), or indirectly, by granting everyone the possibility of satisfying a crucial criterium which regulates belonging or not-belonging within a given order (like granting everyone the right to a decent existence).

As recalled, the 'normal life' which constitutes the destiny of the social structure of the ideal order concerns, exactly, the belonging to different institutional orders. Accordingly, we may conclude that *'fundamental rights' from a formal and essential point of view concern the possibility at all of the particular legal order in question, whereas, from a manifestational and substantial point of view, they concern the possibility of belonging to particular institutional orders* and hereby the possibility of being part of the 'normal life', being part of the destiny of the ideal order.

Preliminary reflection on EU-law as a manifestation of 'rule of law' - according to various definitions of the principle

We shall now turn to the other constitutional principle 'rule of law' and ask what that principle could possibly mean within EU-law.

⁸⁶⁶ - which do not really belong to the area of social rights, of course, but which we included in order to compare the Laval- and Viking-judgments with the Schmidberger- and Omega-judgments

First, regarding the principle itself, it should be emphasized that it covers a variety of different meanings. It is a hugely important principle within philosophy of law, political philosophy and political science, and it is deeply founded within the conceptual histories of those disciplines.⁸⁶⁷ Let me outline some of the most important definitions of this principle, as I see it, in order for us to have at least some indications of a historical conceptual foundation on the basis of which we may consider the meaning of the 'rule of law' within EU-law.

'Rule of law' might refer to certain fundamental, formal characteristics of law: The law should be prospective, well-known, general and certain, and everyone should be equal before the law. These elements of law has been discussed since the Classical Antiquity; in the time of the Enlightenment, they became hugely important. Today, this understanding constitutes a dominant understanding and is often referred to as a 'thin' interpretation of the principle. 'Thin' or not 'thin' - we should be aware that the mentioned criteria are not necessarily easily satisfied. As far as EU-law is concerned, we shall discuss, in particular, the criterium of 'certainty'.

'Rule of law' might also refer to a particular kind of constitutional orders. Today, that would generally be 'democracies' that recognize the principle of 'human rights' (more precisely, rights which some way or the other can be seen as corresponding to what is regarded as human rights within international law). The separation of powers as well as the existence of a range of particular law enforcing institutions (such as courts, police, administrative institutions) would also generally be required. Also this understanding has prominent historical roots⁸⁶⁸ and is today often referred to as a 'thick' interpretation of the principle 'rule of law'. However, even if this understanding is more explicit than the former understanding in terms of the criteria it entails, it still leaves plenty of space for possible differences between legal orders. This also means that even if this understanding will generally embrace the criteria which make out the first understanding, tensions between the two understandings could easily occur. Just as a law which is prospective, well-known, general, certain and characterized by

⁸⁶⁷ An excellent analysis of the ambiguous character of the principle 'Rule of Law' can be found in Martin Loughlin: *Foundations of Public Law*, chapter 11. Loughlin examines the German, English and French understandings of the principle. He argues that although a coherent formulation of the principle can be devised, this formulation is unworkable in practice. Accordingly, the principle only has value for its aspirational qualities. I can certainly follow Loughlin's argument. My analysis, will, however, follow a different course. I ask: If we take seriously the claim that the EU is a manifestation of this principle, what could this principle then possibly mean within the context of the EU?

⁸⁶⁸ For instance in John Locke's *Second Treatise of Government* and Montesquieu's *The Spirit of the Laws*

equality does not need to be a democracy, we might also come across a democratic state (with established fundamental rights and the required institutions) in which the law is not well-known and certain.

For classical as well as modern philosophers, 'rule of law' would also mean 'rule of justice'. Today, 'justice' and 'rule of law' are rarely directly identified. From a positivistic point of view, 'rule of law' has nothing to do with justice; also morally problematic laws may be able to satisfy certain criteria so that they can be seen as expressions of 'rule of law'. But even if it is held that 'rule of law' is related to 'justice', the two are not necessarily identified. 'Justice' might simply constitute an ideal governing (or which might govern) the application of the rule of law. However, in spite of the fact that the relationship between 'rule of law' and 'justice' is today deeply problematized if not completely broken, I will argue that neither politicians, nor lawyers, judges or other practitioners can in fact do without some sort of normative foundation of law. For this reason, the concept of 'justice' is somehow in play behind the scenes of law and politics, in the form of 'values', in the form of 'fundamental rights', in the form of authority as such or in the form of institutional assertiveness.⁸⁶⁹

There is another distinction which would seem to be closely related to the distinction between 'law as justice' and 'law as unrelated to justice', namely the distinction between 'legitimacy' and 'legality'. However, the two distinctions should be kept separate even though they may overlap to some extent. 'Legality' would refer to law as 'technicality', as that which is simply binding because it satisfies certain formal criteria. 'Legitimacy' would refer to law as founded in something which transcends law itself. But a 'legitimate law' need not be a 'just law', metaphysically speaking. Historically established principles such as 'democracy', 'tradition', 'solidarity' or 'freedom' may be sources of legitimacy. Such principles may be claimed to be articulations of 'justice' in a metaphysical sense, or they may not. Just like religious principles may function as sources of legitimacy in a pragmatic-historical sense or in an absolute sense. Crucial is that 'legitimate law' implies the existence of some sort of principle, idea or vision which transcends the law itself and in the light of which it is interpreted and applied. We may call it the 'spirit' of the law. In truth, to the extent that the law is seen in the

⁸⁶⁹ This observation is of course associated with the reflections concerning the 'natural law ghost' presented in the Introduction and in chapter 2

light of this 'spirit', the 'spirit' is part of the law itself and not external to it. But simultaneously, as a source of 'legitimacy' the 'spirit' goes beyond the law itself.⁸⁷⁰

Finally, allow me to introduce a classical and fascinating expression: 'Government of laws, not of men'⁸⁷¹. This short expression should be emphasized especially because it concentrates, as I see it, the core concern inherent in the principle of 'rule of law', just as it articulates the deepest and most disturbing problematic of this principle. On the one hand, it concerns the essential ambition of law: that law should be something different from mere subjectivity - whether subjectivity would mean pure randomness, the reign of taste and opinion, the reign of human interests or the *factum brutum* of power. Law should not be arbitrary; it should exist above the arbitrary opinions, interests and power-relations which dominate the human world. On the other hand, the expression is, unfortunately, deeply problematic. As unfolded in the Introduction and in chapter 1-2 (and often repeated throughout this work), human law is, in contrast to natural law or divine law, exactly *human* law. It is not only drafted, accepted, interpreted and applied by human beings. It depends, essentially, on those who are subjected to it. Law could not be lived were it not for human beings. It exists through them. For this reason, law will never govern alone; human beings will always govern as well.

With these definitions and distinctions in mind, we shall now turn to EU-law in order to consider how we may more specifically characterize the meaning of the principle 'rule of law' within EU-law.

It is relatively easy to establish that EU-law is indeed a manifestation of the principle 'rule of law' according to a range of the definitions provided above. EU-law is based on written and binding law; and it includes a constitutional level of law (even though there is no 'Constitution'), that is, Treaties and a Charter which clarifies the competences of EU-law, the political and legal processes of law-making and -enforcement, the fundamental purposes as well as fundamental rights of EU-law. EU-law is prospective, well-known (public and accessible), general and implies that everyone should be equal before the law. It is supported by a range of political and

⁸⁷⁰ This understanding of 'legitimacy' is deeply inspired by Carl Schmitt. In chapter 1, the relationship between 'justice' and 'legitimacy' is being reflected.

⁸⁷¹ The phrase itself is attributed to John Adams (in his 7th 'Novanglus letter', 1774), but the idea is expressed already by Aristotle in his '*Politics*', book 3, chapter 16: '*It is more proper that law should govern than any one of the citizens*'. But of course, the expression 'rule of law' in itself implies that law should govern instead of human beings. The title of Samuel Rutherford's book on the rule of law from 1644 was a reversal of the traditional '*rex lex*' (the king is the law): *Lex, Rex* (the law is king).

legal institutions the functions and competences of which are defined in the Treaties. Since it is implemented through the member states, it is supported by a range of national political, legal and administrative institutions as well. It is commonly discussed whether EU-law is democratic or not, but it is clearly not without democratic features. Also, EU-law constitutes an extensive and highly developed law regime in spite of the fact that it is relatively young.

Regarding the distinction between 'law as justice' and 'law as unrelated to justice', EU-law does not claim to be an instance of absolute justice in a metaphysical sense no more than does other western contemporary legal orders. The interpretations of the CJEU are not based on a universal concept of justice, but on the written sources of EU-law, legislation and case-law, as well as other instruments, such as the ECHR and the case-law of the ECtHR. And yet. The concept of 'justice' does occur in the Treaty (although just once). And 'fundamental rights' as well as other 'values' are granted a universal status (although this 'universal status' can be deconstructed and problematized from several perspectives as demonstrated above⁸⁷²). Finally, and most importantly, we have established that fundamental aspects are implied in the social structure of the ideal order of EU-law; but since these aspects serve the condition of possibility of the law, rather than the purposes of law (according to our analyses), we cannot say that they constitute the foundation of a universal concept of justice. In other words: it cannot be denied that natural law aspirations are in play within EU-law. This does not mean that the functioning of EU-law is based on a universal concept of justice. But the natural law 'ghost' has not been driven away.

With respect to the related but not identical distinction, the distinction between 'legality' and 'legitimacy', it is very obvious that EU-law (or at least the areas we have examined) is unfolded as a regime of law carried by a 'spirit', at least as far the rulings of the CJEU are concerned. The CJEU does even occasionally use the expression of 'spirit' (interpreting a given provision 'in the spirit of' a given Directive, a given constellation of Directives, a fundamental provision of the Treaty or maybe even the Treaty as such). Other times, it is the expression of 'purpose' which is utilized by the court. In any case, we have seen the significant role of interpretational horizons, EU-purposes and fundamental EU-principles within the judgments of the CJEU. We have also seen the flexibility which characterizes the interpretations of the court - supported by interpretational horizons, EU-purposes and fundamental EU-principles and

⁸⁷² In particular in chapter 21 and in chapter 25

fundamental rights and unfolded by way of logical creativity and the establishment of conceptual definitions and criteria. The most crucial argument stated by the CJEU as to the justification of such maneuvers is exactly that EU-law 'should not be undermined', it should 'not be rendered meaningless'. It is clear that the CJEU sees itself as the safeguard of EU-law vis-a-vis national implementations which by way of technical-strategic interpretations would evade the 'meaning' of EU-law.

For these reasons - that is, the significance of contextual and teleological methods of interpretation - it could be argued that EU-law constitutes an instance of 'rule of law' in the sense of 'legitimacy', rather than 'legality'. On the other hand, there are other elements which should be taken into account and which would modify this conclusion. Firstly, the ECJ also applies literal methods of interpretation. We have seen that the precise wording of a provision may play a crucial role in CJEU-judgments. Exact definitions and criteria provided for in legislation and logical implications of such definitions and criteria are certainly just as important as interpretational horizons, EU-purposes, fundamental EU-principles and fundamental rights. In fact, what we have seen is that these different methods of interpretation play together and support each other, sometimes in highly complex ways.

Secondly, EU-law does not only exist through the interpretations of the CJEU, even if the CJEU is *the* competent court with respect to interpreting EU-law. In principle, the member states should follow the judgments of the CJEU, and not just the conclusions of judgments, but also the premises and lines of argumentation. Consequently, member states should implement EU-law in accordance with the 'spirit' or purposes of EU-law, as interpreted by the CJEU. None the less, the CJEU can of course not prevent the member states from implementing EU-law in technical-strategical manners, only work against it.

Thirdly, we might ask to what extent and in what sense 'the spirit' of EU-law stems from sources which transcend the law itself? Can the interpretational horizons, the EU-purposes, the fundamental EU-principles and -rights which are so crucial to the functioning of EU-law (and which are all closely connected to a 'spirit' of EU-law) be said to be 'external' to EU-law? They are obviously 'internal' to the law in a very prominent sense. However, I will argue that they also point to external sources of the law, to political purposes and agendas, to historically inherited political, legal and philosophical ideas and to conceptual-institutional presumptions and visions of order. But what exactly is the status of these 'external' sources? Are they merely historical, or

do they also have a metaphysical status of some kind? This question obviously relates to the ambiguous presence of the 'natural law ghost' within EU-law and cannot be answered in any unambiguous way.

So, we shall conclude that EU-law constitutes an instance of 'rule of law' in the sense of 'legitimacy', rather than 'legality'. But 'legality' plays an important role as well, both in terms of interpretational methods of the CJEU, and in terms of the existence of national implementations which evade the 'meanings' of EU-law, as seen by the CJEU. Furthermore, and crucially: the exact nature of the 'legitimacy' which penetrates the 'spirit' of EU-law is unclear.

There are still two definitions left, namely the definition 'government of law, not of men' and the definition of 'certainty'. These two definitions should be given special attention. They circulate around the same essential idea: that law is the opposite of arbitrariness, that law is something which is predictable and reliable and which does not depend on subjective conditions such as taste, opinions, relations of interests or power. They are also both deeply problematic. As explained above, law will never govern alone; human beings will always govern as well. As for 'certainty', human law can never function as a calculable machine. Any law requires interpretation from the perspective of particular situations or cases. For this reason, human law is always dynamical and changeable to some extent. It develops over time, through particular applications.

As far as EU-law is concerned, these two definitions are particularly problematic. Due to its extremely flexible and dynamical nature, it can be questioned to what extent EU-law is 'certain' at all? And due to the prominent role of the CJEU which is responsible for this flexible and dynamical and often unpredictable nature of the law it can be asked whether we are not witnessing a 'government of men (and women), rather than of law'? Also, the high degree of national discretion which constitutes an important element of the law we have dealt with could give rise to suspicions regarding the nature of EU-law: Is it basically too uncertain and 'too human' in order to constitute an instance of 'rule of law'?

As stated, I believe that both definitions - in spite of their problematic nature - circulate around the very essence of what 'rule of law' could possibly mean. Law should not be arbitrary. Otherwise, law ceases to be law. Some kind of regularity must be required. This also means that even if law is interpreted, enforced and unfolded through human

beings, some kind of regularity must speak through the human mediations of law - if law shall not cease to be law.

Consequently, in order for us to be able to characterize, essentially, EU-law from the point of view of the principle of 'rule of law', we shall consider, firstly, whether or not EU-law constitutes 'a government of human beings, rather than of law', and secondly, whether some kind of regularity does indeed speak through the human mediations?

Does law govern, or human beings?

We have seen that EU non-discrimination Law is generally full of 'escape-routes', both in terms of explicit exceptions, in terms of possibilities of justifying discrimination and in terms of vague concepts, definitions and criteria. This leaves plenty of room for national discretion, but also for surprising and creative interpretations carried out by the CJEU. And the CJEU is indeed creative. Different kinds of rights and different logics of rights interplay with one another in the judgments of the court, sometimes in accordance with regular patterns, other times on an ad-hoc-basis. Conceptual definitions and criteria are established by the court where such definitions and criteria are lacking in legislation. Contextualizing interpretations (on the basis of the particular features of a particular case, but involving considerations as to the status of certain contemporary social problematics) play important roles as well. And finally - as mentioned above - all this creativity is supported by very broadly (and some times vaguely) defined fundamental EU-purposes, EU-principles -and rights and fundamental rights. Ultimately, it is supported by interpretational horizons.

It should also be mentioned that we have encountered some serious inconsistencies, both within judgments and across judgments⁸⁷³.

Does this mean that human beings govern - and more particularly judges, national politicians and administrators? To some extent they do, of course. But I will argue that

⁸⁷³ The *Feryn*-judgment analyzed in chapter 10 (in the section 'Racial or ethnic origin' means 'foreignness as such'); the *Rosenbladt*-judgment analyzed in chapter 11 ('Legitimate aims and appropriate and necessary means in the light of the labour market'), the *Chacón Navas* and the *HK Danmark* judgments analyzed in chapter 12 ('Definitions of 'disability': relations between 'disability', 'sickness' and 'professional life'); the *Grant* and *P v S* judgments analyzed in chapter 13 ('Sex' versus 'sexual orientation': The establishment of a double distinction'); the *Dahlab* and *Sahin* judgments in chapter 14 ('The State's intervention in the right of individuals to manifestation of religion or belief'); the *Johnston* and *Sidar* judgments in chapter 18 ('Justification of discrimination by reference to occupational requirements'); and the *Viking* and *Laval* judgments analyzed in this chapter ('First study: Judgments which concern a conflict between a national 'fundamental right' and a fundamental EU-principle or -right')

what we are witnessing transcend coincidences, individual human opinions and interests as well as particular political interests. No doubt, as far as national implementations are concerned, national political agendas will very often lie behind particular interpretations. As far as the judgments of the CJEU are concerned, the court certainly seeks to protect and strengthen EU-law as such, while also protecting and strengthening the EU and European integration as such. But when that is said, I will argue that the fundamental EU-principles and -rights, fundamental rights, the EU-purposes, the conceptual definitions and criteria and ultimately the interpretational horizons are indeed manifestations of a kind of regularity. They are the manifestations of a complex and comprehensive, and yet particular, conceptual world. Even the inconsistencies become intelligible on the basis of this particular conceptual world: they are manifestations of conceptual dilemmas inherent in it.⁸⁷⁴

This conceptual world has two overall expressions: it concerns *the law as law* (conditions of possibilities for law as such and for particular legal regimes; a second-order dimension of the law which secures it against undermining and secures the right to the right), and it concerns the anchors of order analyzed in this work.

Hereby, we have reached the second point: if we are indeed witnessing a kind of regularity, how may we then describe it?

The elements of this ‘other kind of regularity’

We shall now attempt to describe this particular kind of regularity which characterizes the area of EU social rights.

It is a regularity which unfolds by way of mixed interpretational methods, that is both literal and teleological approaches. Crucial is, more precisely, the establishment of EU-concepts and conceptual criteria, a general logical creativity as well as the use of contextualizing interpretations (with respect to the particular case in question and its historical and social conditions) *on the basis of* fundamental EU-principles and -rights, fundamental rights, EU-purposes, and ultimately interpretational horizons.

Let us consider these different elements one at a time.

First, **fundamental EU-principles and -rights**. These are the principles and rights which are connected to the citizenship of the EU: fundamental mobility, residence and

⁸⁷⁴ See the previous note regarding inconsistent judgments (either when read in isolation, or when compared to other judgments). In the case of all the mentioned judgments, the analysis certainly demonstrated that inconsistencies were due to deep-lying conceptual problematics; they were not merely the result of careless or random interpretation.

work-access rights along with the principle of non-discrimination with respect to 'nationality'. It is also the principle of equal treatment between men and women (which often appears in the shape of the principle 'substantive and not formal equality'), including the principle of equal pay and the principle of 'special protection of women'. The principle of non-discrimination with respect to the remaining discrimination grounds ('racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion') is also claimed to constitute a fundamental principle of EU-law, but we have seen that it does not at all possess the same capabilities as the other fundamental EU-principles; it does not function as a basis for conceptual inventions, logical creativity or contextual interpretation. On the contrary, it appears to be rather weak vis-a-vis the many escape-routes laid down in the Race Equality Directive and the General Framework Directive.

So, what kind of regularity do the fundamental EU-principles and rights constitute? They constitute, first and foremost, the 'internal market'. In addition, they create a foundation for future transformations of the relationship between the order of the family and the order of the employment relationship. Finally, it should be emphasized that the 'fundamental rights' which are connected to the EU-citizenship add another dimension to the concept of 'rights', namely the 'right to the right'-dimension; that is, they protect the concept of 'rights' as such.

Secondly, the establishment of **EU-concepts and conceptual criteria**. This can of course happen in relation to all the different kinds of rights we have dealt with and in relation to all legal problematics. But so far, the most important EU-concept is the concept of 'Worker'. And the most significant conceptual criteria concern distinctions between different kind of benefits within the national systems - and in particular the distinction between social security and social assistance - and distinctions between social rights springing from the employment relationship and social rights which do not.

So, what kind of regularity do the establishment of EU-concepts and conceptual criteria constitute? They constitute the order of the 'national welfare systems'. In addition, they are crucial to the integrative aspect of 'the national labour market' (which we have identified as a part of the basic logic of the order). Finally, they regulate the relationship between the order of the 'employment relationship' and the order of the 'national welfare systems'.

Thirdly, **fundamental rights**. We have analyzed their role above. 'Fundamental rights' concern the possibility of the legal order. From a formal and essential point of view, they concern the foundations of the law as such, including the foundations of the particular legal order. From a manifestational and substantial point of view, they

concern the possibility of belonging to particular institutional orders, and hereby of being part of the ideal order at all.

Fundamental rights protect the foundations of the legal order as such and the foundation of the anchors of order in the sense that they secure the possibility of belonging to them.

Fourthly, **logical creativity and contextualizing interpretations**. These means of interpretation serve the flexibility of EU social rights. They strengthen the capacities of those rights - their possibilities of capturing a range of problematics which would otherwise (that is, from the point of view of a more 'literal' reading of the law) not have been covered.

The regularity constituted by these flexible means of interpretation concerns the concept of 'rights'. In various ways, they protect and secure the concept of 'rights'.

Lastly, the **interpretational horizons** (which comprises the **purposes of EU-law** - claimed purposes, utilized directly within the argumentations of judgments, as well as silent, vaguely indicated purposes). This last element is the most complicated one, - and we shall have to dwell on it for a little longer.

When analyzing the horizons of the three hierarchies of signifiers in chapter 27, we found that they all center around the labour market, only from different perspectives.

The horizons of the hierarchy of names center around *subjective conditions of the labour market* - more precisely, conditions for becoming a part of it and conditions under which a person is a part of it. These conditions include facilitating rights and institutional arrangements as well as the fostering of a particular subjective attitude, general societal integration, a complex relationship between stability and mobility, equality in the sense of 'imitation' (which enhances rather than reduces the differentiations of the labour market) and the issue of 'rights' as such.

The horizons of the hierarchy of non-names center around *objective contradictions of the labour market*. Firstly, the employment relationship appears to us as a fundamentally conflictuous relationship; the respective interests of employers and employees do not coincide. Secondly, the 'right to work' and the idea of the labour market as a 'natural balance' confront each other tensionally; they may complement each other, but they may also reduce or even exclude one another. Since the idea of the labour market as a 'natural balance' is itself subject to a differentiation, the right to work is both confronted with the idea of 'natural balances' understood as processes of continuous flexible adjustments on the basis of existing power relations and with the idea of the labour market understood as something which is created through state intervention.

Thirdly, the idea of a socially inclusive labour market is confronted with a different understanding according to which not everybody should work and according to which those who are facing special difficulties in life in general deserve economical help.

The horizons of the hierarchy of signifiers in-between names and non-names center around *the temporal complexity of the labour market with respect to the relationship between institutional transformation and fundamental conditions*. Three different, dominating horizons spring from this hierarchy: a horizon constituted by a concern for the sustainability of the welfare systems of the member states; a horizon constituted by the vision of a future societal state in which women are integrated in the labour market as well as being mothers; and finally a horizon constituted by the presumption that fundamental differences between women and men exist and that such differences are crucial to the possibility of the 'civilizational self'.

It is important to mention as well that there are horizons springing from the three hierarchies which do not directly relate to the labour market. There are dimensions of EU social rights which cannot be reduced to support and protection of actual, potential or previous workers. There are crucial problematics of the order of the family and the order of the state (with respect to its ideological foundation). And finally, an undeveloped idea centering on the role of the state as responsible for certain general, public concerns, such as security, safety, order and health recurrently appears.

However, as argued in chapter 27, we have to regard these other dimensions of EU-rights and these problematics of 'family' and 'state' in the light of the labour market as an overall purpose. We cannot discern any other vision of 'the normal life' than a life of work, and as far as concerns the relationship between fundamental problematics of 'state', 'family' and 'work', we have seen that in the hierarchy of non-names, they are asymmetrically reflected which means that the former two are mediated through the latter. Finally, regarding the idea of 'public concerns', it is unclear what it means.

In other words: The interpretational horizons unfold visions of all six anchors of order, including relations between them. In addition, they comprise visions as to the concept of rights. And crucially, tensions between fundamental aspect which ultimately concern the possibility of the law itself, present law and future law are vivid within them. - But all this circulates around the labour market as overall purpose. What does it mean that the institutional orders, the concept of rights and the foundations of the law are given to us as something which ultimately concern the labour market?

As discussed in chapter 27, we cannot really say what the labour market means as an overall purpose - if it is indeed *the* overall purpose, but no other overall purpose appears. As a purpose, does it function as an integrator vis-a-vis the subjective and objective aspects and tensions; and would it be capable of creating a connection between transformation and fundamental issues? And not least, *why* is it a purpose? The image of a planetary system may serve as a symbol for the world opened to us through the interpretational horizons. The 'labour market' is the sun around which the institutional orders circulate as planets. The concept of right and the foundations of the law constitute the conditions of possibility for the circulation of these institutional orders - that they remain in their respective orbits. The planets (the institutional orders), are illuminated by the sun (the labour market), so that we may see what kind of life they contain. But the sun itself is only pure light, it cannot be seen.

Now, as a result of our analyses of the anchors of order of the ideal order, we did indeed qualify the basic logics of the labour market. We found that a tragical inclusive and crippled relationship of opposition constitutes the labour market as an institutional order. Also, we were able to characterize life within the order of the labour market as life in which a person cannot relate to him- or herself as a purpose, but must relate to the labour market as a purpose; as life characterized by the repression of 'individual integrations'; and as life which is the manifestation of deep societal integration and social reality. Will these qualifications help us to understand the purpose, to see the sun?

We should be aware that the 'labour market' now appears to us in a double role; it is both institutional order and overall purpose, both circulating planet and sun. We may envision two different possibilities. First scenario: The sun is identical with the institutional order of the labour market, that is, the 'labour market' as an institutional order has a unique status, it is not a circulating planet at all. Second scenario: The 'labour market' is indeed an institutional order like the other institutional orders, but 'the labour market' also constitutes an overall purpose, and as such it has a different meaning, a meaning which is not identical with the meaning of the institutional order of the labour market.

The first scenario would not be reasonable. Even if it is indeed so that all of the other orders relate to the labour market and are reflected through it, it is also so that they are presumed to be orders in their own right, with basic logics of their own which can be subjected to qualifications. To say that the 'labour market' as an institutional order

would be the sun which gives light and purpose to all the other orders, including the 'family' and the 'state' would not be senseful. This leaves us with the second scenario: 'The labour market' as a purpose is not reducible to the labour market as an institutional order. It means something different. The second scenario does not exclude, though, that the labour market as a purpose relates to certain aspects of the institutional order of the labour market (the idea of the labour market as a purpose-in-itself even springs from the qualified logic of that order).

On the basis of the law we have dealt with, we cannot say what the labour market as a purpose might mean. But this does not mean that we cannot discuss it. Such a discussion belongs in the final part of this work. Accordingly, we shall return to it in a short while.

For the purposes of the present analysis, we shall conclude the following:

The regularity created by and through the interpretational horizons consists in the six anchors of order and relations between them. In addition, they constitute foundations of law as such and of the concept of 'rights'. The institutional orders and the foundations of law are all illuminated by an overall purpose the nature of which we cannot see.

A regularity - but relying on a quivering foundation

The regularity which characterizes the area of EU social rights unfolds by way of EU-concepts and conceptual criteria, logical creativity and contextualizing interpretations *on the basis of* fundamental EU-principles and -rights, fundamental rights, EU-purposes and ultimately interpretational horizons.

We have seen that all of these elements point in the same direction. They constitute *anchors of orders* (some of them or all of them or crucial aspect of them) as well as *relations between them*. They constitute *foundations of law* as well (foundations of law as such or of the particular legal order), and they protect and secure the *concept of 'rights'*.

We call this regularity. And it is. It is a regularity which does not stand in opposition to flexibility. On the contrary, it is fed by flexibility, lives on it. Ultimately, it is only the interpretational horizons which can provide stability and regularity; the other elements depend on them. Fundamental EU-principles and -rights, fundamental rights and EU-purposes depend on them directly, whereas concepts and conceptual criteria, logical creativity and contextualizing interpretations depend on them indirectly since they depend on fundamental EU-principles and -rights, fundamental rights and EU-

purposes. On the other hand, the interpretational horizons can be said to gain stability through the latter elements - principles, rights and articulated purposes.

The interpretational horizons can provide stability and regularity in combination with flexibility to the extent that the anchors of order and the fundamental aspects which they constitute are characterized by stability and regularity. We have seen that they are in the sense that they imply basic logics which can be qualified in the ideal order. However, two important issues should be raised in this respect:

Firstly, the qualified logics are not unproblematic. The ghosts may have been answered but not necessarily in ways which would end all their worries and sadness. Or differently put: new ghosts might arise on the basis of the qualified logics. This does not mean that the qualified logics do not constitute regularity. But some sort of quivering unrest remains.

Secondly, the internal market is not an institutional order. Its basic logic, the logic of exchange, interplays with other logics which are distinct from it. In this respect, we have analyzed the 'real link'-logic and two logics of rights, springing from the EU-citizenship. The problem is not that the internal market implies a conglomerate of logics. The problem is that the interplaying of these different logics is fundamentally ambiguous. The logic of exchange is both inhibited and strengthened by the other logics, but the relationship between the strengthening and the inhibiting aspect cannot be determined. Accordingly, the internal market constitutes the joker among the anchors of order, the joker of the ideal order.

Finalizing the analysis of the responsibility logic of the state *as one*:

Scenarios of danger

We have analyzed the meaning of the constitutional principles 'fundamental rights' and 'rule of law' within the context of EU-law. All along, our aim has been to qualify the basic logic of the state *as one* from the point of view of the ideal order, - but since the law we have dealt with does not entail any conceptualizations as to the meaning of the two principles within the context of national law, we had to turn our attention towards the meaning of those principles within EU-law.

Even if the analyses above will not tell us what the principles 'fundamental rights' and 'rule of law' would ideally mean as qualifying principles of the state *as one* in an exhaustive sense, they certainly provide us with qualifications of the basic responsibility-logic of this order. Crucial is, that our investigation concerns the state *as*

one from the point of view of the ideal order of EU-law. As argued above, *in so far as the state as one is responsible for the implementation of EU-law*, the 'state as one' must assume an understanding of 'fundamental rights' and of 'rule of law' which coincides with the understanding of those principles as implied in EU-law as such.

Before we engaged in the analyses, we presumed that this would be so. As responsible for the implementation of EU-law, the state *as one* can obviously not be based on particular understandings of 'fundamental rights' and 'rule of law' which would be incompatible with the understandings implied in EU-law. In addition, it is clear that national and EU-understandings cannot be separated: the latter understandings imply considerations as to the role and discretion of the member states. After having conducted the analyses, we may substantiate this point - and, in fact, strengthen it considerably.

As far as 'fundamental rights' are concerned, we have seen that they generally serve to strengthen EU-law vis-a-vis national law - by way of strengthening fundamental EU-principles and -rights, particular EU-purposes, concepts and conceptual criteria, the ideological dimensions of EU-law as well the flexible and logically inventive methods of interpretation of the CJEU. In the few cases in which particular national understandings of particular 'fundamental rights' are accepted by the CJEU, it is still so that the evaluation of the 'legitimacy, appropriateness and necessity' of those national understanding is carried out by the CJEU. The member states are certainly obliged to follow CJEU-understandings of 'fundamental rights'.

Concerning the 'rule of law', we have seen that this principle is based on a general assumption of a 'spirit' of EU-law; a spirit which is manifested through EU-concepts and conceptual criteria, logical creativity and contextualizing interpretations on the basis of fundamental EU-principles and -rights, fundamental rights, EU-purposes and ultimately interpretational horizons. Although the member states are certainly granted a lot of discretion as far as many aspects of EU-law are concerned, they are still obliged to implement EU-law in accordance with 'the spirit' of that law. The CJEU leaves no doubt as to that.

In other words: the member states must accept CJEU-understandings of fundamental rights as well as the comprehensive and complex 'spirit' of EU-law including its ways of manifestation and the interpretational horizons on which it ultimately depends. National discretion is only granted *on the basis* of these understandings and the 'spirit' of EU-law; national discretion does not constitute an alternative to them, neither does it

constitute a position from which negotiations or compromises can be made. Ideally speaking, that is. From the point of view of EU-law. What the member states choose to do is another matter. Often, member states will tend to avoid the full implications of EU-law by way of technical-strategic interpretations. But such technical-strategic interpretations are exactly the kind of interpretations which the CJEU seeks to counteract.

But how about the other side of the responsibility-logic of the state *as one*? The state *as one* is not only presumed to be responsible for the implementation of EU-law, it is presumed to be responsible as such, that is, also with respect to the areas of national law which are not covered by EU-law. In principle, the state *as one* could, as far as those national areas of law are concerned, be based on other understandings of 'fundamental rights' and 'rule of law' than those analyzed above. But it would not be unproblematic. First of all, we have seen several times that areas of national law which are not covered by EU-law (such as marriage laws or areas of immigration law) may still, under particular circumstances, become subjected to provisions of EU-law. This can happen if these areas are somehow connected to issues which are covered by EU-law. Since numerous areas of national law are potentially connected to issues which are covered by EU-law, and since EU-law develops year by year, the state *as one* cannot assume any too strict divisions within national law on the basis of which two different understandings of the constitutional principles in question could be manifested.

Secondly, it is clear that the existence of two very different understandings of the principles of 'rule of law' and 'fundamental rights' within the same national legal order would be deeply problematic - especially when one of those understandings (namely the EU-understanding) implies very fundamental elements such as basic institutional orders and assumptions as to the foundations of law as such.

Consequently: From the point of view of the ideal order of EU-law, the state *as one* is indeed characterized by 'fundamental rights' and 'rule of law' according to the understanding of those principles which can be derived from EU-law. This is so to the extent that the state *as one* is responsible for the implementation of EU-law, - but beyond that as well.

We shall now consider which one of the three scenarios of danger outlined in the beginning of this chapter would capture most adequately the qualified responsibility-logic of the 'State as one' from the point of view of the ideal order. Is the state *as one* essentially endangered by too powerful institutional orders? Is it endangered by erratic

forces undermining those orders from within? Or is it endangered by a multiplicity of different, overall integrations?

We already know that the first constitutional principle, 'democracy', conceptualized as 'pluralism', and as derived from the ECtHR-judgments concerning religious freedom, could be related to all three scenarios of danger. More precisely, the manifestation of particular beliefs could be seen as threatening to the stability of the state in the sense that it is bound to particular *institutional orders* (such as churches) which enjoy a certain degree of autonomy. But the manifestation of particular beliefs could also be seen as a potential threat to the *functioning* of certain institutional orders (such as schools). Finally, the manifestation of particular beliefs could be seen as threatening the overall role of the state as such in the sense that they would represent a variety of different *overall integrations or deconstructions*.

However, the third scenario would be the crucial scenario as far as concerns the ECtHR-judgments on religious freedom. It is implied in these judgments that manifestations of particular beliefs may not only give rise to institutional imbalances or threaten the functioning of particular institutional orders, but that they may endanger the social order as a whole because they undermine its fundamental principles.

The conceptualization of the constitutional principle of 'democracy' is peculiar in the sense that it relies on a paradox. 'Pluralism' constitutes an ideal and a danger at the same time. In order for 'democracy' to be realized, the state *as one* must pursue the ideal of pluralism while simultaneously guarding against it.

In contrast, the other two principles, 'fundamental rights' and 'rule of law' are not paradoxical. The meanings we have been able to give them do not imply that these principles are in themselves dangerous. They are only ideals. But they are still meant to guard against dangers. So what dangers might that be?

The respective results of the two analyses of the two constitutional principles correspond to each other. 'Fundamental rights' protect and secure the foundations of law as such as well as the foundations of the particular legal order. They also support and develop the clarification, efficiency, conceptual foundation, logical creativity and ideological dimensions of EU-law. Hereby, they serve to protect the possibility of belonging to basic national institutional orders (our 'anchors of order', except for the internal market). In particular, they serve to protect the possibility of belonging to the order of the 'national labour market': the fundamental right to work is granted an almost absolute status.

The principle of 'rule of law' (in relation to which the principle of 'fundamental rights' constitutes an element among others) can be conceptualized as a kind of regularity constituted by the six anchors of order with their qualified logics as well as foundations of law, including the concept of 'rights'. It is manifested through EU-concepts and conceptual criteria, logical creativity, contextualizing interpretations, fundamental EU-principles, -rights and -purposes and fundamental rights, and it relies on interpretational horizons. It is a kind of regularity which embraces flexibility and which accordingly allows for a powerful role of human beings. Furthermore, it is a kind of regularity which is deeply ambiguous as far as concerns the concept of 'justice'; it certainly does not lack a foundation, but it appears to be lacking an overall purpose. This also means that the legitimacy of the order (based on the 'spirit of EU-law') becomes ambiguous; it is unclear whether it stems from historical or universal sources. On the basis of these results, let us consider the three scenarios of danger, one by one.

First scenario of danger: *Some or all of the institutional orders could become so strong that it would threaten the stability of the state.*

This is clearly not a scenario which is implied in the principles of 'fundamental rights' and 'rule of law' according to the conceptualizations we have provided. On the contrary, the institutional orders make out the very essence of the social order, and they are upheld by fundamental assumptions concerning the possibilities of law and 'rights', - just as these assumptions are upheld by the institutional orders (they are inscribed in those orders, reflected in their respective logics).

It is also clear that the institutional orders depend on each other mutually. In this sense, they do not seem to need the state as an overall integrator. They need the state as many, that is, in its different roles within the orders. In these different roles, the state is subjected to the logics of the respective orders. It is not denied that the state might be characterized by overall organizational, social, economic and ethical concerns, - but the manifestation of these concerns should be understood within the meaning of the respective institutional orders and the relations between them. Only in so far as 'public order, security, safety and health' is concerned does the state seem to have a role which transcends the institutional orders, and that role is hardly an integrating role, but only a safeguarding role. No, if there is an overall integrator, then it would be the labour market as an overall purpose, the sun around which the institutional orders circulate - the sun which we cannot see.

In other words: It is in no way implied that too powerful institutional orders would constitute a danger. On the contrary, the stronger institutions, the better. The state *as one* is not threatened by the institutional orders, because the state has already, substantially speaking, been absorbed by these orders. This does not mean that the state *as one* is not in itself a crucial institutional order. But it is crucial by virtue of being responsible for the various institutional orders in the double sense that it supports their respective logics and guards them against external threats. It is characterized by a 'responsibility'-logic, nothing else.

Second scenario of danger: *The institutional orders would not be strong enough - meaning that they could be undermined by erratic forces within them*

It is more ambiguous whether this scenario of danger would be implied in the principles of 'fundamental rights' and 'rule of law' according to the conceptualizations we have provided.

On the one hand, it would be senseful to assume that this scenario is not implied. The regularity which makes out the meaning 'rule of law' embraces flexibility, is fed by it. Accordingly, it is not implied that we should fear the existence or evolvment of erratic forces within the institutional orders. It is presumed that human interpretations - in all their flexible variations and with the developments of institutional logics they imply - are a strength, not a danger.

On the other hand, this flexibility is held in place within certain borders. More precisely, it unfolds on the basis of concepts, principles, rights and interpretational horizons which, in their turn, are based on presumed institutional orders, but which also qualifies the basic logics of those orders. Even if the means of interpretation - the creative use and development of logics and signifiers, contextualizing strategies, teleological as well as literal strategies - are constantly being developed, the qualifications of the basic logics of the institutional orders (analyzed in this part) are clearly not arbitrary or merely temporary qualifications. Admittedly, they are not fixed qualifications, they may be developed further; but they do constitute foundations on the basis of which the flexibility of the ideal order unfolds.

This means that human flexibility is embraced, but also held in place so that it does not unfold uncontrollably. Consequently, we may indeed say that the constitutional principle of 'rule of law' implies the second scenario of danger.

This conclusion is further supported by the role of 'fundamental rights' within EU-law. As we have seen, they serve to protect the possibility of belonging to the institutional

orders. In other words, 'fundamental rights' are not free-floating individual rights. They are not rights which make it possible for the individual to participate in the unfolding of pluralism *up against* the institutional orders. Rather, they constitute a kind of structural containment of pluralism.⁸⁷⁵

Third scenario of danger: *A multiplicity of different overall integrations or deconstructions will threaten the role of the state as common denominator of the different institutional orders and as ultimately responsible for these orders.*

This third scenario of danger is obviously implied in the principles of 'fundamental rights' and 'rule of law'. The reasons are already formulated above: Human flexibility is held in place by institutional logics so that it does not unfold uncontrollably; 'fundamental rights' serve the institutional orders and not their critique or possible deconstruction.

The existence of a multiplicity of different overall integrations or deconstructions would mean the existence of different overall perspectives on the ideal order as such, on the totality of institutional orders. Such overall, crosscutting perspectives could strengthen the ideal order as a whole in that they would create a foundation for the legitimacy or even justice of the respective institutional orders and the relations between them. But obviously, they could also deconstruct the overall meaning of the order completely, or understand the respective institutional orders according to other logics than those identified above. As such, they would threaten the institutional orders and they would threaten the state *as one* as ultimately responsible for those orders.

It should be noticed, though, that a certain ambiguity remains. The fact that the state *as one* does not itself appear as an overall integrator, and the fact that the state *as one* is defined as ideologically neutral creates an opening for individual (or collective) overall integrations or deconstructions. However, such integrations or deconstructions would still need to relate to the overall purpose of the ideal order, the 'labour market'. In other words, they would need to be different interpretations of the purpose which cannot be seen, the sun around which the institutional orders circulate.

⁸⁷⁵ Apart from serving the existence of the six anchors of orders, they also serve the existence (or establishment of) a range of other institutional orders which may be seen as sub-orders or complementary orders in relation to the anchors of order we have analyzed in this work (or indeed other anchors of order seen from the perspective of other areas of law than social rights). 'The space of public opinion' and 'churches' would be obvious examples of institutional orders served by 'fundamental rights'

**The third scenario of danger is the crucial scenario
- but it interplays with the second scenario**

We have seen that a close connection exists between the two latter scenarios of danger. There is room for as well as need of human flexibility. There is room for as well as need of individual integrations because we are lacking a vision of an overall purpose and because the flexibility on which the ideal order depends ultimately springs from human interpretative and reflexive capacities - capacities which may be unfolded on many different levels, but which are somehow always related to overall perspectives, even in their most fragmented and unconscious manifestations. But simultaneously, human flexibility and individual integrations are restricted in the sense that they shall be unfolded on the basis of the qualified basic logics of the institutional orders and on the basis of the fundamental aspects of the ideal order inscribed in those orders.

Our analyses of the constitutional principles 'rule of law' and 'fundamental rights' with respect to the three scenarios of danger has culminated in the same result as our analysis of the principle of 'democracy': The third scenario of danger is the most crucial one. However, as can be seen from the analyses of 'rule of law' and 'fundamental rights', the third scenario interplays closely with the second scenario. Overall integrations or deconstructions are potentially dangerous to the institutional logics and the fundamental aspects on which the ideal order depends. Such integrations or deconstructions will be manifested as human interpretation and reflexion within these orders, and as such they may undermine them from within - just as they may maintain them and strengthen them. They may be manifested on many different levels and in many different forms - as belief or declared non-belief or pure anarchy. In any case, the more 'overall' their nature and, especially, the more 'transcendent' their nature, the more dangerous they are considered to be.

Answering the eight ghost

How do we answer the eighth ghost? The ghost simply asks: How is the presumed 'responsibility' of the state possible in the light of the dangers confronting it?

It is not easy to answer the ghost. The problem is, of course, that the state *as one* is not given the role as an overall integrator of the institutional orders for which it is responsible. Neither is it given an ideological foundation. It is declared to be neutral. Naturally, it is not. As we saw in the ECtHR-judgments regarding religious freedom, the claimed neutrality of the state continuously collapses. But we do not even need

these judgments in order to deconstruct the neutrality of the state. The state is substantially absorbed in the institutional orders. And they are not neutral.

So, the state *as one* is without integrating capacities, and it is without ideological foundation, and yet it is not neutral. In addition, we are confronted with an overall purpose, namely the 'labour market' the nature of which as a purpose we cannot see.

Polemically, we might conclude: Perhaps these paradoxical features are exactly what we need in order for the ideal order to be realized. Because of these paradoxical features, there is room for human flexibility and human integrations, but the unfolding of both is held in place so that neither of them will develop uncontrollably. On the other hand, we might also conclude that these paradoxical features constitute an enormous problem.

With these words, we shall finalize the investigation of the six anchors of order from the point of view of the ideal order - and move to the very last part of this work, in which we shall both present its overall conclusions, but also reflect upon the deep problematics with which we are faced and which cannot be solved on the basis of analyses of the law alone.

These problematics - which are all related to each other - concern the simultaneous neutrality and non-neutrality of the state, the possible lack of an overall purpose, the meaning of the 'labour market' as an overall purpose, the fact that the 'Internal Market' constitutes a joker in the ideal order and the fact that the eight ghosts have been answered in ways which leaves us with tensional conditions on the basis of which new ghosts may arise...

An Ending and Beginning

I. Overall remarks: purposes, positions and approaches of the dissertation

It has been the purpose of this dissertation to analyze a contemporary battlefield of law, the field of EU social rights, from a political-philosophical point of view.

Why would such an analysis be important?

Law has political-philosophical implications for social order

I have argued that political-philosophical analyses of contemporary manifestations of law are important because law is deeply and inescapably conceptually connected with fundamental features of social order. Law is constitutive for social order, but law is also an expression of social order. The interrelations between the two do not merely concern the actual rules and rights laid down in the law, but fundamental presumptions regarding the nature of human beings and the purposes of social order, including the question of the sources of authority due to which regulation can be realized at all. Law and social order are conceptually interrelated with respect to such presumptions - this is the conviction on the basis of which this work has been carried out.

In other words: law has political-philosophical implications for social order - and these implications I have sought to pursue. In my view, philosophical and empirical analysis should not always be separated. Philosophical analysis should not only engage in reflections as to the nature of human beings *as such* and the purposes of law *as such*. It is crucial, as well, that we examine the fundamental understandings or forms of rationality implied in empirical law (as in any empirical phenomenon of regulation), so that we may at all be aware of them, be able to discuss them, transform or develop them.

‘Political-philosophical features’ is meant broader, though, than presumptions as to the nature of human beings and the purposes of social order. Also the basic nature of the social structure of a given social order and the means by which this social structure is sought realized constitute important objects of analysis from a political-philosophical point of view. In this work, I have examined to what extent we were facing a hierarchical or an egalitarian social structure, or rather a social structure characterized by fluid differences? Likewise, I have examined the nature of the means of regulation -

their repressive as well as possibility-creating characteristics. Apart from the fact that such examinations are important in themselves, they are also necessary in order for us to approach the other political-philosophical questions regarding the nature of human beings and the purposes of social order as implied in the law. These questions cannot be dealt with in abstraction.

**In the contemporary situation, we need a political-philosophical
thinking which defies the identity-thinking**

Political-philosophical analyses of contemporary manifestations of law are not only important for the general reason that law is conceptually connected with fundamental features of social order. They are also important for contemporary reasons. 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. 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.

Without a 'human nature', it has become difficult to understand the relation between law and those subjected to law. We have to maintain, though, that this relationship is crucial to the functioning of law. 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. It 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. This *living the law* brings an element of fundamental unpredictability into the law which both serves it (in the form of devoted application, flexible interpretation, useful deviations, even rebellions) and constitutes a threat to the law (potentially, it may undermine law).

But it has also become difficult to formulate overall political purposes and visions. One should not think so. Without a human nature, would mankind then not finally be free with respect to the formulation of purposes? I have argued that we need the idea of a human foundation of some kind in order to be able to formulate purposes at all - whether those purposes would be envisioned to accord with the human foundation, or to break with it.

Simultaneously, I believe we may detect the presence, today, of a 'natural law ghost'. This seems to indicate that we cannot live with the consequences of the purely created

human nature and the loss of overall purposes. More precisely, in so far as the human foundation and the normative foundation of law is concerned, we are caught in an inescapable paradox. On the one hand, we cannot avoid asking the 'anthropological question' and the 'normative question'; these questions belong to law. On the other hand, we cannot answer them. Or, if we do, the answers could be deconstructed right away. In my view, we have to live with the paradox. But there are different ways of living with it.

The natural law ghost can be seen as a particular manifestation of the paradox, characterized by a stark tension between universality and relativism. More precisely, I have argued that the most important symptom of the presence of the ghost is constituted by the dominating 'identity'-thinking of our time. 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. Due to the dominance of this concept, the questions as to a human and a normative foundation of law are collapsing into each other.

In this contemporary situation, I believe that the following role for political philosophy should be sought. Firstly, we are in need of political-philosophical analyses carried out on the shaky foundation of the paradox - analyses that raise the questions as to a human and normative foundation of law even if these questions can ultimately neither be raised nor answered. But they can be raised in relation to the empirical law which is being examined. Empirical law implies presumptions with respect to both questions - while simultaneously being a powerful expression of the created or constructed human nature.

Secondly, we must, in our analytical approach, distinguish between a human and a normative foundation of law. While analyzing empirical law, we must remain open to the possibility that the purposes of law may not be derived from a human foundation of law. Just as such purposes may not be identical with the law itself. It should be recalled that the purposes of a social political order could be thought of in the shape of ideals or purposes which are not and which cannot be realized completely by that order. That would imply the opposite of an 'identity'-thinking - a non-identity-thinking.

Taking seriously the *shadow-realm* of EU social rights

Finally, why would a political-philosophical analysis of EU social rights be important? 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.

Within this rights-regime, the relationship which the 'right' traditionally represents, the state-citizen-relationship, has been transformed without being abolished. Due to the nature of EU-law in general (that it depends on being implemented by the member states) and the principle of non-discrimination in particular (which constitutes the basis of the majority of EU-social rights), the transformation of the classical relationship between a right-granting body and a right-holder is manifested in highly complex ways - which complicates significantly the issues of social structure and social means mentioned above.

But EU social rights 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. They are under pressure in practically all European countries. 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'). The analyses of this dissertation bear witness to that. Numerous matters are being considered which do not just concern 'social rights' in a narrow sense: matters of religion, of 'the ideological stranger', of sex and sexuality, of the ideological foundation of the state - just to mention some of them.

But it should also be emphasized that EU-law as such, in my view, constitutes an important object of political-philosophical analysis. EU-law plays a huge role in relation to national law. Yet, the implications thereof for the political-philosophical features of social order may be very difficult to detect. This is exactly due to the fact that EU-law is implemented by the member states. In addition, EU-law is often formulated in broad terms leaving many decisions to the discretion of the member states; and EU-law only covers certain areas of national law and not others. These features are certainly obvious as far as social rights are concerned. EU social rights are

even, predominantly, formal rights which means that also as far as their content is concerned, they depend on pre-existing national rights. In short: the implementation of EU social rights involve numerous national elements: national authorities, national rights, national interpretation of EU-rights, national decisions - not to mention the general structures (categories and organization of rights) of the national systems of rights.

On this basis, it could very well be argued that we should not at all talk about the 'political-philosophical implications' of EU social rights as such. It could be argued that everything depends on national implementation, and that, accordingly, EU social rights are nothing 'in themselves'. The notion of 'legal pluralism' dominates EU literature in general. Interestingly, at the same time, the concept of 'identity' dominates the political discussions on EU. The two are usually combined, though, in the sense that the legal pluralism of EU is assumed to form part of its 'identity'.

My approach has been the following. I have not in any way presumed that a substantial social order would be implied in EU social rights. I have been open towards the possibility that what I would find would be a largely formal order. None the less, it was clear to me that the forms of rationality implied in EU social rights are interesting as such; in any case, they imply social hierarchies as well as dynamical or fluid structures, they imply certain means in the form of logics of rights and presumptions regarding the nature of those who are subjected to the law and regarding the purposes of law. In any case, these forms of rationality would be in play in connection with the implementation of the rights in the member states. More precisely, they would meet other hierarchies, logics, conceptual foundations and complexities, - and in these meetings the conceptual implications of EU social rights must necessarily be taken into account, be part of a battle, a compromise, a reconciliation or even 'a fight until death'.

I have used the notion of a *shadow-realm*. The rationality forms implied in EU-social rights will never be fully manifested anywhere, only more or less reduced or transformed in the different member states, due to their conceptual meetings (or battles) with other rationality forms. However, this does not mean that these rationality forms are not real or important. Only, they are never manifested in a pure form. In fact, I will argue that this makes them into an even more relevant object of political-philosophical analysis. They are generally hard to detect, they live in the shadow.

It turned out, as a result of the analyses, that the shadow-realm was in fact far more substantial than I had expected. As mentioned above, I would have expected to be able

to analyze the political-philosophical features of a rather formal or even abstract order. But what I found was wide-reaching over-national visions of national order, vibrating with rationality forms concerning the member states as states - and not only with respect to the four political-philosophical categories. I had to add a fifth category, namely that of institutional orders, and this category turned out to be the most essential of them all.

On the basis hereof, my position with respect to the 'pluralism' and 'identity' discussions can be summed up as follows: In contrast to many pluralists, I have held (and still hold) that it is meaningful to analyze the political-philosophical implications of EU-law as such. Even if we are dealing with a shadow realm, it is a binding and hugely important shadow realm. In contrast to many identity-thinkers, on the other hand, I believe that the question of overall political purposes and visions of the EU 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 this question must be dealt with on the basis of a non-identity-thinking, as explained above.

I have analyzed a huge empirical material, legislation and case-law. The analyses were carried out according to a particular structure and according to particular 'grasps' so that they would prepare for a political-philosophical construction in accordance with the four political-philosophical categories, mentioned above, 'social structure', 'means', 'human foundation' and 'purposes'. More precisely, the analyses of the empirical material were structured according to the various signifiers of right-holders which I have found in the law. In this connection, I spoke about 'names', non-names' and 'signifiers in-between names and non-names'. By using these terms, I wanted to underline the tension between the 'createdness' of the right-holders (according to various categorizations) and the fact that the right-holders *as created* are not identical with the right-holders *as such*. Also, I pursued the various logics of non-discrimination rights and the nature of the horizons within which the interpretations of the CJEU take place.

The analyses of the empirical material was carried out in Part I, and the political-philosophical construction, based on these analyses, took place in Part II. Apart from the four political-philosophical categories, a fifth category was added in Part II, that of 'institutional orders'. The purpose of Part II was the construction of an 'ideal order' - as implied in the particular regime of rights which had been examined, the regime of EU

social rights. Issues of temporality played a huge role for the construction carried out in Part II.

I shall not go through the theoretical considerations which underpin the analyses and the construction, nor the detailed structure or the particular analytical ideas and 'grasps' of the dissertation. All this can be found in chapter 1-3. Only, it should be recalled that the dissertation relies on a tensional theoretical foundation, developed 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 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; however, these forms of rationality are multiple, muddled and unclear. Furthermore, concepts are not presumed to exhaust reality. The speechless - that which escapes concepts and cannot be grasped by concepts - constitute a dynamical source of language and of conceptual transformation. On the basis of 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. Moreover, 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.

II. The main features of the ideal order

I shall now sum up the main results of the work: the features of the 'ideal order', constructed on the basis of the analyses of EU social rights. Also, I shall present some concluding remarks - corresponding to the conclusions we may formulate on the basis of these results. However, as has become clear by the end of Part II, the 'ideal order' is by far a harmonic order. We are faced with a number of fundamental problematics.

For this reason, the 'conclusions' shall not be my last words; in truth, they are not conclusions. In the very last part of the dissertation, I shall engage in three reflections that dive into the unhappy conditions and paradoxical features of the ideal order in order to locate its immanent openings. It should be emphasized that these last reflexions have a different status than the rest of the work.

A destiny-bound social structure celebrating a particular idea of 'the normal life'

The ideal order appears to us as a largely hierarchical, destiny-bound social structure celebrating a particular idea of 'the normal life'.

According to this hierarchical structure, 'EU-citizens' and 'Workers', as well as their 'Family-members', make out the upper layers of the social structure. Reversely, those who cannot claim any of these names are either excluded or make out the very bottom of the social structure. In the middle of the social structure, we find those 'EU-citizens' who are not 'Workers', but who are capable of supporting themselves due to other sources, as well as those 'Third Country Nationals' who can satisfy certain criteria concerning self-support, length of residence, education and professional experiences.

Completely excluded are a large number of 'Third Country Nationals', especially illegal 'Third Country Nationals' - whether they are 'Workers' or not. Forgotten or ignored are a number of EU-citizens, namely those who dependent on social assistance in their own member state, that is, the 'prisoners' or 'losers' of the national systems. Also the extremely mobile, the wanderers who move from country to country, are likely to exist on the border of the social structure of the ideal order.

It is a complex hierarchical structure, though, characterized by an endless number of sub-names, including combinations of names and sub-names and vast greyish areas. Most notably, the name 'Worker' covers so huge differences that there are parts of the name which extends towards the bottom of the social structure, even if we only consider 'EU-citizen Workers'. Also, it is a dynamical hierarchical structure; for many, it will be possible to move upwards in the hierarchy, although not limitlessly. Internal dynamics are created by *the building up of a working history*, by *stability* and by *the will to work and integration* - primarily in the national labour market, but also in the national systems and the society in a broader sense. In addition, the *capability of self-support* is crucial for 'Third Country Nationals' as it is for those 'EU-citizens' who are not 'Workers'. Also, 'Third Country Nationals' must prove *their good will as such*; they are subjected to a general suspicion of fraud and abuse.

It is a hierarchical structure which confirms the significance of existing national factors of hierarchization such as education, language, working experience, social status, social connections and capabilities, level of income and a general will to ideological adaption. On the other hand, it diminishes the significance of other factors, namely 'nationality', 'racial or ethnic origin', 'age', 'disability', 'sexual orientation', 'religion or belief' and 'sex'. However, due to fundamental weaknesses of the non-discrimination rights in

question, national forms of discrimination are reproduced (with respect to language, culture, educational system and welfare rights), just as forms of discrimination with respect to the other factors. Accordingly, young people are prioritized higher than older people; handicapped people, homosexuals, religious people immigrants or others who deviate culturally from established norms still represent vulnerable groups. As for men and women, intransparencies are huge. It is clear, though, that 'mothers' and 'transsexuals' are given special attention.

It is a social structure which celebrates a particular idea of 'the normal life'. The normal life implies the realization of the full-grown working life, full-grown memberships of systems of rights, full-grown societal integration, institutionally, mentally and politically, and the full-grown family life. The normal life is not essentially about 'culture', it can be realized in many different places. Nor is it essentially about level of income or about the kind or amount of work carried out (although these elements certainly play their parts). The 'normal life' is essentially about the belonging to different communities which can be qualified as institutional orders.

Since there is no alternative vision implied in the social structure, only deficient realizations of the normal life, we may indeed say: *These communities constitute the destiny* for all those subjected to the law we have dealt with. For the same reason, we are confronted with a social structure which is not without totalitarian aspects. I do not mean 'totalitarianism' in the sense that there is no way out. The lives of the excluded or ignored are lives 'outside' or on the border of the social structure. A person may even choose a life among the excluded or ignored. But in a deep conceptual sense, we are facing totalitarianism. The normal life represents the only reward as well as the only contribution within the hierarchical structure. From the point of view of this structure, all other lives are deficient lives, shadow-lives; we are conceptually blinded with respect to their nature.

The social structure of the ideal order is not only a hierarchical structure, it also contains fluid aspects. But also these aspects are destiny bound aspects. They are so in a double sense: They represent *transhistorical aspects of destiny*, and as such, they relate to the 'normal life' which constitutes the *contemporary destiny* of the social structure.

The fluid aspects of the social structure are due to the fact that a large number of the non-discrimination rights we have dealt with are not granted to pre-defined right-holders. Precise definitions of rights-holders in the form of fixed categorizations only arise in connection with the particular applications of the law. But also the rights

themselves are elusive - because of deep conceptual problems, unclear 'escape routes' as far as the principle of non-discrimination is concerned or because of logically creative interpretations. Certain general fixations of right-holders, concepts and logics have arisen within the case-law (this is practically inevitable), but fundamentally, the non-discrimination rights in question are 'free' in the sense that they are not bound to any designated right-holders or conceptually defined discrimination grounds or in the sense that they are logically flexible.

The fluid aspects of the social structure were qualified as trans-historical aspects of destiny. They concern aspects of human life - 'racial or ethnic origin', 'age', 'disability', 'sexual orientation', 'religion or belief' and 'sex' - which have, throughout European history, been inescapable in a threefold sense: they have been inescapable as such, in their particular manifestations and in terms of cultural significance. These transhistorical aspects of destiny have the form of *event or occurrence*, and they strike as *individual and collective destiny*. In contrast, the hierarchical aspects of destiny, culminating in the idea of the 'normal life', are *contemporary*, have the form of *regularity* and strike as *collective destiny*.

In the ideal order, the present cultural significance of the transhistorical aspects is meant to be either eliminated or adjusted so that they will not prevent human beings from *being part of the destiny of today* - the particular communities of citizenship, work and family. It is important to note, though, that the transhistorical destiny aspects remain. Only not as fixated; due to their fluid nature, they will continuously show new faces, appear in ever new particular manifestations

The fluidity of the transhistorical aspects of destiny certainly implies a liberating element: No particular groups of people are stigmatized by being defined in general as potential victims of discrimination. In addition, non-discrimination law becomes extremely flexible - capable of capturing, in principle, a manifold of different and even unpredictable forms of discrimination. But the fluidity also enhances the never-ending nature of that presumed discrimination by emphasizing the unfixable and ever-developing nature of it.

The fluidity also means that the individual is alone with his or her destiny. Not only is it individuals who are struck by the transhistorical aspects of destiny. There is no general conceptualization of how they are struck. The destiny of the individual is essentially *particular*, so particular that it is not fixated in general.

An order lacking overall purposes, but which is not without a human foundation

The ideal order appears to be lacking overall purposes. Substantially, it consists in the different communities which make out the foundation of the 'normal life' and which can be qualified as institutional orders. Those communities or orders all center around the labour market as a purpose. But we have not been able to see what the labour market means *as an overall purpose* (and not merely as an institutional order). No other overall purposes have been detectable, neither of the state, nor of the EU.

We shall return to the issues of overall purposes in a little while. But before that, it shall be emphasized that even if the ideal order seems to be lacking an overall purpose, it is not without foundation. On the basis of an analysis of a constellation of concepts - 'dignity', 'private life', 'privacy' and 'decency' - with respect to the various appearances of those concepts in the law, we were able to establish that the existence of a common human foundation is indeed presumed by the law. This human foundation can be characterized according to three complementary perspectives.

The first perspective, springing from the concept of 'dignity', provides us with an almost entirely negative characteristic of 'a human foundation'. It centers on the concept of 'independence'. 'Independence' only means 'not being completely dependent'. Human beings cannot be completely owned, completely controlled or determined. Something remains which cannot be captured completely. This something is however not a self.

The second perspective, springing from the concept of 'private life', tells us that human beings are fundamentally deeply interwoven with one another. Our connectedness and interwovenness is not only due to various means of regulation; we are fundamentally bound together.

The third perspective, springing from the concepts of 'privacy', 'private life' and 'decency', seen in the light of presumptions as to the existence of fundamental differences between the sexes implied in the law, qualifies the human foundation in terms of a striving self relying on being one sex in contrast to the other sex. That is, in order to be a civilizational self, a more fundamental self is needed, something which breaks free of the amorphousness which would otherwise be the result of our complete interwovenness. This fundamental self is not an autonomous and integrating self, it is a self which is separable and recognizable as a body.

All three perspectives provide us with characterizations which must be seen as conditions for the becoming of 'the civilizational self', subjectable to law, a self which

can be named and regulated. This human foundation is both presumed as a foundation of law, as it is presumed to be something which is violable and accordingly needs protection and/or positive establishment by the law. Family, sex and sexuality, the home, the naked body and physically intimate activities all play important, but ambiguous roles in this connection. They are both symbols of that which needs special protection, as they are symbols of that which threatens the foundation. This ambiguity is due to the fact that they are symbols of our deep connectedness with each other, but hereby they also threaten the distinctions upon which the striving self relies and they constitute complexities for the realization of independence. Likewise, they are symbols of spaces or situations in which the 'masks fall of'. As such, they point simultaneously to the strengths and the weaknesses of the civilizational self: its dynamic and flexible nature, but also its fragility.

We were able to qualify the common human foundation according to yet another perspective, derived from ECtHR-judgments concerning religious freedom. The common human foundation can be qualified as a spiritual foundation, but in a poor sense.

Human beings are assumed to possess some sort of reflexive and interpretative capabilities. These capabilities can be connected to what I have called 'individual integrations', that is, crosscutting and overall perspectives in relation to the social order in which a person lives. We distinguished between different kinds of individual integrations. 'Thought and conscience' would constitute the most general level, corresponding to particular and possibly fragmented integrations, more or less conceptually developed, and more or less conscious. 'Believing' in the broad sense of the word would make out the next level. Finally, 'particular beliefs' would constitute the highest level of individual integrations; comprehensive understandings of the world would be at stake.

The law we have dealt with only implies that human beings in general possess reflexive and interpretative capabilities in the most modest sense - as 'thought and conscience'. 'Believing' is not presumed to characterize human beings in general. In addition to that, 'thought and conscience' (just like 'believing') is ascribed to a presumed 'inner individual' rather being seen as the manifested capabilities of a social individual. This means that any powerful potentials are amputated. Had that not been so, the common human foundation could have been qualified as a striving self which is fundamentally involved in interpretative endeavors, passionately and reflectively,

constructively or destructively, or both. In stead, we are left with only indications of such potentials.

The common human foundation is inscribed in a universal logic in the sense that it represents an order which is meant to be instituted by the law, but which has always existed, also before and independently from the law. This universal logic can be captured by what I have called the inviolable-violable-paradox: the human foundation is inviolable in the sense that it has always existed and always will exist; yet, it may be violated for which reason it needs protection by human law.

In this sense, the presumption of a common human foundation, as implied in the law, constitutes an 'Interzone' between a presumed order and an ideal order; it neither belongs to one or the other, but to both. But I have also chosen the word 'Interzone' for another reason. In the writings of William S. Burroughs, 'Interzone' refers to a mental state as it refers to physical places. The 'Interzone' is a place and a state which everyone can enter, no matter their nationality, their history (including the crimes they have committed) or their possible non-identity (in a legal as well as social and psychological sense). In fact, the 'Interzone' is in particular a place and a state for people who have no context. The 'Interzone' is on the one hand characterized by complete stasis: nothing happens and nothing will happen, no meaning beyond survival and immediate pleasure will ever arise. On the other hand, it is haunted by continuous transformations: bodies disintegrate, bodies melt together so that they become inseparable, bodies are violated; human bodies, sexual organs, animals, money and drugs are part of a constant flow of exchange; human language either crumbles or explodes in cascades of disjointed sentences; logics are dreamlike and associative - to the extent that they exist at all.

Certainly, it is a provocation: to use Burroughs' 'Interzone' - a place and state of addiction and abuse - as a symbol of the common human foundation implied in the law we have dealt with. But the symbol is honestly meant.

The common human foundation we have derived from the law appears to us as a pure condition of civilization. That is, it reveals to us what must be assumed about a human being so that he or she may be named and regulated. This common human foundation can be described as a state in which bodies and sexes are hardly distinguishable. An actual 'self' does not exist, neither in a physical or spiritual sense; only a 'striving self' exists, marking a movement towards a condition of separable and recognizable bodies while being simultaneously interwoven with other 'striving selves' and being the

expression of a kind of ungraspable, irreducible life. This 'striving self' is characterized by spiritual capacities, but they are reduced to a minimum, they stiffen and crumble in the 'inner individual'. - I find that Burroughs' 'Interzone' does indeed constitute an accurate and powerful symbol in this connection: In the 'Interzone', human interactions are devoid of meaning, they are pure exchanges; but a dream logic creates a space which both resembles and does not resemble the civilized world.

In other words: The common human foundation does not represent an 'autonomous' or 'free self', and far less a moral self capable of meeting and considering other selves. We are not even facing human forces of some kind that wants something, seeks for something. Except for civilization as such. The common human foundation constitutes nothing but a foundation of naming and regulation - although as such, it transcends civilization.

In spite of its complexity and conceptual richness, this human foundation is a poor foundation. In a sense, it represents a much more pessimistic anthropology than the 'natural state' envisioned by Hobbes - or any metaphysical presumption of a 'will to power'. But apart from being poor, it is also clear that we cannot derive any purposes from this foundation. So, even if it is inscribed in a universal logic which means that it represents something which is presumed to be hugely precious and which needs protection and *in this sense* constitutes a purpose of human law (more precisely, a purpose of fundamental or human rights), it does not give rise to any purposes of the ideal order as such. It constitutes nothing but a condition of possibility for the ideal order.

An order based on weak particular rights, but a very powerful concept of rights

EU social rights are predominantly non-discrimination rights. Accordingly, the ideal order we have constructed centers on non-discrimination rights. However, substantial rights play an important role in connection with the discrimination ground 'nationality' - and some of these rights are fundamental EU-rights - and a minor role in connection with the discrimination ground 'sex'. Fundamental rights play a certain (actual and potential) role in connection with all of the discrimination grounds, but only as interpretational aspects of those rights, not as independent rights.

We have found that in many ways, non-discrimination rights are weak rights. They are formal rights in the sense that they depend entirely on the existence of national

substantial rights. They do not formulate any content themselves; their function is to give access to certain national substantial rights.

When digging deeper into the peculiar formal logics of these rights, another fundamental problematic comes into sight: non-discrimination rights presuppose that a certain level of equality already exists. This is due to the fact that non-discrimination rights depend on comparisons between two situations which are similar, only not with respect to the single aspect which the non-discrimination right in question concerns. This problematic can also be called 'the problematic of multi-layered discrimination'. The forms of discrimination at issue are obviously deeply socially rooted forms of discrimination, and they are likely to give rise to a range of other differences (like differences of education, social status, patterns of behavior etc) - meaning that many cases of discrimination will not be capturable by non-discrimination rights because the existence of 'comparable situations' cannot be established.

Lastly, non-discrimination rights are weak rights because 'justification of discrimination' plays an enormous role in connection with these rights. Discrimination is not just forbidden, it is also largely accepted. This problematic is as fundamental as the other two. The social order in which we live brings together so differentiated forms of regulation that a rigid prohibition of certain forms of discrimination which have so far been relatively dominant would generally be problematic from the point of view of the functioning of the social order. For this reason, the law provides for multiple 'escape-routes'.

However, when all this is said, we have seen that *some* of the non-discrimination rights we have investigated have been developed into quite powerful rights (in particular the non-discrimination rights of EU-citizens in relation to the discrimination ground 'nationality', but also some of the non-discrimination rights relating to the discrimination ground 'sex'). But also in connection with those non-discrimination rights which are still weak (related to the discrimination grounds 'racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief'), we have seen that the CJEU has, in particular cases, been able to compensate for their weaknesses.

More precisely, we have seen that the CJEU has developed a variety of interpretative methods which can be seen as different 'answers' to the fundamental problematics characterizing non-discrimination rights. These different ways of meeting the problematics are certainly not capable of eliminating them. To a large extent, they only serve to modify the consequences of the problematics, and as far as some of the

'answers' are concerned, only under particular (and rare) circumstances. But what is interesting is that a very strong *concept of rights* has been developed on the basis of the weak non-discrimination rights.

First of all, it should be recalled how differentiated the non-discrimination rights in question are. I have distinguished between three overall kinds: as-if-rights, non-significance rights and determinately reduced non-significance rights. They can be qualified as follows. As-if-rights are attributed to names and imply that *'the right-holder shall be treated as-if he or she was in another situation than he or she actually is*. Non-significance rights are attributed to non-names, and their logical formula would read: *'The aspect of 'racial or ethnic origin'/'age'/'disability'/'sexual orientation'/'religion or belief' shall be insignificant within a certain area of rights'*. Determinately reduced non-significance rights are granted to the double-names 'Man in contrast to being woman' and 'Woman in contrast to being man', and they imply that *'the aspect of 'being one or the other sex' shall be insignificant within a certain area of rights'*. The three overall kinds of non-discrimination rights give rise to a large number of variations as well as modified versions. In addition, we have seen that the CJEU will sometimes combine different logics of rights within the same judgment.

But not only have non-discrimination rights been developed into highly differentiated rights (which means that the fundamental tension between specification and fluidity regarding the nature of the right-holders is unfolded according to a rich spectrum of variations), the CJEU has also developed them with respect to the fundamental problematics which adhere to all of them. These developments include alterations by which the material scope of the rights is extended, the comparability-logic is 'stretched' or new logical dimensions are added; complementary measures in the form of content rights or alternative kinds of non-discrimination rights such as the right to 'positive discrimination' and the right not to be subjected to 'indirect discrimination' and logically creative ways of establishing and combining different standards of comparison. These logical alterations and complementary measures rely, however, on the support of fundamental EU-principles and rights as well as fundamental rights. Moreover, developments include the establishment of EU-concepts and conceptual criteria as well as stabile interpretational horizons comprising the purposes of the ideal order.

By virtue of these developments, the concept of 'rights' as such has become extremely powerful. Not in the sense that non-discrimination rights in general have become

powerful. As already stated, the particular non-discrimination rights are only moderately strengthened, some more, some less. No, the concept of 'rights' as such has grown powerful because all of the 'answers' of the CJEU to the fundamental problematics bear witness to a certain 'metaphysication' of the concept of rights, that is, a meaning of the right which goes beyond the particular rights. They are all expressions of the idea that rights 'should not be rendered meaningless' due to technical or literal interpretations. And some of them are even expressions of a 'second-order' thinking in relation to rights, a 'right to one's right'-logic.

It should be born in mind, though, that the 'metaphysication' of the concept of rights depend on EU-principles and rights and fundamental rights, EU-concepts and conceptual criteria, EU-purposes and ultimately on interpretational horizons. And all of these elements depend, in their turn, on certain institutional orders which are presumed to exist prior to the law we have dealt with, but which are also qualified by that law. More precisely, the fundamental interpretational elements and the fundamental institutional orders are deeply intertwined in one another. The interpretational elements cannot be seen independently from the institutional orders; they are expressions of particular understandings of those orders. And the institutional orders gain their particular qualifications through the interpretational elements.

This brings us to the fourth and last feature of the ideal order.

Institutional orders make out the essence of the ideal order

The ideal order depends on particular institutional orders. In fact, I have argued that these institutional orders make out the very essence of the ideal order. As we have seen above, the 'normal life' which makes out the contemporary destiny of the social structure which can be derived from the law we have dealt with essentially concerns the belonging to certain fundamental institutional orders. And the 'metaphysication' of the concept of rights depends on a range of interpretational elements which, in their turn, depend on the presumption and particular qualifications of institutional orders. - Also the common human foundation is to some extent connected to particular institutional orders. Especially the order of the 'Family' interplays ambiguously with that foundation. It should be emphasized, though, that the common human foundation transcends the existence of particular institutional orders in the sense that it constitutes foundations of the civilized self as such.

I have identified six institutional orders which are presumed to exist prior to the law - and which are presumed to constitute fundamental institutional orders in the sense that they constitute the basis for other institutions, are characterized by particular logics and need no justification as such. I have called these six institutional orders 'anchors of order'. They are the following: the 'National Labour Market, the 'National Welfare Systems, the 'Employment Relationship, the 'Internal Market', the 'Family' and the 'State as One'. Crucially, these anchors of order and their basic logics are not just presumed to exist prior to the law - as foundations without which the ideal order could not be realized. The presumed anchors of order are also altered by the ideal order in the sense that the presumed basic logics are qualified in the ideal order. These qualified institutional logics make out the essence of the ideal order.

I shall return to these qualified institutional logics in a short while. As far as concerns the overall role of the anchors of order within the ideal order, it should be emphasized that they all center around the labour market as a purpose. However, since we have not been able to see what the labour market means *as an overall purpose* (and not merely as an institutional order), the six anchors of order do not appear to constitute an integrated entity - even though it is clear that they are closely related to and partly depending on one another. The state does not play the role of an integrator, either. For these reasons, a particular scenario of danger arises from the substantial midst of the ideal order: Potentially, it is threatened by any overall perspective cutting across the various meanings of the six anchors of orders and establishing a meaning or lack of the same beyond them. In short: it is potentially threatened by individual integrations and deconstructions of the order as a whole.

A confirming or progressive order?

Tensions between the ideal and the presumed order

On the basis of these characteristics of the ideal order, it is possible to conceptualize it in the light of the presumed order, that is, in the light of the basic temporal tension characterizing every human law - the tension between the world as it is presumed to be was it not for the law and the ideal order meant to be realized by the law.

The ideal order is neither revolutionary, nor conservative. It does not seek to break with all existing laws and institutions, but builds extensively on established orders; but it is, none the less, a 'new order', an order in its own right. Let me sum up the confirming

features of the ideal order as well as the progressive, so that we shall be able to see in exactly what way it does indeed constitute a 'new order'.

First of all, the ideal order is *progressive* in the sense that it breaks with historically deep-rooted forms of discrimination which are still highly influential in contemporary society. However, it should be noted that those forms of discrimination represent past structures of power which still live on in contemporary societies, rather than contemporary structures of power. Discrimination which relates to language, property, education, competences, personal appearance, working experience, social status or income is not prohibited. This is not surprising; non-discrimination law in relation to such factors would only be possible if part of a revolution, a radical society change. But we should be aware that those discrimination grounds which are the most influential today, are neglected by the law.

Furthermore, the ideal order is progressive due to the fact that an extensive regime of rights has been developed. However, differences are huge within this regime. In relation to the discrimination ground 'nationality', quite powerful non-discrimination rights have been developed, supported by fundamental EU-principles and rights, EU concepts and conceptual criteria and interpretational horizons which are so closely intertwined with those principles, rights and concepts that they are difficult to visualize as such. But there are also weak non-discrimination rights in relation to this discrimination ground. As far as the discrimination ground 'sex' is concerned, logical inventiveness and contextualizing strategies of interpretation, based on fundamental EU-principles as well as interpretational horizons characterized by an unresolved tension between fundamental and historically changeable aspects have developed non-discrimination rights into a mixture of strong and unpredictable rights. Non-discrimination rights with respect to the grounds of 'racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief' are still largely undeveloped. Interpretational horizons play a crucial role, but they do not do so in connection with fundamental principles or clarified EU-concepts or EU-criteria - which bears witness to the fact that they do not constitute stabile, established horizons.

Due to their formal nature, non-discrimination rights depend on the interpretational elements outlined above: fundamental EU-principles and rights, fundamental rights, EU-concepts and conceptual criteria and stabile interpretational horizons, comprising EU-purposes. Whenever all of these elements are in play, non-discrimination rights tend to be relatively powerful; whenever none or only few of these elements are

developed in relation to particular non-discrimination rights, these rights tend to be extremely fragile. We should be aware that the border between 'flexibility' and 'uncertainty' is delicate. Non-discrimination rights which have the logical form of non-significance rights (attributed to non-names) are extremely flexible. But since they are hardly supported by any of the mentioned interpretational elements, 'flexibility' becomes 'uncertainty'.

It should be noted as well that the formal aspect of non-discrimination rights must be respected. If it is undermined completely (by way of logical creativity and contextualizing interpretation), non-discrimination rights as such are undermined, and arbitrariness reigns instead. The principle of 'substantive and not formal equality' which dominates non-discrimination rights with respect to 'sex' is potentially dangerous in this respect.

The regime of rights implies a certain 'metaphysication' of the concept of rights as such. This 'metaphysication' depends on the same interpretational elements as does the strengthening of the particular rights. Indeed, it is always mediated through interpretations of particular rights. Yet, it should be seen as something different from them. What is at stake is a certain meaning of 'rights' which goes beyond the particular rights, a certain metaphysical idea according to which 'a right' implies 'a right to the right', the idea that a 'right' should be able to withstand all sorts of erosions, whether they come from contractions inherent in the particular right itself or from external pressures. This metaphysical idea shines through the particular interpretations of particular rights, some times strongly, other times weakly or hardly at all. However, it is never manifested in a full and absolute sense - for which reason it is crucial to distinguish between this idea and the particular rights, the strong rights as well as the weak rights.

When considered as social means, non-discrimination rights are progressive in the sense that they do open for the possibility of substantial transformations in the lives of the right-holders. The as-if-rights which are granted in relation to the discrimination ground 'nationality' concern the possibility of *national replanting*, the possibility of unfolding the 'normal life' in a different place. The non-significance rights granted in relation to the grounds 'racial or ethnic origin', 'age', 'disability', 'sexual orientation' and 'religion or belief' circulate around *freedom from cultural destiny*, whereas the determinately reduced non-significance rights, as-if-rights and non-significance rights granted in relation to the ground of 'sex' circulate around *adjustments of cultural destiny*.

However, when considered as social means, non-discrimination rights are also deeply embedded in those aspects of the presumed order which they were supposed to eliminate or 'combat'. As-if-rights are based on *imagination, simulation or 'false translation'* (the right-holder shall be treated as-if he or she was in another situation than he or actually is). Non-significance rights place human beings in *an endless destiny-battle* - a battle which involves the continuous fighting against ever new manifestations of the transhistorical destiny aspects. And determinately reduced non-significance rights place human beings in *a destiny battle which involves the continuous fighting against manifestations of destiny aspects which fundamentally can neither be changed nor varied*.

These were the progressive features of the ideal order - all of them ambiguous, though. The confirming features of the ideal order, on the other hand, spring from the fundamental problematics of non-discrimination rights outlined above.

The ideal order is *indirectly positively confirming* in the sense that non-discrimination rights depend on the content of national substantial rights; that is, they reproduce national rights and hereby national hierarchies and various forms of discrimination.

The ideal order is *negatively confirming* in the sense that the manifestation of the principle of non-discrimination is subjected to severe limitations, due to limitations of material scope, exemptions and possibilities of 'justifying discrimination' provided for in the law. This means that a range of discrimination issues are left untouched by the law.

The ideal order is also *negatively confirming* in the sense that many (if not most) cases of discrimination will not be capturable by non-discrimination rights; as explained above, the functioning of non-discrimination rights requires that a certain level of equality already exists (otherwise, the existence of 'comparable situations' cannot be established).

Finally, the ideal order is simultaneously *directly positively confirming* and *progressive* in that it relies on the existence of national institutional orders, including certain general logics, but also alters the understanding of those orders by qualifying their logics. Likewise, the ideal order reproduces and creates conceptual fundamental assumptions as to the nature of human beings.

As already stated: the qualified institutional orders make out the very essence of the ideal order. The regime of non-discrimination rights depend on certain interpretational elements which, in their turn, are expressions of particular understandings of

institutional orders. And the possibilities opened by non-discrimination rights all circulate around the realization of the 'normal life' which constitutes the contemporary destiny of the ideal order and which essentially consists in the belonging to those institutional orders.

Accordingly, we shall conclude that the 'ideal order' is, essentially, a new order due to the particular qualifications of the six anchors of order on which it relies, including the fundamental assumptions pervading them. Also, it is a 'new order' by virtue of its highly flexible and logically creative methods of interpretation based on certain fundamental interpretational elements - EU-principles and rights, fundamental rights, EU-concepts and conceptual criteria, EU-purposes and horizons - which, however, are deeply intertwined with the six anchors of order, are expressions of them. Finally, the 'metaphysication' of the concept of rights as such constitutes a significant progressive feature of the ideal order.

In other words: The ideal order is not so much a 'new order' by virtue of the particular rights it entails; these rights are haunted by severe limitations and fundamental problematics. First and foremost, it is a 'new order' because of the conceptual creations which 'lie behind' the particular rights, so to speak - the interpretative methods and elements by which they are sought realized, the metaphysical idea of 'rights' shining through those realizations, the fundamental assumptions regarding the possibility of the civilizational self as such and the particular qualifications of the institutional orders within which the particular rights are presumed to gain their social meaning.

Reflecting the totalitarian implications of the lack of overall purposes - and the totalitarian implications of the formulation of purposes

As it appears, we are left with an ideal order which is lacking an overall purpose. Or more precisely, the labour market plays the role of an overall purpose in that the six anchors of order all center around the labour market, when considered from the perspective of the various interpretational horizons which dominate the law we have dealt with. Those horizons circulate around *subjective conditions of the labour market*, *objective contradictions of the labour market* and *the temporal complexity of the labour market with respect to the relationship between institutional transformation and fundamental conditions*. However, although the complexities of the labour market have thus been richly presented to us (both in terms of the meaning of the labour market as an institutional order, in terms of complexities which concern the relations between the

labour market and other institutional orders and in terms of the relationship between the labour market and fundamental assumptions as to the difference between the sexes), we have not been able to see what the labour market means *as an overall purpose*.

For this reason, a particular scenario of danger arises: The ideal order is potentially threatened by individual integrations and deconstructions of the order as a whole.

Two different kinds of objections could be raised in relation to this problematic. Firstly, it could be argued that we do not need any 'overall purpose'. It is sufficient that we are confronted with a range of particular purposes that characterize the particular institutional orders as well as the interplay between them - like the purpose of 'free movement' characterizing the 'internal market', the purpose of 'improving the conditions of workers' central to the orders of the 'labour market', the 'employment relationship', the 'welfare systems', the 'family' and the relations between them. It could be said that even if this would indeed open for a scenario of danger, this scenario of danger must be seen as a necessary implication of an ideologically open society, a society in which no particular overall purposes are imposed on people, but in which they are free to formulate their own overall purposes, to 'fill out the empty space', to name their own gods.

My answer would be that a social order does need overall purposes. Not necessarily *one* overall purpose, rather several, or at least *more than one*. But crucially, a social order needs purposes which are not merely purposes that correspond to the different institutional orders, but purposes which cut across those orders and which have an integrating nature.

Let me emphasize, as I did in the Introduction, that the issue of overall purposes should not be seen as an issue of 'identity'. On the contrary. The concept of 'identity' implies 'being identical to one-self', 'being one-self and not another', 'being in accordance with what one essentially is'. To the extent that an ideal social order could be said to possess an 'identity', that is, 'be identical to itself', it would mean that it had accomplished what it was meant to accomplish, that no tension existed between that ideal order and the ideals implied in the ideal order. 'Identity' means 'self-confirmation', indeed tautological self-confirmation: 'I am what I am because this is what I am'. It is the presumption of this work that an order needs to be un-identical to itself. The ideals implied in it should not be reducible to the ideals which are manifested in the order. Even if they should relate to the manifested ideals, they should be regulative ideals as well, ideals which never will and never can be fully realized by

that order. As such, they would function as critical correctives within that order, continuously reminding us that law and institutionalization is not 'justice', - at best, law and institutionalization strives towards justice.

It should be recalled that a social order will never be ideologically neutral in any case. The lack of overall purposes does not free an order from being ideological. On the contrary, it may very well support the ideological dimensions to the extent that it leaves us with no tensions between the normativity of the order (which is inevitable) and *something else*, the idea that things could be *otherwise*. As unfolded above, the ideal order which we have constructed is not without totalitarian aspects. The existence of overall purposes which could give a glimpse of other kinds of lives than the 'normal life' or other dimensions of the 'normal life' could open the order towards possibilities of self-reflexion, self-criticism and possibly even substantial transformations.

But naturally, the formulation of overall purposes also implies the risk of totalitarianism, even if they stand in a tensional relationship to the ideal order itself. The proclamation of a 'god' - be it a transcendent god or an immanent, secular god - is the same as abolishing the meaningfulness of other gods, unless they can be subordinated the proclaimed god, translated into the proclaimed god or otherwise understood within the conceptual horizons of the proclaimed god. As unfolded in chapter 2, those philosophers who are most intensely occupied with the non-identifiability of established social order and 'justice' are all negative philosophers in the sense that they would warn against any positive definition of justice. Adorno seeks to establish a 'negative dialectic' in which we may sense and acknowledge the 'non-identical' - without ever conceptualizing it. Derrida seeks a language and a conversation with 'ghosts' in singular moments which are neither real nor unreal, neither actual nor virtual, neither existing nor non-existing. Bloch works through fragments of compacted meaning - riddles, enigmas, paradoxes - and finds herein glimpses of hope and utopia. Not only does 'justice', hope and ethical responsibility stand in stark opposition to established social orders, according to these philosophers, it is also so that 'justice' cannot be positively defined. As soon as it is defined, it is lost. It will have become a new center of power and repression. There is a peculiar temporal logic to 'justice': it can be sought only beyond time and language.

On the other hand, if it is so that a social order needs overall purposes in order to be non-identical with itself, those purposes should also somehow reflect the social order in question, negatively as well as positively. Otherwise, they would not be overall

purposes *of that order*. And some kind of conceptualization of those purposes would be necessary as well, however open or dynamical or even enigmatic.

This is the unescapable dilemma confronting us: to seek 'justice' only beyond time and language, in moments of absolute singularity, which means that the ideal order as such will be lacking the possibility of being non-identical to itself and thus the possibility of critical self-reflexion, - or to seek to establish positive overall purposes reflecting the ideal order which means entering the road of ideological totalitarianism.

The other objection which could be raised in relation to the problematic of 'purposes' would come from an entirely different position, namely from the position of a 'value'-thinking. It could be argued that the ideal order is not lacking overall purposes, that such purposes are given in the form of the 'universal values' of 'democracy', 'human rights' and 'rule of law'. These values are stated in the Treaties, and they constitute ideals which are sought realized in all member states and in the EU as such (and to the extent that they are not sought realized, it is being problematized and criticized).

My answer would be that 'democracy', 'human rights' and 'rule of law' certainly could constitute overall purposes of the ideal order - but not simply because it is claimed that they do. We would have to consider the meaning of those principles within the ideal order (and not just their meaning as abstract principles) in order to establish whether these principles are reflected by the ideal order as such, and whether this reflection implies the presence of ideals which will never fully be realized by that order. In other words, do these principles merely constitute foundations and means of the ideal order, - or could they be seen as purposes as well?

The concept of 'values' has been heavily criticized in this work. In particular, I have argued that 'values' cannot be universal. They are pure normativity and expressions of immediate subjectivity; they are without foundation and imply a certain kind of positivism: 'we believe in these values because we believe in them'. They border on relativism and even nihilism. Whereas the concept of 'identity' implies the tautological self-confirmation of that which is, the concept of 'value', in contrast, floats freely without any bonds - it is no more bound to the ideal order than it is to any metaphysical foundation.

Being a free-floating normative entity, a 'value' could, of course, be seen as something which stands in a tensional relationship to a particular social order. However, it would still be an expression of pure subjective normativity. When considered as an ideal, a value undermines itself by virtue of its own gesture. The self-contradicting expression

of 'universal values' (which is dominant today, and not just in the EU) can only be the symptom of a deep disorientation with respect to the issue of overall purposes.

III. Locating the immanent openings of the ideal order

So, we shall need to reflect the problematic of the lack of overall purposes in the light of the essential characteristics of the ideal order. That is, we shall seek to establish what the 'labour market' as an overall purpose could possibly mean, - just as we shall consider whether any other overall purposes might spring from the ideal order, especially purposes related to the 'state as *one*'. We shall be crucially aware of the inescapable dilemma described just above. Overall purposes might be negative in the sense that they reject the logics of the ideal order (but still be reflections of the ideal order). They might even border on paradoxicality, on utopia, on the impossible. They might also be positive in the sense that they bring together various aspects of the ideal order. Or they might waver between the two.

The six anchors of order make out the essence of the ideal order. Accordingly, we shall recapture the qualifications of their basic logics, as developed in the last chapters of the dissertation. These qualifications have arisen as a result of our attempts to answer the eight ghosts who emerged from the analysis of the basic logics of the orders. Even if we did indeed answer the eight ghosts, the answers were not that altogether satisfying. They generally described unhappy logics of some sort - logics based on relationships of opposition, on asymmetrical mediations between individual and common aspects, taboos, discrimination, tensions between fundamental and particular aspects, lurking violence, danger and paradoxicality. In truth, new ghosts and new questions already vibrate within the answers.

In this sense, the ideal order is not closed in on itself; it is not self-sufficient and self-confirming. It is not identical with itself; even if we had wished to establish an 'identity' of the ideal order, it would not have been possible. It does indeed - even if only negatively - open up to the possibility of overall purposes which would reflect it while simultaneously standing in a tensional relationship to it.

It should be emphasized that these last reflexions as to the possibility of establishing overall purposes of the ideal order have a different status than all the previous reflexions. With respect to the question of overall purposes, we cannot get any further on the basis of the law we have dealt with. As concluded by the end of part II, we are left with an overall purpose, namely the 'labour market', the nature of which as a

purpose we cannot see; we are left with a state without integrating capacities and without ideological foundation; and we are left with six anchors of order bursting with new ghosts. - However, we may engage in some last reflexions which seeks out the *potentials* of the law we have dealt with, reflexions which dive into the unhappy conditions and paradoxical features of the six anchors of order in order to locate the immanent openings of the ideal order.

The qualified logics of the six anchors of order

The qualified logics of the six anchors of order can be summarized as follows:

The '**National Labour Market**' is constituted by a relationship of opposition (between the parties of the labour market) which cannot be transformed or redeemed. This relationship of opposition is inclusive, meant to integrate everyone. In addition, it is a crippled relationship of opposition in terms of the means by which it unfolds.

The relationship of opposition is tragical because it implies the collision of two logics. Due to the fact that the interests of the parties are basically 'divergent and legitimate', no true reconciliation can ever be reached, only compromises. But simultaneously, the parties are continuously driven towards each other. If a true reconciliation of the interests of the parties were indeed obtained, then it would mean a violation of the interests of parties. Their fundamental legitimacy as divergent would have been abandoned. The relationship of opposition is also tragical because it implies a blindness; essentially it depends on the 'balances' which happen to be established.

Consequently, the relationship of opposition is characterized by a split temporality. It is both defined as a relation which is strangely disconnected from history - a relation which will eternally remain the same. In this sense, the relation of opposition is like a satellite which has been launched into space and hereafter stays in its orbit. Simultaneously, however, the relationship of opposition is defined as a relation which is time-bound to an extreme degree in that it, in its particular manifestations, can only reflect what happens to be the outcome of the relationship at a given moment in time.

The national labour market is both seen as a 'natural balance' as such, but also as a 'natural balance' created by the state. The role of the state in this respect is to create a temporality for the labour markets which can be defined as a temporality in-between the historically disconnected satellite-temporality and the extremely earth-bound temporality. In other words, the role of the state is to create for the labour market a

substantial history (remembered and kept alive) as well as substantial developments. However, the state fills out this role with very moderate means - securing flows and exchange in the work force along with rewards of stability and loyalty.

Finally, we were able to qualify life within the labour market in contrast to life outside of it. In life within the national labour market, a person cannot relate to him- or herself as a purpose, but must relate to the labour market as a purpose. Life within the labour market is the manifestation of deep societal integration, as well as social reality - but it is characterized by the repression of 'individual integrations'. In contrast, life outside of the labour markets is life in which a person is his or her own purpose and in which individual integrations might possibly find spaces of manifestation. But it is life in which social integration and social reality is lacking. In other words: we might say that a person outside of the labour market is liberated into individuality - a free determination of life purposes and a free unfoldment of interpretative capabilities - but that person would be emptied of social material through which that individuality could be manifested.

The basic logic of the '**National Welfare Systems**' - a membership-integrating rights-and duties logic - is qualified by a particular conceptualization of 'social assistance' in contrast to social security.

Social assistance is essentially a safety net, but not just for the sake of the receivers. Social assistance protects society as a whole against that which lies beyond civilization. Due to social assistance, society will not need to witness those states of human existence in which human beings are not recognizable as human beings anymore, but only raw life and existential battle is left. Social assistance guards society against chaos - the state of physical and mental dissolution in which institutionalization as such would fail.

The qualification carries with it two glaring expressions of discrimination.

Firstly, receivers of social assistance are regarded as possible subjects of civilization, like everybody else, but they are excluded from the rights-and-duties-logic in so far as it means 'membership' and 'integration'.

Secondly, the concept of social assistance is - presumably, at least - applied differently depending on whether the receiver is an 'EU-citizen' or a 'Third Country National'. As a result, a parallel institutional order arises - implying that 'Third Country Nationals'

are always closer to the threshold of civilization, to the point of chaos at which institutionalization as such will fail.

In relation to the '**Employment Relationship**' we examined the relationship between the employment relationship itself - presumed to be a 'relationship of subordination' in the form of a particular event - and the memberships to which it leads, namely memberships of the Labour Market' and of the 'National Welfare Systems'.

The connections between the individual phenomenon of the employment relationship and the orders of membership and integration turned out to be marked by one-sided mediations. There is no reflection in the individual employment relationship of the overall concerns underpinning the order of the 'national welfare systems'. In contrast, in the order of the labour market, there is no reflection of the logic of the individual employment relationship. In the first case, we lack a reflection of the aspect of the 'common' in the aspect of the 'individual'; in the second case, we lack a reflection of 'the individual' in the 'common'.

In other words, from the perspective of the individual employment relationship, the order of the labour market constitutes the crucial order of common, overall concerns, whereas the overall concerns of the order of the 'national welfare systems' are repressed. The employment relationship itself is really nothing but an event - a particular instance of the logic of the labour market, never a purpose in itself.

The basic logic of the '**Internal Market**' - a minimal logic of exchange of entities carrying economic value - was both qualified and challenged.

On the basis of a consideration as to the possible compatibility between the logic of exchange and the principle of 'free movement of people', we found that if 'free movement' shall both be a manifestation of freedom on behalf of the people and of the market, then we must presume that the logic of exchange does not have the nature of a natural law - that it either unfolds chaotically and unpredictably, or through self-reflexivity. The freedom of the people can be understood as the possibility of deciding *where* to unfold the logic of exchange, but also as the possibility of being movers themselves of the logic of exchange, due to their investment in that logic with will and actions.

Furthermore, the logic of exchange was qualified in the sense that we established a differentiation with respect to different ways of belonging to the internal market. The internal market both embraces people who are themselves the objects of exchange -

people who sell something which is intimately connected to their own body, mind and life - as it embraces people who exchange something which is distinct from themselves. But the logic of exchange was also challenged in the sense that we detected certain other logics which undoubtedly form part of the manifestation of the internal market, but which cannot be seen as instances of the logic of exchange, namely the 'real link logic' (extracted from the differentiated concept of 'Worker') and two logics of rights, the citizenship-equality logic and the 'right to one's right'-logic. These logics do not qualify the logic of exchange, but they do interact with it and may accordingly be seen as particular dimensions of it. The problem is, however, that the interplay of these different logics is fundamentally ambiguous. We cannot determine whether the 'real-link' logic and the two logics of rights strengthen or inhibit the logic of exchange.

The 'real link' logic can be said to strengthen the logic of exchange in the sense that it gives it a clear ideological dimension: it becomes a mystical force which requires passion and dedication from those who belong to it in the strong sense (with body, mind and life). This does not only serve the freedom of the market (the material through which it unfolds is increased), but also the freedom of the people from the point of view of being part of the continuous transformation of that logic. But the problem is that the subjective attitude which is required by the real link criterium appears to be a distinct subjective attitude. This means that the ideological dimension is fixated.

The two logics of rights can be said to strengthen the logic of exchange in the sense that they feed the market with workers and consumers and secure the possibilities of people to take part in the logic of exchange. However, the transforming capacities of the logic of exchange will possibly be limited; at least it will unfold according to certain rules.

Due to the ambiguous interplay between different logics of the internal market, we concluded that the internal market does not really constitute an institutional order. It is the 'joker' among our six anchors of order.

The basic logics of the '**Family**' - a logic of internal asymmetrical dependencies and a logic of sacredness - was almost undermined as a result of the qualifications of it in the ideal order.

The 'Family' is torn between fundamentalism and particularism. In accordance with its presumed basic logics, it is seen as a fundamental order which needs fundamental protection. But the protection provided is immensely differentiated. Different families

are not treated alike. It appears that the family needs protection only from the point of view of other concerns (such as the basic freedoms of EU-law, the principle of non-discrimination or issues of integration). Hereby, the 'family' becomes dependent on the logics of other institutional orders and the hierarchies through which they unfold. This means that the self-sufficient logics of the family are seriously endangered.

None the less, the fundamental status of the family and its basic logics are upheld. Conceptually, we can make sense of this, but only just barely; the undermining of the basic logics of the family lies stumbling near.

The family concerns, in the most intricate and ambiguous way, the foundation of the civilizational self. It concerns this foundation both constructively and destructively - opening a horizon of the conditions of possibility for the civilizational self as well as a horizon of the possibilities of loosing the civilizational self. In the order of the family we are in touch with the fragility of the civilizational self. This is why this order is sacred to us, and why we cannot be without it. - And this is why this order is resilient - to some extent at least - to the huge external pressure it is exposed to.

Finally, we qualified the order of the '**State as one**'. This order has a special status; it concerns the role of the state as the common denominator of all the other anchors of order. Accordingly, the '*State as one*' is one on the basis of being many.

The basic logic of the '*State as one*' is a responsibility logic: the '*State as one*' is responsible for the institutional orders which adhere to it, both with respect to the implementation of EU-law within those orders and as such. The responsibility-logic is, moreover, a logic of danger. It penetrates deeply the three core constitutional principles of the state, 'democracy', 'human rights' and 'rule of law'.

The meaning of 'democracy' was given as a part of the basic logic of the '*State as one*'. 'Democracy' can be conceptualized as pluralism, and pluralism, in its turn, constitutes a danger and an ideal at the same time. Consequently, as far as the principle of democracy is concerned the logic of danger unfolds as a paradoxical logic: in order to realize democracy, the '*State as one*' must turn against its own ideal.

In order to qualify, fully, the responsibility-logic of the '*State as one*', we thoroughly examined the meaning of the other two constitutional principles. We examined their meaning within EU-law since the law we have dealt with does not entail any conceptualizations as to the meaning of those principles within national law. We argued that the '*State as one*' must, from the point of view of the ideal order, assume an

understanding of 'fundamental rights' and of 'rule of law' which coincides with the understanding of those principles as implied in EU-law.

As far as 'fundamental rights' are concerned, they function as interpretational aspects of EU-rights. Generally, they serve to strengthen EU-law vis-a-vis national law. They support and develop the clarification, efficiency, conceptual foundation, logical creativity and ideological dimensions of EU-law. Hereby, they serve to protect the possibility of belonging to basic national institutional orders. In particular, they serve to protect the possibility of belonging to the order of the 'National Labour Market': the fundamental right to work is granted an almost absolute status.

But 'fundamental rights' have another role as well. From a formal and essential point of view, they are meant to protect the common human foundation implied in the law. Accordingly, they concern the possibility of the civilizational self as regulated by law. This means that they protect *the law as such* (by protecting the conditions for subjecting human beings to law), but since they protect the law as such, they also protect the *particular legal order* in question, that is the ideal order. The protection of the particular legal order is dubious, though. By protecting the possibility of the law as such, fundamental rights also point to the essential fragility of any particular law: All names and regulations could loose their power and be left as ruined masks of civilization - replaced by other names and regulations or by the lack of the same.

The principle of 'rule of law' can be conceptualized as a kind of regularity constituted by the six anchors of order with their qualified logics as well as foundations of law, including the concept of 'rights'. It is manifested through EU-concepts and conceptual criteria, logical creativity, contextualizing interpretations, fundamental EU-principles, -rights and -purposes and fundamental rights, and it relies on interpretational horizons. It is a kind of regularity which embraces flexibility and which accordingly allows for a powerful role of human beings. Furthermore, it is a kind of regularity which is deeply ambiguous as far as concerns the concept of 'justice' - which also means that the legitimacy of the order, based on a general assumption of a 'spirit' of EU-law, becomes ambiguous.

On the basis of the analyses of the principles of 'fundamental rights' and 'rule of law' we were able to qualify the responsibility-logic as a particular logic of danger: Overall integrations or deconstructions are potentially dangerous to the institutional logics and the fundamental aspects on which the ideal order depends. Such integrations or deconstructions will be manifested as human interpretation and reflexion within these

orders, and as such they may undermine them from within - just as they may maintain them and strengthen them. They may be manifested on many different levels and in many different forms - as belief or declared non-belief or pure anarchy. In any case, the more 'overall' their nature and, especially, the more 'transcendent' their nature, the more dangerous they are considered to be.

The 'State *as one*' is characterized by this scenario of danger because it does not play the role of a substantial integrator in relation the institutional orders for which it is responsible. This does not mean that it does not play a crucial role, or roles, more precisely. Within the different orders, it plays various important roles, and in overall, it has a safeguarding role, namely that of protecting them against internal as well as external undermining. But when I say that it does not play the role of substantial integrator, I mean that it is not characterized by a principle of its own by which the different orders are brought together as different orders of the same overall order.

But are not 'fundamental rights', 'rule of law' and 'democracy' such integrating principles? They are common principles which apply to all anchors of order. 'Fundamental rights' protect the possibility of belonging to those orders (except for the 'internal market') as they protect to the possibility of law as such. 'Rule of law' consists, essentially, in a kind of regularity constituted by the anchors of order as well as foundations of law, manifested through particular interpretational elements. 'Democracy' reflects, paradoxically, the relationship between the institutional orders and their possible dissolution. The three constitutional principles are exactly constitutional: they establish a common foundation of all six anchors of order, and they function as mediators of the manifestation of these orders. Simultaneously, however, the three constitutional principles are constituted themselves - namely by the anchors of order. The three principles reflect the institutional orders in this double sense of constituting and being constituted. This means that they are integrators only by way of confirmation or doubling. They can be said to secure the overall order, but only in the sense that they double it. Substantially, they are absorbed in the institutional orders which they integrate and protect.

Consequently, the 'State *as one*', as qualified in the ideal order, is characterized by the following paradox: As responsible for the other five anchors of order it is without integrating capacities and it is without ideological foundation, - and yet it is not neutral.

Looking across the landscape of the six anchors of order

When looking at and across all the qualifications of the six anchors of order, what do we see?

Firstly, we notice that the problematics inherent in the 'State *as one*' correspond to the problematics of the ideal order as such. This is due to the fact that the ideal order is mediated through the 'State *as one*'; it is the 'State *as one*' and not the EU which is responsible for the implementation of EU-law - and hereby for the realization of the ideal order.

Secondly, we notice that the stability of the ideal order depends on the six anchors of order, - but they are all problematic one way or the other. This means that the stability of the order is fundamentally endangered: the interpretational elements through which the 'regularity' of the order is manifested will be in a constant risk of collapse due to deep-lying conceptual insecurities, inconsistencies or even paradoxes. We have seen that the non-discrimination rights related to non-names are much weaker than the other non-discrimination rights. This can be explained by the fact that they are younger and have been subjected to fewer interpretations by the CJEU. It can also be explained by the deep-lying conceptual difficulties haunting these rights. But in any case, the lacking development of these rights - in terms of conceptual clarification, fundamental principles and stable interpretational horizons - are deeply intertwined with deep-lying problematics of the six anchors of order.

On the other hand, the fact that the six anchors are all problematic means that the ideal order is characterized by a fundamental openness. In spite of the fact that there is no overall mediating principle, but only constitutional principles which are themselves constituted and which merely double the very orders which they secure, the ideal as such is not self-sufficient and self-confirming. The problematics of the institutional orders constitute fractures which opens the ideal order for reflexions on potential purposes.

Lastly, when looking across the landscape of the six anchors of order, we notice that certain themes dominate and reappear again and again. This means that apart from being connected to one another in various ways, there is also something common to be said in relation to those orders as far as their substantial focal points are concerned. This gives a basis for a reflexion on overall purposes. The reoccurring themes are the following:

- The labour market appears as a dominating common purpose in the light of which individual lives as well as human relations seem to have no meaning of their own.
- The common human foundation which concerns the conditions of possibility of the civilizational self appears to play a crucial part in relation to several institutional logics - but it collides with issues of discrimination and hierarchization
- The question of individual freedom vibrates within all of the orders, positively in the orders of the 'internal market' and the 'State *as one*', negatively in the others. Only within the 'internal market', freedom is conceptualized. Within this order, 'freedom' appears to coincide with 'transformation' as such, - but this understanding is fundamentally shaken by the fact that the 'internal market' is a joker, institutionally speaking, characterized by various logics the respective roles of which cannot be determined.

First reflexion: The labour market as a common purpose in the light of which individual lives have no meaning of their own

The labour market appears to us as a common purpose in the light of which the individual life as well as human relations have no meaning of their own. Life within the labour market means having the labour market and not one self as a purpose. In this connection, the individual employment relationship is nothing but an event, reflecting the common purpose of the the labour market and nothing else.

Belonging to the labour market means being integrated and having social reality. The labour market coincides, in other words, with community as such - not only a particular community. On this basis, it is senseful that the fundamental right to work is granted an almost absolute status: no one should be excluded from the *possibility* of working. A person can belong to the labour market without actually working or on the basis of very little work, presently or in the past. But a person cannot belong to the labour market without being, at least, a potential worker. Since the labour market coincides with social reality and community as such, the criteria for belonging to it are obscure as far as the border zones (the zones of the potential workers) are concerned.

The social reality constituted by the labour market consists in a tragical and crippled relationship of opposition characterized by a split temporality: a historically disconnected satellite-temporality and an extremely earth-bound temporality. What it lacks is historical remembrance and forces of development.

From this description of the meaning of the labour market, derived from the 'labour market' as an institutional order and from the ways in which this order dominates other institutional orders, I would like to draw out two crucial aspects. Firstly: the labour market is equal to a community the ultimate nature of which is mystical, but which is manifested in the form of an inescapable relationship of opposition. Secondly: the meaning of work within the labour market is neither bound to the idea of production nor to the idea of creative capabilities of human beings; work is merely process.

As to the first aspect, the *community-aspect*. It can be said that the labour market has become more than a particular institutional order. By representing community as such and social reality at all, it has become a fundamental condition of human life. Accordingly, we may see the labour market in the light of perspectives which bring forward the issue of 'community' as an inescapable life condition.

For Benjamin, organization as such or community as such constitutes the mystery as well as destiny of human life. The unknown sources of law are bound to the fundamental mystery of human organization as 'community'.⁸⁷⁶ In other words: even if all sorts of rational explanations can be given with respect to the fact that human beings build communities, the fundamental source of 'community' is mystical, the aspect itself of being bound to and within community transcends explanations. We cannot say what 'belonging' means - because we are pervaded by 'community'.

Carl Schmitt sees the inescapable community aspect of human life as fundamentally bound to the political nature of human beings. The 'political' is destiny as is 'community'. The 'political' takes the form of friend-enemy-relations. But every community stands in a tensional relationship to other communities. The stronger the tensions, the stronger the oppositions, the more political the situation. The political as such is destiny, but particular manifestations of the political are not. Particular friend-enemy-relations may be dissolved and replaced by others. Or they may be weakened, just as they may be intensified. Crucially, the possibility of self-reflexion through the other, through the enemy, exists. 'The enemy is my own question as a figure', says Schmitt in his prison-writings.

So, we may see the relationship of opposition which constitutes the institutional order of the labour market as something more than the definition of an institutional order; we

⁸⁷⁶ Walter Benjamin: "Franz Kafka. On the Tenth Anniversary of His Death", in *Illuminations*

may see it as an expression of fundamental conditions of human life, namely 'community' and the 'political'. The belonging to particular relationships of opposition constitutes an inescapable condition. And we shall never be able to say what this belonging essentially means. But the particular relationship of opposition (between the parties of the labour market) need not be inescapable. It could be replaced by other relationships of opposition. Or, if not, it could be reflected by the parties so that they would know their own position by virtue of knowing and recognizing the other position. In this sense, it would neither need to be a tragical nor a crippled relationship of opposition. It would not need to be historically decoupled, to be cut off from remembrance and forces of transformation.

Regarding the second aspect, the *work-proces-aspect*, we shall need to dwell on different understandings of the meaning of work.

As is well-known (and analyzed, for instance, by Koselleck), the celebration of work is a relatively new historical phenomena. Previously, work was regarded as a necessary evil and as something which stood in contrast to the precious and enjoyable elements of human life such as science, art, contemplation, amusement, play and sensual pleasures. But also in the works of many modern thinkers this understanding lives on, or parts of it. Even if work has been recognized as an absolute value, or as something absolutely dignified which should be shared by all human beings, it is still seen as something which should be kept down to a minimum, so that human beings could find their liberation in science, art, ethical reflexion and practice or play. Such double-understandings of work are especially predominant in the works of reformist or revolutionary thinkers - utilitarianists, anarchists and socialists. In the works of Marx, the tension between the celebration of work as a value in itself and the utopian idea of liberation from work is so strong that it becomes contradictuous.⁸⁷⁷

Among the modern thinkers who celebrate work without ambiguity, we may differentiate between those who celebrate work because of the products it produces, and those who celebrate work because of the creation (on the basis of given materials) which it implies. In other words, focus may be on the product of work, or on the human capacities of production. Both understandings may have a religious dimension (and as such, they also have historical roots long before modern times). According to the former, work would constitute a hard and painful human condition, given by God,

⁸⁷⁷ See the analysis of Marx' concept of work in Hannah Arendt: *Vita Activa oder Vom Tätigen Leben*, chapter 3 ("Die Arbeit")

but the products of work would be the reward due to which this condition became tolerable. Or: the products of work were gifts of God, and the act of saving them or humbly rationalizing them would be ways in which to honor those gifts.⁸⁷⁸ According to the latter understanding, the act of utilizing the capacities for work (physical strength, rational thinking, talents of various kinds) given by God - which also means that the raw materials given by God (the fruits of the earth and sea) were being utilized - would constitute the dignity, the special status of work.⁸⁷⁹

Both understandings may also be formulated in secular terms, though. The former understanding may simply read: Work in-itself is meaningless, but because of its products and the property which the products give rise to, work becomes meaningful. This conception can be found among liberalists as well as socialists and anarchists. The latter understanding would read: The act of utilizing one's talents and of creating and transforming materials of various kinds makes work meaningful. I will argue that this understanding underpins most contemporary 'ideologies' of work. Today, work is mostly seen as a factor of personal identity and/ or as a factor of personal development. Work may be seen as such a factor for many reasons (reasons connected to the nature of contemporary capitalism, to contemporary socio-economic hierarchies, to the 'modern individual' seeking learning, development, transition), but no matter the reasons given, it is presumed that the activity of working is meaningful as such because it is performed by a particular individual.

Nothing suggests that any of the three mentioned understandings of work - the necessary-evil-, the product- and the creation-understanding - form part of the horizons of the ideal order. The concept of work as it appears within the ideal order does not at all depend on the products of work. Someone who produces very little or nothing at all (in the case of 'potential workers') may also belong to the labour market. And as far as the 'actual workers' are concerned, the kind of work performed and the outcomes of it are not considered relevant; the remuneration criterium concerns the relation between employer and employee, not the products of work. Nor is it so that the worker's talents and satisfaction with respect to using them, creating and transforming, plays a role. On the contrary, we learn that someone who merely has him- or herself as a purpose and not the labour market does not belong in it. Finally, the necessary-evil-understanding is not relevant for the simple reason that we are not

⁸⁷⁸ - one of the major points in Max Weber: *Die protestantische Ethik und der Geist des Kapitalismus*

⁸⁷⁹ John Locke: *Second Treatise of Government*, chapter 5

confronted with any conceptualization of common purposes beyond the labour market; the labour market *is* social reality.

This means that what is left is a brute understanding according to which work is nothing but the processes of work itself. Hannah Arendt analyses, brilliantly, the concept of work⁸⁸⁰. She distinguishes between work and 'Herstellen', and reflects upon the aspects of reification implied in work. Her point is that work is a process which burns itself up continuously. Nothing remains which we could call the products of work or which we could enjoy as lasting characteristics of work. She eliminates all possible meanings and justifications of work which would transcend the naked process of work itself. As such, work is a life condition, common for all. For Arendt, this analysis serves a purpose of liberation. Once we have realized that work is only that, we shall be free to engage ourselves in public purposes. She understands work as fundamentally private because it is connected to the body.

Seen from the point of view of our analysis of the ideal order, Arendt's analysis is lacking the community-aspect, the identification of work and community. Such identifications can be found in many socialistic, democratic and anarchistic conceptions according to which work, community and solidarity are intimately connected. But we should be aware of the following distinction: These conceptions imply that *because we are part of a community, we should work*, we should celebrate the community through work, - but they do not imply that *in order to be part of a community, we should work*.

On the basis of these different understandings of work, we may say that the concept of work implied in the ideal order is a pure and crude concept according to which work is nothing but naked process of work itself; work burns itself up continuously. On the other hand, we cannot accept Arendt's understanding of work as 'private' - although it is true that in so far as work is connected to the individual body, there will be a private dimension to work which cannot be eliminated. Since Arendt does not integrate the community-aspect within her analysis, she does not conceptualize work as part of the mysterious primeval cause of 'belonging'. This does not mean, however, that Arendt's hope of liberation cannot be formulated from the point of view of the ideal order: The fact that we have realized that work burns itself up, continuously, so that nothing remains, could liberate us with respect to the formulation of other purposes.

⁸⁸⁰ Hannah Arendt: *Vita Activa oder Vom Tätigen Leben*, chapter 3 ("Die Arbeit")

Both considerations tell us that the 'labour market' as a common purpose within the ideal order implies a liberating potential. This liberating potential springs, in fact, from the crudeness of the conceptions implied.

The relationship of opposition between the parties of the labour market is recognized as legitimate as such and as a manifestation of an inescapable condition of human life (in contrast to dominating contemporary theories and political positions according to which this opposition is no longer relevant and which claims the existence of an unmodified individualism). Likewise, the concept of work has been stripped of any possible ideological ornaments (in contrast to dominating theories and positions according to which work functions as a foundation of individual identity and development). - From these crude and naked conceptions we may derive a liberating potential: The relationship of opposition between the parties of the labour market would neither need to be a tragical nor a crippled relationship of opposition. It would not need to be cut off from historical remembrance and forces of transformation, but could be opened for possibilities of self-reflexion and transformation. And 'work' would not need to constitute, in an absolute sense, the meaning of belonging and community - even if it does form part of the mysterious primeval cause of 'belonging'. The only problem is that if these liberating potentials were to be realized it would mean the dissolution of the ideal order. Accordingly, to the extent that we may in this connection talk about 'overall purposes' of the ideal order, they have the form of negations.

Second reflexion: The common human foundation versus issues of discrimination and hierarchization

The common human foundation which concerns the conditions of possibility of the civilizational self plays a crucial part in relation to several institutional logics - most notably the logics of the national welfare systems and the family.

According to the qualified logic of the 'national welfare systems', social assistance serves to guard society against that which lies beyond civilization; its function is to secure that no one shall lose the possibility of becoming and remaining civilizational selves. Society shall not be confronted with human beings who are not recognizable as human beings anymore, but only raw life and existential battle. In contrast, in the order of the 'family', we are in touch with the fragility of the civilizational self - with its conditions as well as its possible violation and collapse.

However, this common human foundation which is feared and protected in the order of the national welfare systems and celebrated in the order of the family is subjected to discrimination and hierarchization. Receivers of social assistance are - although they are regarded as possible subjects of civilization, like everybody else - excluded from 'membership' and 'integration'. And 'Third Country Nationals' are treated as if they were always closer to the threshold of civilization, as if they would always constitute more problematic subjects of civilization than EU-citizens. Likewise, the sacred order of the family is more sacred in some cases than in others. The common human foundation is not protected equally. It is particularized in accordance with other concerns.

In his book, *Homo Sacer*, Agamben thematizes *that something* which is the object of political power and regulation. Agamben's attempt is interesting because it moves within a border-zone between taking human beings for granted and tabooing the question. In other words: He does not merely presume the existence of subjects, individuals, human beings or what ever term one would choose - as much social science would do and as modern natural law would also do (on the basis of metaphysical argumentation); but neither does he hold that the question cannot be asked, that we can only raise questions concerning subjects, individuals or human beings *qua constituted* by political, legal and other kinds of social regulation. In truth, many of the greatest political philosophers of the 20th century would either avoid the question of *what that something is* which is being constituted and focus on the consequences, forms and means of that constitution, - or they would have established another kind of ontology focusing on movements, connections, constellations and difference on the basis of which one cannot distinguish as such between something which regulates and something which is being regulated.

For Agamben, that which is the object of political power and regulation is *raw life*. It is today, as it has always been. But whereas raw life used to constitute the border areas of political regulation, it constitutes today the very center of political regulation. Politics of today acknowledges no other value than 'life' itself, Agamben says, state and democracy have essentially become bio-political, claiming to liberate 'life' from 'raw life'. In contemporary prison camps in which established law regimes have been replaced by rules of exception, such as Guantanamo Bay detention camp, we are witnessing the culmination of contemporary politics, a politics centering on 'raw life'.

In other words, what Agamben says, is that from the point of view of politics today, human life is not qualified in any way prior to political regulation; it is not qualified

life, but raw life or bare life which is the object of political regulation. As such, raw life is '*included by way of exclusion*'; it is included in the camps which constitute a permanent state of exception, and it is included in the bio-political strategies of the state through which it is eliminated as such, or 'liberated into' qualified life.

So, can anything be said of this raw life which is included by way of exclusion? Agamben seeks its historical roots and finds that once, this life was seen as sacred. It was seen as life which could be killed, but not sacrificed. As included in the sovereign exception, it could be killed, but it was also sacred life because it represented '*a zone of indistinction and continuous transition*' between sacred and profane, religion and law, man and beast, nature and culture. - But today, this 'sacrificial ideology' has been forgotten. Today, life is being killed in the most profane and banal ways. What is left of 'Homo Sacer' is life which can be killed.⁸⁸¹

On the basis of this highly interesting analysis carried out by Agamben, we may reflect upon the nature of the common human foundation which is presumed by the ideal order. This human foundation is more than 'raw life'. But it resembles in many ways the 'sacred life' which was presumed by ancient sovereign rulers according to Agamben. The common human foundation is indeed seen as something sacred which should be protected as such. It is seen as something precious and ungraspable, yet simultaneously horrifying, dangerously marked by 'zones of indistinction'.

The distinctions which are indistinguishable in the common human foundation are distinctions between man and woman, individual body and confluent bodies, this generation and the next generation, physical violence and other kinds of violence, the possibility of being a self and the impossibility of being a self, determinability and indeterminability. Moreover, the distinction between existence and non-existence has become indistinguishable due to the universal logic within which the common human foundation is inscribed - it is presumed to be inviolable and violable at the same time. - These 'zones of indistinctions' are, in other words, conceptually different from the zones hinted at by Agamben - and yet, they are not incomparable. We may say that 'sacred and profane', 'religion and law', 'man and beast', 'nature and culture' are distinctions which are crucial to the possibility of civilization within the context of the rise of the modern European state, whereas the distinctions I have found to be crucial in relation to the common human foundation presumed by the ideal order are

⁸⁸¹ Agamben: *Homo Sacer*, Introduction, Part I (chapter 1,2), Part II (chapter 1,3,4,6), Part III (chapter 1,3)

distinctions which still haunt the European state of today. But to some extent, they certainly relate to Agamben's indistinguishable distinctions.

The common human foundation presumed by the ideal order can certainly be seen as 'included by way of exclusion'; it is protected by the law while simultaneously pointing towards something which transcends the law and which constitutes the condition of law. But exactly because the common human foundation constitutes the condition of law, its 'inclusion by way of exclusion' is of a fundamentally different nature than the 'inclusion by way of exclusion' of 'Homo Sacer', as analyzed by Agamben. 'Homo Sacer' is ultimately excluded because the raw life represented by that concept may be killed, either literally or symbolically. The common human foundation, in contrast, is that on which the law builds. Certainly, the indistinguishable distinctions shall be distinguishable in order for law and civilization to be possible. But the transitions between indistinguishability and distinguishability are part of the human foundation itself. And law relies on those transitions as well, not only on distinguishable distinctions. In other words: the common human foundation implies in itself a foundation of law - something without which naming and regulation would not be possible, something which precedes naming and regulation and which is not itself constituted by naming or regulation.

Accordingly, the common human foundation is different from 'Homo Sacer' in two crucial aspects. Firstly, it has not lost its sacred nature, but is still characterized by pre-civilizational zones of indistinction. Secondly, it is more than raw life which may be killed. It is - although in a restless and paradoxical manner - qualified life which constitutes a foundation of the namings and regulations of law and politics.

Now, does this 'more than raw life' foundation provide us with a foundation of equality? It is presumed to characterize all human beings - although some (namely 'Third Country Nationals') are seen as deeper embedded in the indistinctions of this foundation than others (namely EU-citizens) and although the protection of this foundation with respect to the fragilities it implies are seen as more important in the case of some than in the case of others (depending on other concerns).

In a sense, we may say that such inequalities are not inconsistent with the nature of the foundation. As displayed by way of Burroughs' concept 'Interzone', the common human foundation is not a foundation of equality and mutual respect between individuals. It does not even acknowledge the existence of individuals. It is a foundation of continuous transformations, of disintegrated bodies and language, of

meaningless interactions, violence, abuse and dream-logics. In addition, it is a foundation which implies no other particular human will than the will to civilization (in the form of naming and regulation) and to decivilization and the transition between the two.

We have already stated that no common purposes can be derived from this foundation. Yet, could not any hopes be formulated on the basis of the reflection provided above? Enriched by Agamben's analysis of 'Homo Sacer', we have seen that the element of 'sacredness' should not be underestimated. The fact that the ideal order does, at all, presume the existence of a sacred human foundation of the law is in itself a significant gesture - even if this foundation is brutal and poor. The hope which can be derived from this is not so much a hope of equality. But it is a hope, though, that concerns the many shadow lives of the ideal order, the excluded as well as those in the border areas of the order. As sacred lives, should they not have a voice as well? Should not their lives be visible, along with those lives which are realizations of the 'normal life'? Again, we have formulated a hope (if not a purpose) which negates a fundamental characteristic of the ideal order.

Third reflexion: Freedom as transformation

The question of individual freedom vibrates within all of the orders.

In the orders of the 'Labour Market', the 'National Systems', the 'Employment relationship' and the 'Family', the question of freedom vibrates negatively - that is, it vibrates in the tragical relationship of opposition which coincides with social reality, in the rights-and-duties-logic, in the relationship of subordination and in the asymmetrical interdependencies.

In the 'State *as one*' the question vibrates positively. 'Democracy' in the shape of 'pluralism' constitutes a fundamental characteristic of this order. But since 'pluralism' is not only an ideal, but also a danger which threatens the 'State as One', freedom appears as something both limited and ambiguous.

Only within the internal market, 'freedom' is conceptualized. Within this order 'freedom' may both refer to the freedom of the market and the freedom of the people. For the purposes of this reflexion, we are interested in the freedom of the people. The freedom of the people can be understood as the possibility of deciding *where* to unfold the logic of exchange, but also as the possibility of being movers themselves of the logic

of exchange, due to their investment in that logic with will and actions, body, life, mind and heart.

In other words, the most powerful conceptualization of 'freedom' springs from the order of the internal market. Within this order, freedom appears to coincide with 'transformation' as such - unqualified, collective transformation, that is. The problem is, however, that this radical concept of freedom - freedom as transformation as such - is shaken by the fact that the internal market is a joker, institutionally speaking, characterized by various logics the respective roles of which cannot be determined. More precisely, it is unclear whether some of these logics will feed this radical freedom - with material and means of manifestation - or whether they will limit and fixate it.

Today, we are confronted with what I shall call the 'paradox of creation'. The 'natural forces' of markets are no longer taken for granted, markets are seen as institutionally created. Likewise, the existence of human 'driving forces' are not taken for granted - whether such forces would be seen as an expression of greed or as a will to power or to competition or as a search for knowledge, challenges, adventure or the common good. Markets, including human driving forces, must be created, not only by way of law and politics, but also by way of cultural education, therapy, art and ideological commitment - in short, by way of the multiple known and unknown mechanisms of 'the social'.

Human driving forces must be created in order for them to be creative - dynamical, innovative, ever ongoing - with expanding and surprising capabilities. But how does one create creation? It seems to be an implication of 'creation' that its sources cannot be fully known in advance, and far less calculated with. And certainly, 'the social' which provides the sources of human creation is itself seen as a mystery escaping exact calculation. It is exactly because it is a mystery that it can 'create creation'. Yet, this mystery is sought solved.

As a result of the 'paradox of creation', human beings are conceptualized as machines in a particular kind of way. More precisely, a particular kind of Man/Woman-machine arises. This particular kind is different from a Man/Woman-machine which depends on a logic of

alienation. When Chaplin in *Modern Times* is forced into moving like a machine by the machines and continues moving in stiff and fixated sequences after the end of the work day, it is clear that his body has been taken over by the machines as an alienating force. Neither does the Man/Woman-machine I have in mind resemble the futuristic vision of the machine as something 'anti-subjective', as a triumph over human weakness. No, it

is human resources, human driving forces which have become - or are being sought as - machines. Man/Woman and machine have been fused into one. Since these machines are supposed to be creative Man/Woman-machines, they are not predictable machines. The machine is an extension and intensification of human driving forces, not a reduction of them into automatic modes.

Frankenstein's creature would be a strong metaphor for this particular Man/Woman-machine. The creature is made of pieces of dead bodies, collected and sewn together by the scientist Frankenstein. As such, the artificial creature is made of original human material. Frankenstein has developed a secret technique to imbue dead bodies with life. He electrifies the composite body - and hereby gives it life, becomes its creator. However, the creature turns out to be so ugly that the creator runs away from it in horror. The many tragic events that follow can all be seen as a result of the *all too human* nature of the creature. It is tormented by the feeling of being abandoned by its creator, by loneliness, sadness, longing, anger and the urge for revenge.⁸⁸²

Another powerful metaphor would be the girl with the red shoes - the focal character of a fairy tale by Hans Christian Andersen. She is a human being, - but she has acquired a magical pair of red shoes. At some point she starts dancing, and she cannot stop dancing. The shoes forces her to continue, they have taken control over her body. She cannot take them off, they are stuck to her feet. At the end she finds an executioner and asks him to chop off her feet which he does. However, even hereafter, the shoes continue to haunt her, they continue to dance with her amputated feet inside them, barring the way for the crippled girl.⁸⁸³

A counter image to the created human being, the Man/Woman-machine, can be found in the anarchist as a literary figure. Interestingly, the great works of fiction which thematize anarchism do hardly ever portray anarchists as serious political combatants. Anarchists are either portrayed as ridiculous hypocrites secretly longing for a bourgeois lifestyle, as superficial dreamers or as nihilists whose aim is nothing but destruction. Only the latter kind of anarchists are truly anarchists, we gather. In relation to his novel, *The Secret Agent*, which revolves around a group of anarchists in London in the 1880's, Joseph Conrad wrote that Winnie Verloc is the only character who is a true anarchist because she is '*the only character who performs a serious act of violence*

⁸⁸² Mary Shelley: *Frankenstein; or, The Modern Prometheus*

⁸⁸³ Hans Christian Andersen: *The Red Shoes*

against another'⁸⁸⁴. Dostojevski's masterpiece, *Demons*, depicts a variety of revolutionary dreamers in the late 19th Century Russia. Some are confused and naïve, subjected to manipulation, others are calculating destroyers. A confusing mix of ideologies and utopian ideas pervades the novel. However, the serious characters are all aimed at destruction. Not only the destruction of the central institutions of power - the Church, the Tsardom, the nobility. They are aimed at the destruction of any social order and moral so as to reach a state of chaos (in the case of the character Pyotr Verkhovensky); or at the destruction of one's own life (Kirillov); or at the destruction of one's own dignity (Stavrogin).

The destructive anarchist can be seen as a counter image to the Man/Woman-machine in the sense that the former is completely free. He or she may choose any goal whatsoever, that is what 'anarchism' implies. This also means that the anarchist is uncreated; the driving forces of the anarchist come from nowhere, they are pure spontaneity. The anarchist is a pure creator. However, in the hands of Dostojevski, this 'pure creation' becomes pure destruction. The unlimited freedom finds no purposes, but turns against the idea of any order, or against the anarchist him or herself, resulting in an ideological and psychological collapse.

Because of this collapse, the counter image is turned around and becomes, nevertheless, an expression of the Man/Woman-machine. The pure uncreated creation collapses into mechanical destruction.

In the ideal order, we are confronted with a 'created market' called the 'internal market'. The 'internal market' is by far an expression of a pure logic of exchange; it is characterized by many other logics (of which we have analyzed but a few) which will either strengthen or weaken the logic of exchange, or both, but in any case, the logic of exchange will be manifested through them. Since markets consist of human driving forces and their interactions, we are also confronted with the Man/Woman-machine - the created human being in which Man/Woman and machine have been fused into one with unpredictable consequences.

These Man/Woman-machines are 'free movers' in the double sense of moving themselves and moving the logic of exchange. Since their movements are not predictable, we cannot say how they will move the logic of exchange. In principle, they could move it in ways which would undermine the other institutional orders - even if

⁸⁸⁴ Alex Houen, *Terrorism and Modern Literature: From Joseph Conrad to Ciaran Carson*, p. 54.

their movements were made possible by those very orders. But they could also move it in ways which would confirm the fixations and limitations of the logics on the basis of which they are movers and which directly or indirectly concern the other institutional orders.

The three different symbols unfolded above - Frankenstein's creature, the girl with the red shoes and the anarchist as a literary figure - provide us with three different ways in which to see the freedom of the Man/Woman-machine.

In the light of Frankenstein's creature. The institutional orders and their logics are the corpses of which the creature (the Man/Woman-machine) is made. The electrification by which the creature comes alive arises as a result of the frictions of those orders and logics. Hereby the market comes alive as well. But what if the creature hurts? If the composition as a whole is inharmonic or amputated? Then the freedom of the Man/Woman-machine will be the same: painful, discordant, fragmented, desperate.

In the light of the girl with the red shoes. The red shoes would symbolize the community as such, the belonging to the institutional orders; 'community' would be the driving force - and in this case truly a *force*. The dancing would be the market. But since the dancing becomes so wild that the girl (the Man/Woman-machine) cannot stop it, she will need to amputate herself, to cut off the part of her which makes her move at all. But then there will be no movement any longer. There will only be the parody of movement, the feet which keep on dancing by themselves without a body. 'Community' and belonging will have become this parody - and the Man/Woman-machine will have died.

In the light of the anarchist. In this case, the Man/Woman-machine is uncreated. He or she does not contain - in his or her own body or as a prolongation of that body - the institutional order and 'community'. The anarchist (the Man/Woman-machine) is a free creator, a 'free mover' in the absolute sense. But the uncreated freedom turns out to be destructive, and ultimately, it turns against the Man/Woman-machine itself. He or she becomes a machine of self-destruction.

Do any hopes spring from these horrors? Clearly, one could only hope for the opposite. Confronted with the pain, the death and the nihilistic self-destruction of the Man/Woman-machine, one could only hope for the self-reconciliation, the self-awareness and the positive yearnings of the Man/Woman-machine.

But that would imply the full manifestation of individual integrations. And they are held back in the inner individual - as an expression of the paradoxicality of the

principle of the constitutional principle of 'democracy'. - For the third time, we have formulated a purpose - or at least a hope - the realization of which would undermine the ideal order.

Dead ends and utopian potentials

As it appears, all three reflexions come to a dead end.

By diving into the unhappy conditions and paradoxical features of the six anchors of order, we have sought and found some immanent openings of the ideal order. The ideal order is not closed in on itself, it does open up to the possibility of overall purposes - or at least to hopes or fragmented ideas of justice - which are not identical to the logics of the anchors of order although they spring from reflexions of those orders. The problem is, however, that all of the potentials found are negative potentials in the radical sense that if were they realized, they would undermine the ideal order. In this sense they cannot serve us as overall purposes of the ideal order, that is, as regulative ideals which could function as critical correctives within that order.

We were hoping to establish what the 'labour market' as an overall purpose could possibly mean. We found that overall purposes which are not identical to the logics of the 'Labour market' as an institutional order could indeed be derived from those logics (while also considering their influences on other orders). Such overall purposes would consist in the reflexion and transformation of the relationship of opposition which qualifies the 'natural balance' that defines the labour market as an institutional order and in the dissolution of the ruthless identification of work, social reality and community on the basis of the cruel, but liberating perspective that work burns itself up continuously. - But if these purposes were realized, it would undermine the most central institutional order of the ideal order, the 'National Labour Market'.

We were also seeking for other possible overall purposes. We found that an overall hope - if not purpose - could be derived from the common human foundation, implied in the ideal order: that the many shadow lives of the ideal order should be visible, along with those lives which are realizations of the 'normal life'? This hope concerns the totalitarian aspect of the ideal order; we are conceptually blinded with respect to the nature of those 'other lives', the shadow lives, they can only be seen as deficient lives vis-a-vis the vision of the 'normal life'. - But if this hope was realized, it would undermine all of the anchors of order considered as a whole: the 'normal life' consists, exactly, in the membership of those orders.

We formulated yet another hope, concerning freedom. With respect to the perspective of freedom which the 'Internal Market' offers, we found that the only thing which may possibly guard against the scenarios of horror in which the institutionally created human being (the Man/Woman-machine) is trapped would be 'individual integrations'. But 'individual integrations' are held back in the 'inner individual' due to the logics of the 'State *as one*'. Accordingly, in this case, the hope we formulated is a reflexion of the order of the 'State *as one*' (which is threatened by individual integrations) - although we took our point of departure in the 'Internal Market'. In this connection, it should be noted that the principle of 'democracy' in the shape of 'pluralism' does in fact (as the only one of the constitutional principles of the state) imply an ideal which does not merely confirm the totality of the institutional orders. 'Pluralism' as an ideal transcends those orders in that it implies the possibility of their undermining. But for the same reason, the ideal of 'pluralism' is kept in check by the awareness of the dangers of pluralism. - Consequently, the realization of the hope of freedom which would require the manifestation of 'individual integrations' would undermine the 'State *as one*'.

In other words, we would either undermine the most central institutional order of the ideal order, all of the anchors of order considered as a whole or the 'State as One'. This means that even if the ideal order is not self-identical, even if it is not without openings, it does not imply the possibility of self-critique and -correction by virtue of these openings - without undermining itself, that is. Ultimately, it *freezes as it is* - yet, on the basis of inner restlessness... and a number of ghosts.

We should be aware, though, that the ideal order is not without utopian potentials, also in a positive sense. As mentioned above, a certain metaphysication of the concept of rights is implied, a certain metaphysical idea according to which 'a right' implies 'a right to the right' and a 'right' should be able to withstand all sorts of erosions. This idea does not arise as a result of a radical negation; although never positively present in a full sense, it shines through the particular interpretations of particular rights, some times strongly, other times weakly. - But we should also be aware that the particular manifestations of this idea depend on the particular interpretational elements of the ideal order which in turn depend on the six anchors of order.

Accordingly, we may say that the 'metaphysication' of the concept of rights does constitute a particular utopian element of the ideal order; the metaphysical idea as such does transcend the institutional orders, does stand in a tensional relation to them - and

is capable of functioning as a regulate ideal vis-a-vis those orders. On the other hand, this utopian element is held back by the institutional orders because it depends on them. It could not be unfolded without them. If it could, it would break down all the limitations, hierarchies and distinctions on which human law is build. It would transform human law as such, not just the ideal order we have constructed.

Likewise, liberating potentials are implied in the fluid aspects of the law, especially those connected to non-names. The fact that no categories are fixated in advance means that no particular groups of people are stigmatized by being defined in general as potential victims of discrimination. In addition, the law becomes extremely flexible; law will be able to follow 'the unpredictable', the ever new faces of discrimination. However, also as far as this utopian element is concerned, we shall have to recall that it cannot be unfolded in isolation, it depends on the opposite of fluidity, namely stabile structures. Ultimately, non-names are about names, they concern the liberation from the significance of certain signifiers of destiny so that these signifiers shall not prevent the right-holders from getting access to a range of national names (which are fixated). In addition, non-names depend on the existence of stabile interpretational horizons (which depend on institutional orders), and to the extent that such horizons do not yet exist (corresponding to ambiguities or paradoxical features of those orders), the rights in question will remain relatively weak and problematic.

Both elements - the metaphysication of the concept of rights and the fluid aspects of the ideal order - concern core features of human law in general and rights in particular. The former escapes the necessary limitations of law - limitations which spring from the fact that law must establish distinctions and lines of demarcation in order to regulate at all. The latter escapes naming as well as definitions of rights, - building a law for singular events only, events which do not exist in general. As such, they are both utopian - when seen in isolation. But as explained above, none of these elements will ever be able to exist in isolation. Or if they did, we would be confronted with a complete transformation of human law as we know it.

But also when considered merely as elements within and on the conditions of the ideal order, they do possess transforming capabilities. They contribute to a transformation of the concept of rights. A 'right' does not necessarily imply a well-defined relation between state and citizen (although it still implies a relation between state and citizen). A 'right' may constitute a fluid space of possibilities.

Could not the metaphysication of the concept of rights and the fluid aspects of the ideal order contribute to a transformation of the substantial contents of the ideal order, the qualified logics of the institutional orders? Could they not join forces with the inherent ghosts of those orders, pushing the ideal order towards new and changed institutional logics? In principle, they could; but as it is, they are bound to the institutional orders which have frozen before our eyes.

Epilogue

I began this work with an image. It was an image stemming from Andrei Tarkovsky's film 'Stalker'. Three men are waiting outside the 'Room' - constituting the metaphysical core of the 'Zone' they have entered. Two of them are fearing the 'Room', whereas the third one, the 'Stalker' still has hopes with respect to the 'Room', even if desperate hopes.

If we understand the Zone as the law, then the 'Room' constitutes the secret core of the law. However, the secrets of the law are no different than the secrets of those who are living the law: those who are living the law *are* the law.

As the secret core of the law, the 'Room' is characterized by an essential doubleness. It reveals the true wishes of those who enter it. That is, it reveals the nature of human beings through their wishes, and the nature of wishes through human beings. Two of the men fear to enter the room because they have understood this connection between who they are themselves and the wishes they have. They have realized that they cannot formulate any wishes who do not reflect who they are themselves. The fact that they fear this connection shows us that they would wish that it had not been so. They would have *wished that their wishes did not mirror themselves*, but could have been an expression of something higher, something transcending themselves. Something which, in turn, could have transformed themselves into something better than what they immediately are.

As I said in the Introduction: the image constitutes the scene of the dissertation. What I have wanted is that we (the reader and I) would - just for a while - take part in the waiting outside of the 'Room' together with the three men. That we would share both their fears and hopes, while realizing that who we are and what we wish for are inescapably connected. As far as the law is concerned, this means that the human foundation of law (the fact that the authority of the law is realized through those subjected to the law) and the normative foundation of law (the purposes of law) are inescapably connected. When speaking, therefore, of a non-identity-thinking, of a distinction between the two, I do not mean a fundamental separation. That would be impossible. No, a non-identity-thinking fears the connection between the two and hopes for a tension between them: that we would be capable of formulating purposes

for the law which would not merely reflect who we immediately are and what the law immediately is, through us.

So, the 'Room', the metaphysical core of the law, is a prison. We shall only meet ourselves. This dissertation has been circulating around the 'Room'. It has been a waiting outside of the 'Room' - while simultaneously observing the multiple forms of rationality which make out - in predictable and unpredictable ways - the content of the 'Zone'. The non-identity-thinking which I have pursued - and which have culminated by the end of the dissertation - simply means this: to continue to fear the 'Room'.

LEGISLATION

The Treaty of the European Union (TEU)

The Treaty of the Functioning of the European Union (TFEU)

The Charter of Fundamental Rights of the European Union

Regulations and Directives:

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

Reg. (EC) No 883/2004 on the coordination of social security systems ("Social Security Coordination Regulation")

Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community ("Social Security Coordination Regulation")

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 ("Residence Directive")

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

Dir. 2003/109/EC concerning the status of third-country nationals who are long-term residents ("Long Term Residence Directive")

Dir. 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ("Blue Card Holder Directive")

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 ("Victim of Trafficking Directive")

Dir. 2003/86/EC on the right to family reunification ("Family Reunification Directive")

Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("Race Equality Directive")

Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ("General Framework Directive")

Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security ("Social Security Equality Directive")

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 ("Employment Equality Directive")

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 ("Self-Employment Equality Directive")

Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services ("Goods and Services Directive")

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

Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC

Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

The European Convention on Human Rights (ECHR)

CASES

Chapter 3

Case C-422/02, *Europe Chemi-Con (Deutschland) v Council*, 2005

Chapter 4

Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, 1986

Case C-260/89, *ERT v DEP*, 1991

Opinion 2/94, Opinion of the Court pursuant to article 228 of the EC Treaty

Case C-13/94, *P v S and Cornwall County Council*, 1996

Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, 2002

Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (opinion)*, 2004

Chapter 5

Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* 2011

Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, 2011

Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* 2004

Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 2001

Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, 2002

Chapter 6

Case C-571/10, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, 2012

Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken*, 2010

Joined Cases C-356/11 and C-357/11, *O. and S. v Maahanmuuttoviras and Maahanmuuttovirasto v L*, 2012

Chapter 7

- Case C-149/79, Commission versus Kingdom of Belgium, 1982
- Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, 2007
- Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, 2007
- Joined Cases C-22/08 and C-23/08, Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900, 2009
- Case C-456/02, Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) 2002
- Case C-516/09, Tanja Borger v Tiroler Gebietskrankenkasse, 2011
- Case C-345/09, J. A. van Delft and Others v College voor zorgverzekeringen, 2010
- Case C-228/07, Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich, 2008
- Case C-406/04, Gérald De Cuyper v Office national de l'emploi, 2006
- Case C-503/09, Lucy Stewart v Secretary of State for Work and Pensions, 2011
- Case C-388/09, Joao Filipe da Silva Martins v Bank Betriebskrankenkasse – Pflegekasse, 2011
- Case C-138/02, Brian Francis Collins v Secretary of State for Work and Pensions, 2004
- Case C-258/04, Office national de l'emploi v Ioannis Ioannidis, 2005
- Case C-158/07, Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, 2008
- Case C-175/00, Marie-Josée Verwayen-Boelen v Rijksdienst voor Arbeidsvoorziening, 2002
- Case C-372/02, Roberto Adanez-Vega v Bundesanstalt für Arbeit, 2004
- Case C-208/07, Petra von Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse, 2009
- Joined Cases C-395/08 and C-396/08, Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci, 2010
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Chapter 33 *(entails a second analysis of judgments which have been analyzed before - now from the point of view of the argumentative role of human rights)*

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Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, 2003

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Summary

It has been the purpose of this dissertation to analyze a contemporary battlefield of law, the field of EU social rights, from a political-philosophical point of view.

It is the conviction of the dissertation that law is deeply and inescapably conceptually connected with fundamental features of social order. Law and social order are not presumed to be identical, but to be mutually constitutive. The interrelations between the two do not merely concern the rights and obligations explicitly laid down in the law, but fundamental presumptions regarding the nature of human beings, overall purposes of social order, hierarchical and dynamical features of society and the possibility at all of regulation, its logics and sources of authority.

On the basis of a historical-conceptual understanding of law according to which law, social structure and metaphysical presumptions are inescapably intertwined, the dissertation derives from the binding provisions of law certain essential features of social order. More precisely, the dissertation demonstrates that from a political philosophical point of view, EU social rights can be said to imply the contours of a particular social order. Significantly, the essential features in question are derived through detailed analyses of EU social rights - through critical investigations of definitions of right-holders, material scope, legal core concepts, exclusions and justifications, complexities and ambiguities of interpretation. The general point is the following: Political philosophical features of social order may not only be derived from the overall constitutional aspects of law (in the case of EU-law: fundamental principles inscribed in the Treaty; the constitutional architecture of EU-law), but are implied in the detailed material web of secondary law.

This work pursues 'forms of rationality' implied in EU-law - 'forms of rationality' which can be seen as the building blocks of a particular social order. However, EU-law depends, essentially, on national law. In the case of social rights, the intimacy of this relationship is particularly striking. EU social rights are not only implemented by the member states. Due to the significance of the principle of non-discrimination, they are predominantly formal rights: they gain their particular content from pre-existing national rights - for which reason they also largely reproduce the general structures (conceptual categories and organization of rights) characterizing the national systems of rights. On this basis, it could very well be argued that EU social rights do not

constitute an interesting object of study 'in themselves'. Against this presumption, the dissertation finds that the forms of rationality implied in EU social rights are indeed interesting 'in themselves'; they imply particular social hierarchies as well as dynamic and fluid structures, particular means of regulation in the form of logics of rights, and particular presumptions regarding the nature of those who are subjected to the law and regarding the purposes of law. These forms of rationality are in play in connection with the implementation of the rights in question in the member states. Here, they will meet other hierarchies, logics, conceptual foundations and complexities, - and in these meetings the conceptual implications of EU social rights must necessarily be taken into account, be part of a battle, a compromise, a reconciliation or even 'a fight until death'. In this connection, the dissertation introduces the notion of a *shadow-realm*. The rationality forms implied in EU-social rights will never be fully manifested anywhere, only as more or less reduced or transformed in the different member states, due to their conceptual meetings (and battles) with other rationality forms. But this does not mean that they are not real or important. Arguably, their shadow-feature makes them into an even more relevant object of political-philosophical analysis. They are hard to detect - for which reason it is generally difficult to estimate their importance for contemporary political and legal developments.

EU social rights are grasped as a particular regime of rights: as rights which are clearly connected by way of common principles, logics and purposes, and meant to be mutually complementary. This rights regime can be seen as a manifestation of essential contemporary problematics relating to the concept of rights: the transformation of the classical relationship between a single right-giver and an unambiguous right-holder; the tension between a 'fundamentalization' of the concept of rights and an erosion of the same; the tension between formal and substantial rights. Furthermore, EU social rights bear witness to the general fragility of social rights - due to which they tend to absorb a range of other political issues concerning social hierarchization: issues concerning the treatment of 'strangers' (ideological as well as geographical strangers), unfortunate people (for reasons of poverty, sickness, disability or unemployment) and those who do not conform to the dominant lifeforms. Along with the problematics relating to the concept of rights, such issues of hierarchization play an important role in the analyses of the dissertation.

The political-philosophical analysis of EU social rights aims towards the construction of a particular social order, on the basis of the forms of rationality derived from the empirical material. This construction is based on four overall categories:

- 1) *Social structure*. Hierarchical features - or lack of the same - on the basis of a comparison of different definitions of right holders with respect to the rights attributed to them (taking into account egalitarian features as well as flexible features by virtue of which we may speak of a partly fluid or ambiguous social structure)
- 2) *Social means*. The particular logics involved in the empirical rights in question, viewed upon as instruments for social regulation and transformation.
- 3) *Purposes*. Overall conceptual world visions, as comprised in the horizons within which the interpretations of the law are carried out, and the relations between them.
- 4) *Human foundation*. Presumptions as to a common human nature, a common foundation of those subjected to and categorized by the law.

The fourth category bears witness to the significance of the issue of the relationship between law and human beings, from the point of view of the dissertation. Through law, human beings are constructed as particular kinds of human beings - as particular right holders. But the dissertation emphasizes that human beings are not only constructed, but also presumed by law - as a material for regulation. As such, human beings do not merely constitute a docile, moldable material, but stand in a tensional relationship to the constructions of law. Human unpredictability may undermine law, but it also serves law. Law is not only drafted, accepted, interpreted and applied by human beings; it only exists *as lived* by those subjected to it. For law to be able to function *as a mediator of life*, it depends on human unpredictability - on flexible interpretations, small deviations, creative applications and even rebellion.

The dissertation neither can nor intends to define human beings 'prior to the law'. It only asks whether EU social rights presuppose the existence of a common human nature prior to the categorizations of law. The fourth political-philosophical category stands in opposition to the first category which relies on legal categorizations of right holders. Also, it is crucial to distinguish between the third and fourth category. The purposes of social order, as implied in EU social rights, are not necessarily identical to a presumed common human foundation.

From the view point of the dissertation, keeping open the possibility of a difference between the purposes and the human foundation of social order is vital. Today, it is argued, these categories tend to collapse into one another. Under the headings of

'identity' and 'values', the difference between what we immediately are and what we might strive to be is being undermined. Simultaneously, however, the dominance of the concepts of 'identity' and 'value' indicates that even in times of secularization we cannot avoid asking the fundamental questions as to the foundations of law, even if we are unable to answer them. In this sense, the concepts of 'identity' and 'value' constitute an expression of a fundamental paradox concerning the foundation of law.

The dissertation wishes to advocate the possibility of a different way in which to live with the fundamental paradox, based on the idea of the 'non-identity', rather than the 'identity', of a social order. A social order may not be 'identical with itself', but stay torn between its presumed human and normative foundation, and between the empirical law and the ideals implied in that law. Such an approach, the dissertation argues, keeps open the possibility of continuous self-reflexion and criticism, and works against totalitarianism.

The dissertation relies on a tensional theoretical foundation, developed on the basis of a complementary reading of Carl Schmitt and Derrida, but involving other philosophers as well, most notably Hegel, Adorno and Deleuze. In accordance with the overall idea of keeping open the possibility of a 'non-identity' of the social order which is being constructed, this tensional foundation unfolds on the basis of the following double-edged understanding of language:

Concepts constitute our reality in that they imply the rationality forms of reality; however, these forms of rationality are multiple, muddled and unclear. Concepts are not presumed to exhaust reality. The speechless - that which escapes concepts and cannot be grasped by concepts - constitute a dynamical source of language and of conceptual transformation. Accordingly, the tensional foundation embraces both deconstruction and the pursuit of overall conceptual meaningfulness. 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.

A number of analytical 'grasps' - ways of structuring, holding, opening and creating the empirical material - have been developed for the purpose of the dissertation. They concern the nature of the *signifiers* of law (the way in which the various right-holders are categorized): the dissertation distinguishes between 'names', 'non-names' and 'signifiers in-between names and non-names', the last kind including 'double-names'. Moreover, they concern the *logics* of law (different logics springing from the principle of

non-discrimination): the dissertation distinguishes between the 'as-if logic', the 'non-significance-logic' and the 'determinately reduced non-significance logic', along with moderations and combinations thereof. Also, '*horizons*' constitute an important analytical concept, referring to particular world visions, but of an infinite nature. A *temporal-normative characterization* of human, historical law is introduced, according to which we should distinguish between a 'presumed order' and an 'ideal order'. Finally, '*ghosts*' are introduced - as a way of systematizing the radicalization of the conceptual analysis, the intensification of deconstruction, the pursuit of overall meaning and the alternation between the two.

The dissertation is divided into two main parts.

In part I, the empirical legal 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 - is being analyzed. Part I is structured according to the differentiations between different kinds of signifiers of law ('names', 'non-names' and 'signifiers in-between names and non-names'), and pursues the characteristics of the various signifiers with respect to the hierarchical or non-hierarchical features implied, as well as logics of rights, fundamental presumptions and interpretational horizons - hereby preparing for a political-philosophical construction.

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. Part II is structured in accordance with the temporal-normative distinction between a 'presumed order' and an 'ideal order'. The construction of the 'ideal order' makes out the greater part of Part II. This part, in its turn, is structured according to three of the political-philosophical categories, 'social structure', 'social means' and 'purposes'. The last category, 'human foundation' is dealt with in a chapter deemed to belong in an interzone between the 'presumed order' and the 'ideal order'. The construction of the 'ideal order' also involves an extensive analysis of six institutional orders: the 'National Labour Market', the 'National Welfare Systems', the 'Employment Relationship', the 'Internal Market', the 'Family' and the 'State as One'. On the basis of the analyses of Part I, the dissertation concludes that these orders are presumed by EU social rights as pre-existing orders, necessary for the implementation of these rights. However, these orders are not merely presumed, they are also qualified in particular manners by the regime of EU social rights.

The last part of the dissertation, 'An Ending and Beginning', entails an extensive summary of the main results and concluding remarks with respect to these results,, but also three reflexions which seek out the potentials of the 'ideal order'.

The results of the analyses will merely be indicated in this summary. The particular social order implied in EU social rights, as constructed in Part II under the heading of 'the ideal order', can be characterized as follows:

- *A destiny-bound social structure celebrating a particular idea of 'the normal life'*. The 'ideal order' is found to be a complex, flexible and to some extent ambiguous order. But in spite of that, it is a largely hierarchical order in which 'EU-citizens', 'Workers' and their 'Family-members' make out the upper layers, and 'Third Country Nationals', 'EU citizens' who are already the losers of the national welfare systems as well as the extremely mobile who move from country to country constitute forgotten or even excluded categories of right holders. The normal life celebrated by this structure is not essentially about a 'culture', but concerns, ultimately, the belonging to different communities which can be qualified as institutional orders.
- *Based on weak particular rights, but a very powerful concept of 'rights'*. EU social rights are generally formulated as non-discrimination rights. The principle of non-discrimination gives rises to fundamental problematics. Interestingly, however, the predominantly *weak EU social rights* have given rise to a *strong concept of rights*. 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. By virtue of these developments, a certain 'metaphysication' of the concept of rights has taken place.
- *Based on a common human foundation in the form of a pure condition of civilization*. This common human foundation does not represent an 'autonomous' or 'free self', and far less a moral self capable of meeting and considering other selves. The common human foundation can be described as a state in which bodies and sexes are hardly distinguishable. Only a 'striving self' exists, marking a movement towards a condition of separable and recognizable bodies while being simultaneously interwoven with other 'striving selves' and being the expression of a kind of ungraspable, irreducible life. The common human foundation constitutes nothing but a foundation of naming and regulation - although as such, it transcends civilization.

- *Lacking overall purposes.* EU social rights center around the labour market as an overall purpose. However, it cannot be discerned what the labour market means *as an overall purpose* (and not merely as an institutional order)
- *Deeply problematic institutional logics make out the essence of the ideal order*, namely the logics of the 'National Labour Market', the 'National Welfare Systems', the 'Employment Relationship', the 'Internal Market', the 'Family' and the 'State as One', as qualified by the rights regime in question. Ultimately, all other elements of the ideal order, its social structure, particular rights and the interpretative methods by which they are sought realized and the metaphysical idea of 'rights' shining through those realizations depend on qualifications of institutional logics. But these essential logics are haunted by relationships of opposition, asymmetrical mediations between individual and common aspects, taboos, discrimination, tensions between fundamental and particular aspects, lurking violence, scenarios of danger and paradoxicality.

However pessimistic these results may seem, it means that the ideal order is not closed in on itself; it is not *identical with itself*. For this reason, it is not without immanent openings.

The last part of the dissertation presents three reflexions which seek out the *potentials* of the ideal order; they dive into the unhappy conditions and paradoxical features of the six anchors of order with the purpose of locating the immanent openings of the ideal order.

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. Philosophers (in particular Benjamin, Arendt and Agamben), as well as artists such as Kafka, Chaplin, Mary Shelley, Hans Christian Andersen, Joseph Conrad and Dostojewski provide conceptual-historical resources for these reflexions in which both deconstruction and the pursuit of overall conceptual meaningfulness are brought to the highest degree of intensity.

The dissertation concludes that the 'ideal order' can indeed be opened up to the possibility of overall purposes - or at least to hopes or fragmented ideas of justice. The problem is, however, that all of the potentials found are negative potentials in the radical sense that if were they realized, they would undermine the ideal order. In this sense they cannot serve us as overall purposes of the ideal order, that is, as regulative ideals which could function as critical correctives within that order.

This does not mean, though, that the ideal order is without utopian potentials, also in a positive sense. Such potentials are implied in the metaphysication of the concept of rights and the fluid aspects of the ideal order - due to which certain stigmatizations of victims of discrimination is avoided and law becomes an instrument for the pursuit of 'the unpredictable', the ever new faces of discrimination.

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