EU Law as a Creative Process

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EU Law as a Creative Process

A hermeneutic approach for the EU internal market and fundamental rights protection

EU recht als een creatief proces

Een hermeneutische benadering voor de EU interne markt en grondrechtenbescherming

(met een samenvatting in het Nederlands)

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Pauline Stéphanie Phoa

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Promotoren:
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Prof. dr. A.M.P Gaakeer
Prof. dr. A. van den Brink

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And we all know I needed it, especially after that dreadful day in July 2019, when my baby sister Hélène passed away so unexpectedly. Siblings are supposed to accompany, challenge and protect each other, but my elder sister Nicole and I have to do without her now, forever feeling that we failed to protect Hélène from the predatory forces in her life. My world collapsed and the grief and anger swallowed me whole. For a while, I did not think I would ever be able to function normally again. I am still moved when I think of how my entire support-system of colleagues, neighbours and friends and family united and mobilised to help me, my sister and my parents through that difficult time, cooking us meals, offering kind words or an understanding, silent shoulder.

I thank all members of the Phoa family (I love you but you are too many to name individually!) as well as my family-in-law, Mireille, Willem, Floor and Willemijn Boswinkel for their care and support. Aat and Jannie van den Herik deserve a special mention for their loving presence during my entire life.

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I dedicate this book to Marijn and Iris. May you always follow your curiosity, and may you find as many teachers and friends as I have to accompany you on your path.

Part II Prefiguration

About the author

Pauline Phoa holds a Bachelor's in law (LL.B) and a Master's degrees in Legal Research (LL.M) from Utrecht University (*cum laude*). She completed an additional Master's degree at Columbia Law School in New York City (class of 2012), for which she received a full scholarship of the Huygens Programme. Her academic achievements at Columbia were recognized by the award of the distinction of 'Harlan Fiske Stone Scholar'.

Before joining academia, Pauline worked as a legal assistant for Judge Arjen W.H. Meij at the General Court of the EU in Luxembourg (2008-2010). After returning from New York, she joined the EU and international law division of Van Diepen Van der Kroef Advocaten in Amsterdam (2012-2014), where she worked on the *Mothers of Srebrenica* case before the ECtHR, as well as on other cases in the fields of mergers and acquisitions, product safety and intellectual property. In 2014, she briefly worked as an EU law advisor for the EU litigation team of the Ministry for Foreign Affairs in The Hague.

Pauline started working on her PhD thesis in 2014 under the supervision of Professors Sybe de Vries, Jeanne Gaakeer and Ton van den Brink. During her research she made several research visits to the Court of Justice in Luxembourg and presented her research at several conferences in, *inter alia*, the Netherlands, Croatia, Spain, and the USA. Furthermore, she taught courses on European law at bachelor's, master's and postgraduate level. In 2019, together with dr. Hanneke van Eijken, Pauline organised the 'Festival Europa', the Netherlands' largest cross-disciplinary festival in preparation of the European Parliamentary elections that year.

Since January 2021, she divides her time as assistant-professor at Utrecht's department of European law, teaching EU law courses on both bachelor's and master's level, and as post-doctoral researcher in the ERC-funded project on 'Modern Bigness' (MOBI) led by Professor Anna Gerbrandy. The MOBI project investigates whether European competition law can and should tackle the challenges of 'Modern Bigness' arising from the digital economy. To answer that question, the project fundamentally reconsiders the nature and boundaries of European competition law in relation to digital developments. Pauline's research for the MOBI-project focuses on platformisation in the agri-food sector.

Outside the academic context, Pauline is an artist and illustrator. She illustrated a collection of children's poetry by Hanneke van Eijken, which was published in January 2021 (*Waar slaap van gemaakt is*, Uitgeverij crU, 2021).

CHAPTER 1

Introduction

1.1 Law as a creative praxis

Legal life starts with a lot of reading – mostly statutes, case law, and doctrinal work like handbooks. However, very soon a student is invited to write, to practise for herself or himself. *Legal life, therefore, is a literary, creative life*. We constantly create texts, and tell and retell stories as we shift between the concrete facts of a case and the abstract rules of statutes and, in more complex cases, the higher order legal norms of general principles of law and/or international and supra-national institutions, or even the abstract idea of justice. As legal professionals, we have the responsibility to ask ourselves: how do we do that, by what art? What do our texts reveal about us as a community of writers, and how do they affect the community of readers? What narratives do they reveal? Literary theory provides us as jurists with a meta-vocabulary to critically reflect upon the work we do, since we are not just passive consumers of case law, but we read professionally and functionally, i.e. we read with the purpose of learning the law and finding material – resources – for subsequent legal writing. How do we do this reading and writing? What happens in the process of interpretation? Furthermore, how do we distinguish between 'good' examples of writing, and less successful ones? Which examples ought we to follow and why? When is our reading and our interpretation 'successful', and what is a good way to write about this interpretation? Moreover, in the act of reading and forming an opinion about the text that we read, we exemplify the judging process that is inherent in the legal profession, and this is especially so in the praxis of adjudication. So, how do we do that?

Classic doctrinal legal research that describes the content of the law governing a particular legal field based on a review of primary legal sources as well as secondary literature, does not take us deep enough into this praxis. Such a classic doctrinal approach assumes that the system of law is logically coherent, and that every new legal text, be it judgment or legislation, is analysed and assessed for its 'fit' within this system. In doing so, legal doctrinal research draws upon the legal system itself to provide concepts, categories and evaluative criteria, making this approach inherently self-referential.[1]

Asking a different kind of question, informed by disciplines external to the law, can be particularly helpful to better understand what we do in European Union (EU) law, the field of law that I take as the object of my study. In EU law, we have to deal with a multitude of interests, cultures, languages and legal traditions. Our professional life in EU law is a complex practice of reading and writing, of cross-cultural language creation. We shape not only a new legal order, but also a new reality for individuals through the legal texts that we produce. What I want to talk about in this study is the way in which a judgment of the European

[1] Terry Hutchinson, 'Doctrinal Research' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 9-10 and 15-16; See also Jan M Smits, *The Mind and Method of a Legal Academic* (Edward Elgar 2012) 13.

Court of Justice (hereafter ECJ[2] or 'the Court') reflects and shapes the ways of thinking and talking about EU law, the stories we tell ourselves, about human life and human interaction in Europe.[3] In this context, the (tense) relationship between the legal framework of the EU internal market and that of fundamental rights[4] protection at EU level will be a particularly informative and illustrative object for reflection.

1.2 Problem statement: balancing the economic interests of the internal market with fundamental rights protection

After the devastation of the First and Second World Wars on the European continent, Jean Monnet and his fellow 'founders of the Treaties' came up with an innovative structure in which the European nation states would be interdependent and, because of this interdependency, less likely to enter into war with each other. The basis for this interdependency was the internal market, i.e. a system of market integration based on the free movement of goods, workers, services and capital.

The scope of EU law has expanded over the years, which means that EU law now encroaches upon areas unforeseen by the original founders of the Treaty. Moreover, the EU has matured into a coherent legal order in which the EU internal market is no longer the sole driver of legal integration. For instance, the protection of fundamental rights initially developed in the 'slipstream'[5] of the building blocks of the EU internal market, i.e. the four freedoms and general principles of EU law such as non-discrimination, effectiveness and proportionality. Since there was initially no written legal framework at EU level

[2] I use the abbreviation 'ECJ' here, rather than 'CJEU'. The Court of Justice of the European Union (CJEU) is the name that indicates the institution, which currently consists of the Court of Justice and the General Court. In this research, I predominantly focus on the Court of Justice, hence the use of 'ECJ'.

[3] Jeanne Gaakeer, 'European Law and Literature: Forever Young. The Nomad Concurs' in Helle Porsdam and Thomas Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities* (De Gruyter 2012) 68.

[4] Within the EU legal order, it is common practice to use the term 'fundamental rights' instead of 'human rights'. It has been suggested that 'fundamental rights' is reserved for the EU- internal sphere, whereas 'human rights' is used in an external sense, describing human rights in an international sense. The present study will follow this distinction, using 'fundamental rights' when designating the EU legal order, and using 'human rights' for a more general or international meaning. See Andrew Williams, 'Respecting Fundamental Rights in the New Union: A Review', in Catherine Barnard, *The Fundamentals of EU law Revisited* (Oxford University Press 2007), 75. See also Allan Rosas, 'Is the EU a human rights organisation?' *CLEER Working Paper* 2011/1, 5-7.

[5] Sybe A de Vries, 'The EU internal market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection' in Sybe A de Vries and others (eds), *The EU Charter as a Binding Instrument: Five Years Old and Growing* (Bloomsbury Publishing 2015).

for the protection of fundamental rights, the Court developed this protection on a case-by-case basis, relying on the constitutional traditions common to the Member States and on international human rights instruments such as the European Convention on Human Rights (hereafter ECHR).[6] However, since the adoption of the Charter of Fundamental Rights of the European Union (hereafter the Charter) at the Nice summit of 2000, the EU had its own (non-binding) fundamental rights catalogue and, with the entry into force of the Lisbon Treaty, the Charter became legally binding. Fundamental rights protection in the EU has thus acquired a solid basis in positive, primary law that some suggest is or can be the new driver for the EU's integration and legitimacy.[7]

However, the functioning and the legitimacy of the EU internal market vis-à-vis fundamental rights protection has also become the object of criticism.[8] There have been a number of cases in which the goal of economic integration of the EU internal market conflicts with fundamental rights, and it seems that the ECJ is struggling to find a coherent approach to these cases. It has been asserted that the ECJ's case law is market-centric, i.e. that it shows a prevalence of EU internal market interests. Furthermore, the legitimacy of the ECJ in its relatively new role as a fundamental rights adjudicator is often called into question, inter alia because of its minimalist style and method of legal reasoning.[9] Some legal scholars express criticism about the adequacy of the current EU fundamental rights discourse and its capacity for achieving real justice.[10] Moreover, the rejection by the Court of the framework agreement for the EU's accession to the ECHR in *Opinion 2/13* is significant for a number of reasons. For instance, it raises questions about the ECJ's perception of its role as a fundamental rights protector in relation to the European Court of Human Rights (ECtHR) in Strasbourg and about the particular conception of fundamental rights protection

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6 Case 4/73 *Nold KG v Commission* ECLI:EU:C:1974:51 [1974] ECR 491.

7 Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 *Common Market Law Review* 630.

8 See for a more thorough discussion Chapter 4.

9 See for instance, Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168 See also Daniel Sarmiento, 'Half a Case at a Time. Dealing with Judicial Minimalism at the European Court of Justice' in Monica Claes and others (eds), *Constitutional Conversations* (Cambridge University Press 2012) 13.

10 Sionaidh Douglas-Scott, 'Human rights as a basis for justice in the European Union' (2017) 8 *Transnational Legal Theory* 59; See also Sacha Prechal: 'The problem is of course that the Court is working with rules that have been written for market integration. At a certain moment there are limits of what one can do with these rules.' in Nik de Boer, 'Interview with Judge Sacha Prechal Part II: Cooperation with national judges, embedding the internal market and transparency at the CJEU' (*European Law Blog*, 19 December 2013) https://europeanlawblog.eu/2013/12/19/interview-with-judge-sacha-prechal-part-ii-cooperation-with-national-judges-embedding-the-internal-market-and-transparency-at-the-cjeu/ accessed 16 December 2020.

in the EU, which may, or may not, be different from the interpretation of these rights by the ECtHR.[11]

The changing role and status of fundamental rights protection in the EU therefore makes the way in which the Court speaks about the EU internal market and about fundamental rights a particularly interesting 'case study' for the type of reflection on the reading and writing process of jurists that I want to undertake in this book. The research project will outline a hermeneutic theory and methodology for EU law, and in particular the adjudication of preliminary references by the ECJ, viewed as a creative process. This methodology will be applied to two thematic, explorative case studies.

1.3 Aim of the study and main research question

1.3.1 James Boyd White and Paul Ricoeur

I want to speak meaningfully about what happens when you write a judgment at the ECJ in which you have to balance fundamental rights protection with economic rights and interests. As I explained in Section 1.1 above, in order to speak meaningfully about this internal process of the judge or référendaire in these types of cases, I think it is useful to think about the law as a practice of reading and writing, and therefore as a creative process.

My study of the writings of James Boyd White and Paul Ricoeur has helped me to refine my own thoughts about EU law as a creative, circular process of reading and writing. I have chosen to engage with the work of White for several reasons. Firstly, he is still considered to be one of the 'founding fathers' of the 'Law and Literature' movement in the US, and still contributes actively to the development of this field.[12] Given his near-iconic status, this project to make one of the first monographs that self-identifies as 'Law and Literature' in the field of EU law, is therefore justified in starting with his work. Secondly, White aspires to be instructive to law students as well as practitioners. This is also my own aim. Moreover, White's 'constitutive rhetoric', with his attention to the art of legal writing, as well as his views on the community-building capacity of the legal language, are particularly instructive for EU lawyers, since in EU law we are continuously trying to build or to strengthen this community. So although White has not written anything in particular about EU law, I think that his work can be particularly instructive for the EU 'project'.[13] The choice to bring the work of White into a dialogue with the work of Paul Ricoeur is motivated by the fact that Ricoeur was one of the most important twentieth century continental

[11] Opinion 2/13 *Accession of the Union to the ECHR* ECLI:EU:C:2014:2454.

[12] See for instance James B White, Keep Law Alive (Carolina Academic Press 2019).

[13] See for instance Sionaidh Douglas Scott, *Law after Modernity* (Bloomsbury Publishing 2013) 13 who also refers to the work of White.

European philosophers,[14] and I initially came to learn about his theories on hermeneutics and narrative through the work of Jeanne Gaakeer.[15] Moreover, as we will see in Chapter 2, there is a remarkable fit between his work and that of White. Gaakeer has argued frequently that the law is a part of the humanities and that the activity of judicial reasoning is an example of *phronesis*, and she connected her own thoughts with those of White and Ricoeur. She opens up the works of these philosophers to a broader legal public and argues for their continued relevance for academia, but especially for legal practice. The present research is a continuation of that discussion.

1.3.2 Main research question

We will explore and compare the writings of these two philosophers more elaborately in Chapter 2, but I will summarise my position as follows. I understand both White's and Ricoeur's writings to mean that for them an important part of reading, of interpreting and understanding a text, is the gradually improving self-understanding of the reader mediated by, on the one hand, the self that an author-narrator projects in the text and, on the other hand, by the vision of humanity and the kind of society we live in that the text proposes. Pivotal in this regard is the fact that this reading experience is viewed as an active process, and that meaning is not something passively received. These themes, i.e. of self-understanding and the vision of humanity (and that includes a reflection upon who is left out of the hegemonic view of society), are what we will call 'narratives of the self and the other', which will be explained in more detail in Chapter 2. Moreover, hermeneutical questions are, in the views of both Ricoeur and White, inherently connected to ethical questions which, in turn, have important ramifications for the practice of law.

It may have become clear from the foregoing that the present research examines law and adjudication as 'praxis', i.e. as an active, embodied practice or process, instead of as a disembodied, static system of rules and principles.[16] Building upon this understanding of the ideas of both White and Ricoeur, the main research question of this study is therefore:

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[14] See Janne E Nijman, 'Paul Ricoeur and International Law: Beyond 'The End of the Subject'. Towards a Reconceptualization of International Legal Personality' (2007) 20 *Leiden Journal of International Law* 25, 39-40.

[15] Jeanne Gaakeer, 'Configuring Justice', (2012) 9 *No Foundations, An Interdisciplinary Journal of Law and Justice*, 20.

[16] See Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 3. See also Paul Ricoeur, *Reflections on the Just* (David Pellauer tr, The University of Chicago Press 2007), 49. Both Gaakeer and Ricoeur refer to Aristotle's notion of praxis as explained in the *Nicomachean Ethics*.

What are the narratives of the self and the other that we can find in EU internal market law and EU fundamental rights protection, and how do they affect the ECJ's adjudicative 'praxis'?

Knowing in what respect or to what extent such narratives of the self and the other are at play in the legal reasoning of the Court may not only help to develop a legal methodology for making more coherent and, ultimately, legitimate decisions in internal market versus fundamental rights disputes, but it will also contribute to the professional ethics and education of EU jurists who have to write about these kinds of problems.

1.3.3 Audience and voice

The audience that I aim at for this research consists primarily of jurists working at the CJEU (judges, référendaires, legal administrators), EU law scholars interested in the Court's legal reasoning, and students of EU law. The target audience for this research has a particular role to play, as will be further explained in Chapter 2.

Taking after the style and tone of writing of James Boyd White, and also of, for instance, Richard Dawson, I write with an autobiographical element, therefore sometimes using the first person singular 'I'. Also, I write not only about law as a cultural, creative activity and as constitutive of a community, but I hope to demonstrate this attitude in the way I write. Therefore, at times I address the reader through the use of the first-person plural 'we'. This is a way to assume a cultural and attitudinal unity: I hope, and claim, to form a community of readers here with you.[17]

1.4 The case studies

Cases such as *Schmidberger*[18] and *Omega*,[19] where a national measure that was intended to protect fundamental rights presented a (prima facie) interference with the free movement of goods and of services, are the 'locus classicus' of the balance between the internal market and fundamental rights. Reynolds[20] has demonstrated that there is a structural asymmetry in the

[17] See Richard Dawson, *Justice as attunement: transforming constitutions in law, literature, economics, and the rest of life* (Routledge 2014), 11. See also James B White, *The Edge of Meaning* (University of Chicago Press 2003), 191, who explained that the presence of 'an irreducibly autobiographical element' in his writing about reading 'is not a mistake or embarrassment, for it is in fact part of my point that all of our readings have such elements, and that it might be good to make them more explicit than we usually do.'

[18] Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333 [2003] ECR I-5659.

[19] Case C-36/01 *Omega Spielhallen* ECLI:EU:C:2004:614 [2004] ECR I-9609.

[20] Stephanie Reynolds, 'Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' (2016) 53 *Common Market Law Review* 643.

classic scheme of the internal market freedoms that places fundamental rights at an immediate disadvantage of having to be justified, and the proportionality needing evidentiary support.

My selection of cases goes beyond this classic arena of the clash between the internal market and fundamental rights by broadening the notion of the internal market to include the fields of data protection and EU citizenship.[21] Both can be said to be 'new' free movement rights as the free movement of EU citizens and the free flow of personal data have important economic implications. However, they also inherently involve fundamental (social) rights. Moreover, if, as some authors have argued, there is a bias inherent in EU law and/or in the reasoning and culture of the ECJ towards 'the economic' or 'the market', then we should also expect to find evidence of this bias in other cases than the ones which concern the classic internal market freedoms. The two categories of cases selected for the case studies not only provide examples of the tension that exists between the EU internal market and fundamental rights, and the balancing act that the ECJ undertakes, but they may also shed a light on concerns about elements of identity and legal subjectivity in these areas of law: who is the person surfing the internet, and what rights do we enjoy and what responsibilities do we have? What image of migrants does EU law convey? How responsive is the ECJ's tradition of legal reasoning to these new challenges?

Case study 1 – EU citizenship and social rights

Since 1992, all the nationals of the Member States enjoy EU citizenship status in addition to their national citizenship. Where before the introduction of this EU citizenship only workers or otherwise economically active persons enjoyed free movement rights under the internal market provisions, now such free movement rights extend – under certain conditions – to all EU citizens, including economically inactive persons. The ECJ has held that being placed at a disadvantage as to corollary rights, such as social benefits, would have the effect of hindering free movement and market integration in Europe.[22] However, Member States increasingly fear that their social welfare systems will be destabilised by this EU migration. This has sparked a heated debate among Member States and legal scholars about migrants' access to social rights and the exclusionary nature or effects of domestic social welfare systems; this debate has taken a particularly sharp turn since the possibility of a Brexit referendum was first spoken of. As particular objects of our study, we will examine in Chapter

[21] Substantive research for this study has been finalised in March 2021, and it therefore only includes developments in case law up until that date.

[22] For example case 186/87 *Cowan* ECLI:EU:C:1989:47 [1989] ECR 195; a case on the language of judicial proceedings is case C-274/96 *Bickel and Franz* ECLI:EU:C:1998:563 [1998] ECR I-7637; see for the right to have access to and reimbursement of medical services undergone in another Member State than the Member State where the sickness insurance originally provides cover case C-157/99 *Smits & Peerbooms* ECLI:EU:C:2001:404 [2001] ECR I-5473.

5 the judgments in *Grzelczyk*[23] and *Dano*,[24] which are two outlying examples of the Court's approach to economically inactive EU citizens' access to social benefits.

Case study 2: data protection and privacy

The important role of technology and digital communication in our society means that what is going on in our heads and in our private 'digital' life, is being commodified. All kinds of data about our behaviour on the internet, our travels, and even health and fitness (such as digital patient records, health apps and fitness trackers), are accessible to both governments and corporations, and their analysis and trade is big business. In recent years, the Court has developed a very strict and ambitious line of case law based on the Data Protection Directive, in which it offers a high level of protection to data subjects. This has served as a basis for the high level of protection ensured by the General Data Protection Regulation[25] (GDPR which entered into force in 2018), with effects that extend beyond the borders of the EU. In Chapter 6 we examine the judgments in *Digital Rights Ireland* and *Google Spain*, which were formative of the Court's new and strict approach to data protection.

1.5 Academic context

When entering a discussion about the work of the European Court of Justice in a specific area of law, using, as is the case in what follows, a particular philosophical methodology, it is useful to be able to locate oneself within the state-of-the-art academic debate in each of these three areas: the relationship between the EU internal market and fundamental rights protection, the reasoning of the ECJ and the interdisciplinary field in legal theory that goes by the name of 'Law and Literature', or, more generally these days, Law and the Humanities. To this end, the following sections provide brief overviews of those debates.

1.5.1 Literature review: balancing the EU internal market and fundamental rights protection

The balancing of internal market law and fundamental rights has attracted the attention of numerous legal scholars. A more extensive review of the academic discussion will follow in Chapter 4, but for the purpose of locating my research within this discussion, it suffices to observe that the debate

[23] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, [2001] ECR I-6193.

[24] Case C-333/13 *Dano* ECLI:EU:C:2014:2358 [2014].

[25] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)).

can be roughly divided into three categories: (1) theories that place the conflict between internal market law and fundamental rights in the context of the *division of competences* between the EU and Member States:[26] (2) theories on *methods of adjudication*, which examine, for instance, the various adjudicative techniques for dealing with a conflict between internal market rights and fundamental rights, such as balancing, as well as the more 'legal-technical' aspects of such a balancing exercise;[27] and (3) theories about the *nature and compatibility* of fundamental rights and the EU's internal market law.[28] My research takes place within, and aims to contribute to, all three categories, as we will see that the 'hermeneutic approach' developed in Chapter 2 both connects and cuts across them.

One of the various theories about the nature of fundamental rights starts from the premise that 'fundamental rights are fundamental not only for the individual rights holder but also for the self-understanding of the polity as a whole'.[29] In other words, the way in which the EU deals with the EU internal market on the one hand, and fundamental rights on the other hand, reveals something about the EU's self-understanding that underpins the legal system. If we take this premise seriously, we may also ask the question whether,

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[26] Edouard Dubout, 'The Protection of Fundamental Rights and the Allocation of Competences in the EU – A Clash of Constitutional Logics' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (1st edn, Oxford University Press 2014); Elise Muir, 'Fundamental Rights: An Unsettling EU Competence' (2014) 15 *Human Rights Review* 25; Philip G Alston and Joseph H H Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' in Philip G Alston, Mara Bustelo and James Heenan (eds), *The EU and human rights* (Oxford University Press 1999); Allard Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 *Common Market Law Review* 367.

[27] See for instance Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0168.pdf; See also Xavier Groussot and Groussot T Petursson, 'Balancing as a Judicial Methodology of EU Constitutional Adjudication' in Sybe A de Vries, Xavier Groussot and Groussot T Petursson (eds), *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'tightrope' Walker* (Eleven International Publishing 2012); See also Hanneke C K Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia 2011); See also Miguel P Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart 1998).

[28] Francesco de Cecco, 'Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law' (2014) 15 *German Law Journal* 383; See also Daniel Augenstein and Bert van Roermund, '"Lisbon vs. Lisbon": Fundamental Rights and Fundamental Freedoms' (2013) 14 *German Law Journal* 1909.

[29] Daniel Augenstein, 'Engaging the Fundamentals: on the Autonomous Substance of EU Fundamental Rights Law' (2013) 14 *German Law Journal* 1922; See also Joseph H H Weiler, 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space' in Joseph H H Weiler (ed), *The Constitution of Europe* (Oxford University Press 1999).

conversely, the key to a consistent legal framework for balancing the EU internal market and fundamental rights, may lie in a clear (or at least clearer) conception of the EU's self and its narrative of, or vision of humanity. Furthermore, taking this perspective on the debate, we are led to ask what impact this has on the Court's legal reasoning in cases in which internal market rights and interests are weighed against, or reconciled with, fundamental rights, which is a question that has not yet been researched extensively, and certainly not from the perspective of the phenomenology of the legal *praxis* at the Court.

1.5.2 Literature review: the ECJ's legal reasoning

Within the academic discourse about the ECJ, several categories of publications can be identified. Firstly, there are publications describing the ECJ as an institution, and its working process in general, in a relatively objective, neutral style. Arnull's *The European Union and its Court of Justice,* is one of the seminal works in this category.[30] Secondly, usually in the same objective style, there are general publications (often handbooks) providing an overview of the different types of procedures or remedies and the procedural law of the ECJ,[31] and publications focusing on a particular type of procedure.[32] A third category of publications approaches the ECJ from the perspective of political science, such as Rasmussen's seminal work, *On Law and Policy in the European Court of Justice*.[33] These works have some overlap with a fourth category, namely the publications that discuss the legitimacy of the Court's – often expansive and progressive – case law, which, in turn, can also involve the question of judicial activism at the ECJ.[34] In a fifth category we can group together publications

[30] Anthony Arnull, *The European Union and its Court of Justice* (2nd edn, Oxford University Press 2006); Other examples: Grainne de Burca and Joseph H H Weiler, *The European Court of Justice* (2nd edn, Oxford University Press 2008); Lionel N Brown, Francis G Jacobs and Tom Kennedy, *The Court of Justice of the European Communities* (5th edn, Sweet and Maxwell 2000).

[31] Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek T Nowak ed, 1st edn, Oxford University Press 2014); René Barents, *Remedies and Procedures Before the EU Courts* (Helen E Breese ed, Wolters Kluwer 2016).

[32] See for instance Martin Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd edn, Oxford University Press 2014); Andrea Biondi and Martin Farley, *The right to damages in European law* (Kluwer Law International 2009).

[33] Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff 1986). See also Karen J Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press 2009); Susanne K Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (1st edn, Oxford University Press 2018); Sabine Saurugger and Fabien Terpan, *The Court of Justice of the European Union and the Politics of Law* (Palgrave Macmillan Education 2017).

[34] See for instance Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015); Bruno de Witte, Elise Muir and Mark Dawson, *Judicial Activism at the European Court of Justice.* (Edward Elgar Publishing 2013); Henri De Waele, *Rechterlijk Activisme en het Europees Hof van Justitie* (Boom

that have looked into the more practical, empirical aspects of the functioning/organization of the Court, explaining (and criticizing) the way in which the ECJ works.[35] A large sixth category is formed by publications that comment more substantively on the legal reasoning of the ECJ, such as publications that study a particular aspect of legal reasoning, like the rule of precedent, more closely[36] and those that in a more normative sense evaluate the quality of judicial reasoning.[37] This sixth category is the academic discussion to which my research aspires to contribute, and I will discuss some of these works in a bit more detail.

Practically all of these books refer, at some point and, admittedly, to a varying intensity, to the classic canons of legal interpretation, i.e., literal (or textual/grammatical), historical, systemic, and teleological (or purposive/functional) interpretation.[38] Most of the publications in this category make a distinction between simple and hard cases, and focus on the latter.[39] Several refer to the importance of the 'argumentative topoi' that are particular to EU law, such as primacy, direct effect, proportionality, mutual recognition, unity.[40] Most of these books have an external academic perspective, i.e. proposing theories that are predictive of outcomes, or at least a taxonomy that structures and explains outcomes, and only very rarely does one find an (accurate) internal perspective

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Juridische Uitgevers 2009); Allard Knook, *Europe's Constitutional Court: The Role of the European Court of Justice in the Intertwined Separation of Powers and Division of Powers in the European Union* (Cambridge University Press 2012 2009); Thomas Horsley, *The Court of Justice of the European Union As an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018).

35 Karen McAuliffe, 'Precedent at the ECJ: The Linguistic Aspect' in Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues* (Oxford University Press 2013); Angela Huyue Zhang, 'The Faceless Court' (2016) 38 *University of Pennsylvania Journal of International Law* 71; See also Alberto Alemanno and Laurent Pech, 'Thinking justice outside the docket: A critical assessment of the reform of the EU'S court system' (2017) 54 *Common Market Law Review* 129.

36 Marc A Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business.* (Cambridge University Press 2014).

37 See for instance Mátyás Bencze and Gar Yein Ng (eds), *How to measure the quality of judicial reasoning* (Springer 2018), in particular Chapter 14 by Gerard Conway, 'The Quality of Decision-Making at the Court of Justice of the European Union', 225-250.

38 See for instance the seminal Anna Bredimas, *Methods of Interpretation and Community Law* (North Holland Publishing Company 1978); See also Rüdiger Stotz, 'The case law of the ECJ' in Karl Riesenhuber (ed), *European Legal Methodology* (Intersentia 2017).

39 Joxerramon Bengoetxea. *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993); Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012); Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013); Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013).

40 See for instance Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013). See also Rüdiger Stotz, 'The case law of the ECJ' in Karl Riesenhuber (ed), *European Legal Methodology* (Intersentia 2017).

of what it is like to do the actual work at the ECJ, i.e. its 'phenomenology'.[41] It is also rare to find books about the legal reasoning of the ECJ that expressly engage with broader theories from 'Law and Literature', 'Law and Humanities', or with hermeneutic philosophy, or language philosophy.

As will be explained more fully in the next chapters, in this research I examine the ECJ's case law from a perspective that combines the 'Law and Literature' approach of James Boyd White, with the hermeneutic philosophy of Paul Ricoeur. With the use of that theoretical perspective, my research aims to supplement the valuable classic approaches to legal interpretation with insights on a deeper narrative, rhetorical as well as an ethical level. Furthermore, my research takes a more internal perspective of the praxis at the Court. My work therefore addresses and attempts to fill several of the gaps that are currently left in the scholarly literature about the legal reasoning of the ECJ.

1.5.3 Literature review: 'Law and Literature' and its place in (post)modern legal theory

As already observed above in Section 1.1, the practice of law really, at heart, consists of reading and writing. We read, interpret what is written in a legal provision, we write about our interpretation of it and its application to concrete facts, and the judgment in which this interpretation is written down could be the object of another, subsequent interpretative action. Therefore, I take as a starting premise that we must see the practice of law as an activity of reading and writing, and therefore as a literary and cultural activity – a *praxis*. This perspective on the law permits me to venture into the theoretical and methodological realm of the humanities. If law is a literary and cultural activity of reading and (persuasive, purposive) writing, then we are, –to put it another way, talking about *hermeneutics*,[42] *narrative* and *rhetoric*. But let us first turn to the interdisciplinary approach to law of which my research forms part, as I assume that not all readers are equally familiar with this approach, nor convinced of its usefulness.

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[41] See for such rare examples the work of Karen McAuliffe, 'Precedent at the ECJ: The Linguistic Aspect' in Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues* (Oxford University Press 2013). See also Antoine Vauchez, *Brokering Europe: Euro-lawyers and the making of a transnational polity* (Cambridge University Press 2015). For a discussion of publications by (former) AGs and judges of the ECJ, see Chapter 3. More generally, with regard to judicial decision-making in the national context, Iris van Domselaar has noted the lack of attention for what she calls the 'troublesome phenomenology' of adjudication: its 'dark, messy, painful, unpredictable and incomprehensive aspects'. She refers to Dworkin's *Law's Empire* as an exception: Iris van Domselaar, *The Fragility of Rightness. Adjudication and the Primacy of Practice* (dissertatie University of Amsterdam 2014), 3-5. The seminal work of Robert Cover already voiced similar concerns about the absence of attention for phenomenology, see Robert Cover, 'Violence and the Word' (1985) 95 Yale Law Journal, 1601.

[42] For definition of hermeneutics, see Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 5.

European roots of Law and Literature and their American resurgence

Many publications about this interdisciplinary approach start with describing the rise of 'Law and Literature' in the US in the 1970s.[43] However, this approach overlooks the earlier, classical roots of the connection between law and literature.[44] For instance, in ancient Greece the practice of law was already closely connected to the art of rhetoric and of interpretation. In ancient Rome, the significance of (oral) rhetoric for the practice of law developed further, as in Rome litigants employed professional lawyers to present their cases, such as Cicero and Quintillian, who also produced treatises on the theory and practice of rhetoric. The Roman rhetorical tradition was revived in school curricula and in professional legal education during the Middle Ages and the Renaissance.[45] As Gaakeer points out, in those days, he who was able to read and write usually and logically occupied himself with the study and practice of both law and literature. In the European universities in the Middle Ages, the scholastic method of dialectic debate meant that rhetorical and poetical elements were further incorporated into the law.[46]

As may be evident from the foregoing, law and literature (or the humanities in a broader sense) were historically and traditionally connected. This bond was deemed natural and useful until the rise of scientific positivism in the nineteenth century, which laid an emphasis on empiricism and rationalism. Academic disciplines and professions were increasingly specialised and separated, and rhetoric and other literary aspects lost their eminence in legal education and practice.[47] The positivist approach claimed that the value of law lay in its objectivity, and that rules exist separately from those who apply them.[48] However, this 'law as science' approach of the nineteenth century lost ground in the early twentieth century and more so from the 1950s onwards.[49] The publi-

[43] Jeanne Gaakeer, 'European Law and Literature: Forever Young. The Nomad Concurs' in Helle Porsdam and Thomas Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities* (De Gruyter 2012); See also James Boyd White, 'The Cultural Background of The Legal Imagination' in Austin Sarat, Cathrine O Frank and Matthew Anderson (eds), *Teaching Law and Literature* (Modern Language Association of America 2011), 29-30.

[44] As pointed out by James B White, 'The Cultural Background of The Legal Imagination' in Austin Sarat, Cathrine O Frank and Matthew Anderson (eds), *Teaching Law and Literature* (Modern Language Association of America 2011), p. 1.; See also for an overview of the history of the 'Law and Literature' movement, Klaus Stierstorfer, 'The Revival of Legal Humanism' in Kieran Dolin (ed), *Law and Literature* (Cambridge University Press 2018).

[45] Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press 2007), 21-22.

[46] Jeanne Gaakeer, 'European Law and Literature: Forever Young. The Nomad Concurs' in Helle Porsdam and Thomas Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities* (De Gruyter 2012), 49-51.

[47] See Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press 2007), 22.

[48] Robert Cryer and others, *Research methodologies in EU and international law* (Hart Publishing 2011), 35-37.

[49] Jeanne Gaakeer, *De waarde van het woord* (Gouda Quint 1995), 26.

cation in 1973 of James Boyd White's *The Legal Imagination* is usually identified as the actual start of the Law and Literature 'movement', although White himself resists the qualification of his work as anything like theory-forming or movement-forming.[50]

White's seminal work is considered the first of many publications that advocate, in a comprehensive way, a humanistic approach to law, in which the activities of reading and writing are considered as central to the work of the legal profession. Since the publication of *The Legal Imagination*, 'Law and Literature', or even more broadly 'Law and Humanities'[51] has become an umbrella term for a kaleidoscope of approaches. These approaches are usually divided, for heuristic purposes, into two categories, namely Law-in-Literature and Law-as-Literature,[52] which we will now discuss briefly.

Law-in-Literature

Generally, research that is classified as 'Law-in-Literature' analyses how the law, related themes and/or the legal profession are portrayed in literary works.[53] It uses literary works as a mirror for the legal profession, providing an external

[50] James B White, *The Legal Imagination* (1st edn. The University of Chicago Press 1973 – 45th anniversary edition Wolters Kluwer 2018). See also James B White, 'Law and Literature: No Manifesto' (1988) 39 *Mercer Law Review* 739.

[51] For this research, I will continue to use the more well-known term 'Law and Literature' to designate the approach to law from the perspective of the humanities.

[52] Often ascribed to Robert Weisberg, 'The law-literature enterprise' (1988) 1(2) *Yale Journal of Law and the Humanities* 1, 17. However, Gaakeer noted that 'the taxonomy of "Law and Literature' research into the two categories is reductive, and perhaps even unhelpful beyond mere heuristics. Although it is a common way to describe this very diverse field of interdisciplinary research, but it does not really do justice to its diversity. See Jeanne Gaakeer, 'The Future of Literary-Legal Jurisprudence' (2001) 5 *Law and Humanities*, 185. The interested reader could consult various anthologies and handbooks in order to get a full picture of this academic output in this rich field. For a more elaborate discussion of the history of Law and Literature and the various branches of research within Law and Literature, see, for instance, Austin Sarat, Matthew D Anderson and Cathrine O Frank, *Law and the Humanities: An Introduction* (Cambridge University Press 2010); Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton University Press 2000); Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press 2007); Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge University Press 1995) and Jeanne Gaakeer, *De waarde van het woord* (Gouda Quint 1995) 51-60.

[53] A landmark publication in the Law-in-Literature category was John Wigmore's *List of Legal Novels*. (John Wigmore, 'A List of Legal Novels' (1908) 2 *Illinois Law Review*, 574, and the updated 'A List of One Hundred Legal Novels' (1922) 17 *Illinois Law Review*, 26). See also Richard Weisberg, 'Wigmore's 'Legal Novels' Revisited: New Resources for the Expanding Lawyer' (1976) 71 *Northwestern University Law Review*, 17. In Wigmore's list of novels, Weisberg identified four categories that may be seen as archetypes for this type of research: 1) novels describing a trial (such as *L'Etranger* by Albert Camus), 2) novels in which the main character is a lawyer (Shakespeare's *Hamlet*, Herman Melville's *Bartleby the Scrivener*), 3) novels in which certain laws are the point of departure (Dostojevsky's *The Fool*), and

view of law in action. Certain scholars who do this type of research suggest that literature may be an instrument to inform legal professionals about the world in which they work. Reading literature, they argue, increases a lawyer's empathic and imaginative skills. It has an ideal vision of literature making lawyers better people, or at least better at what they do.[54] The Law-in-Literature perspective can be used on a meta-level to challenge the legitimacy of the legal approach so far: what alternative norms, narratives and vocabularies do the humanities offer and how may they inform the traditional narration of the law?[55]

Law-as-Literature

The type of research that can be classified as 'Law-as-Literature'[56] approaches law as a literary activity, and therefore leans on, and makes use of, the various theoretical approaches from the humanities, more particularly literary theory, such as rhetoric and hermeneutics, as well as structuralism, semiotics, narratology, and deconstruction of legal texts.[57] Legal scholars using Law-as-Literature approaches, often (implicitly) work within the intellectual tradition of language philosophy and literary theory, which developed as a self-standing academic discipline in the course of the twentieth century out of hermeneutic philosophies.

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4) novels in which the relation between law, justice and the individual are central (Kafka's *In the Penal Colony*).

54 Advocates of the importance of the humanist tradition in legal education are, among others, James B White, Jeanne Gaakeer, Martha Nussbaum, Richard Weisberg, and Robin West. See also Jeanne Gaakeer, *Hope Springs Eternal* (Amsterdam University Press 1998), 33-36.

55 Dawn Watkins and Mandy Burton, *Research methods in law* (Routledge 2013), 73.

56 Where the Law-in-Literature branch has as its seminal text Wigmore's *List of Legal Novels*, Law-as-Literature is viewed as starting with Benjamin Cardozo's '*Law and Literature*'. In that article, he argued that any legal professional should develop a linguistic antenna sensitive to peculiarities beyond the level of signifier and the signified (i.e., the form of a word and its dictionary meaning). He emphasised the importance of literary style in legal texts and the relation between form and content. See Benjamin Cardozo, 'Law and Literature' (1925) 14 *Yale Review* 489. See also Jeanne Gaakeer, 'Law and Literature Redux? Some Remarks on the Importance of the Legal Imagination', in Julen Etxabe and Gary Watt (eds), *Living in a Law Transformed: Encounters with the Work of James Boyd White* (Michigan Publishing 2014) 13.

57 As a methodology, 'Law as Literature' is therefore part of the so-called 'hermeneutic turn'. See also Dawn Watkins and Mandy Burton, *Research methods in law* (Routledge 2013), 74; Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press 2007), 29; Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge University Press 1995), 16, and Jeanne Gaakeer, *Hope Springs Eternal* (Amsterdam University Press 1998) 29-32.

The methodology of Law and Literature

As the previous paragraphs have made clear, Law and Literature has branched out into a broad range of approaches and methodologies, which Jeanne Gaakeer has described as a 'pantheon of legal theorists.'[58]

Although the 'Law and Literature' movement encompasses a kaleidoscope of different uses, there are several premises that they generally have in common:

- language is law's only tool;
- law's instrument is an institutional language that imposes its conceptual framework on its users;
- law and literature are both producers and products of a culture, and they can be analysed as either a reflection, or as a critique of the prevailing societal convictions and conventions.[59] 'In this light, legal language may lose its finality and stability of meaning and become open to reinterpretation and critique';[60]
- an investigation of the literary creation of human experience may help us understand the way in which narratives (re)construct reality.[61]

It is in the domain of 'Law-as-Literature' that my research aspires to contribute, particularly in the field of legal hermeneutics and narrative jurisprudence, as will be explained more fully in Chapter 2. In the following section, I will explain the particular novelty of this approach to the study of EU law and adjudication at the ECJ.

1.5.4 A 'Law and Literature' approach for EU law

The 'Law and Literature' approach has become an established part of legal theory.[62] There is a considerable body of work in the US, but in her

[58] Jeanne Gaakeer, *Hope Springs Eternal* (Amsterdam University Press 1998) 37.

[59] Jeanne Gaakeer, 'Control, Alt, and/or Delete? Some observations on new technologies and the human' in Mireille Hildebrandt and Jeanne Gaakeer (eds), *Human Law and Computer Law* (Springer 2013), 135-157. See also Barbara Villez, 'Law and Literature: A Conjunction Revisited' (2011) 5(1) *Law and Humanities* 209, 210; See Sionaidh Douglas Scott, *Law after Modernity* (Bloomsbury Publishing 2013), 13.

[60] Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press 2007), 21. See also Dawn Watkins and Mandy Burton, *Research methods in law* (Routledge 2013), 78-79.

[61] See, among others, Jeanne Gaakeer, 'Law and Literature Redux? Some Remarks on the Importance of the Legal Imagination', in Julen Etxabe and Gary Watt (eds), *Living in a Law Transformed: Encounters with the Work of James Boyd White*. (Michigan Publishing 2014) 13 and Jeanne Gaakeer, *De waarde van het woord*, (Gouda Quint 1995), 74.

[62] For an overview of the place of the Law and Literature movement in the general "history of ideas" and legal theory: Jeanne Gaakeer, 'Law in context, Law, Equity, and the Realm of Human Affairs' in Daniela Carpi (ed) *Practising Equity, Addressing Law – Equity in Law and Literature* (Universitatsverlag Winter 2008) 33 and Jeanne Gaakeer, '(Con)Temporary Law' (2007) 11 *European Journal of English Studies*, 29. See also, for a history of legal theory in Europe and the 'whatness' of law and legal culture:

inaugural lecture '(Con)Temporary Law', Gaakeer observes that European (continental) scholarship on Law and Literature has been relatively sparse and leaning heavily on the American academic debate, so that a distinctly (continental) European voice in the 'Law and Literature' movement has not yet developed.[63] The particular task for European 'Law and Literature' scholars would be not only to use European literary texts and philosophers, but also to pay particular attention to the local culture from which they sprung. Moreover, a European 'Law and Literature' voice would need to relate to, and account for, the particularities of the (continental) European legal cultures. Furthermore, specific attention should be paid to the consequences of the transition towards a shared, or at least composite, European legal culture in the context of the EU and the ECHR.[64] So far, however, the 'Law and Literature' methodologies are very rarely applied in EU substantive law analysis,[65] and therefore it is my aim to fill this lacuna.

One can only guess at the reasons for the near-absence of 'Law and Literature' scholarship in the field of EU law.[66] Perhaps the case law of the ECJ does not seem to be as rich a source for imaginative legal drafting as, for instance, the case law of the Supreme Court of the United States that is so often the object of Anglo-American 'Law and Literature' examination. Rather, because of their formalist and even minimalist style of reasoning, ECJ cases usually make for dry reading. However, this does not mean that the 'Law and Literature' approach cannot be applied to ECJ case law. On the contrary, in the relatively new legal order of the EU, which is characterised by pluralities of language, cultures and legal traditions, there is much to be gained in taking a legal-literary approach to its law. Moreover, the development of the EU was – and continues to be – highly legalistic;[67] the means of integration were predominantly legal, to a lesser degree political, and even less cultural. Legal communication, and the communication about European law, is therefore very important for the process of European integration, and it deserves a thorough discussion.

Jeanne Gaakeer, 'Reverent Rites of Legal Theory: unity – diversity – interdisciplinarity,' (2012) 36 *The Australian Feminist Law Journal*, 19.

63 Jeanne Gaakeer, '(Con)Temporary Law' (2007) 11 *European Journal of English Studies*, 29 at 39.

64 See for instance the mission statement of the European Network for Law and Literature Scholarship <https://www.eur.nl/esl/over/secties/sociologie-theorie-en-methodologie/law-and-literature > accessed 21 December 2020.

65 For a rare example, see Antoine Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire – Essai sur la figure du juge traducteur* (FU Saint Louis 2009).

66 The following passages have been published before as Pauline S Phoa, 'EU Citizens' Access to Social Benefits: Reality or Fiction? Outlining a Law and Literature Approach to EU citizenship' in Frans Pennings and Martin Seeleib-Kaiser (eds), *EU Citizenship and Social Rights: Entitlements and Impediments to Accessing Welfare* (Edward Elgar Publishing 2018), and are reproduced with permission of the publisher through PLSclear.

67 See for instance Thomas M J Moellers, *The role of law in European integration* (Nove Science Publishers 2003), 6; Karen J Alter, *The European court's political power: Selected essays* (Oxford University Press 2009), 35-36.

As we will see more fully in Chapter 2, the use of the 'Law and Literature' perspective creates awareness of the openness of the law and of legal texts, as well as of their normative determinacy. In that sense, 'Law and Literature' analysis destabilises what is thought of, or presented as, stable and objective, revealing that seemingly 'objective' judgments or legislation may carry certain presumptions and prejudices, or normative 'grand narratives'. If, as Law-as-Literature perspectives claim, a text can be read for its narrative qualities, then EU law and legal texts can be revelatory of EU legal narrative or narratives: EU judgments and legislation may reveal what rights or interests are of prevailing importance in the EU, what the underlying norms are of this nascent legal culture.[68] Moreover, as this interdisciplinary approach teaches us, law is not just a set of rules or institutions; it is a rhetorical and literary activity, but one could also say that law itself is a kind of language; a set of terms, texts and understandings. Especially in a heterogeneous structure such as the EU, law gives us a common language that enables us to talk to each other.[69] As White puts it: 'speaking the legal language means inhabiting a legal culture and being a member of a legal community'.[70] In that sense, law is symbolic: it plays a role in creating a feeling of European identity, and it strengthens social cohesion.[71] In a way, a judicial decision can be 'an artefact that reveals a culture':[72]

> Speaking the legal language means inhabiting a legal culture and being a member of a legal community, made up of people who speak the same way. For this 'language' is not just a set of special-sounding words, but a set of intellectual and social activities, and these constitute both a culture – a set of resources for future speech and action, a set of ways of claiming meaning for experience – and

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[68] See for a similar argument George Raitt, 'Insights for Legal Reasoning from Studies of Literary Adaptation and Intertextuality' (2013) 18 *Deakin Law Review* 191, 196; See also Thomas Morawetz, 'Law and Literature' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell 2010), 451; Jeanne Gaakeer, *Hope Springs Eternal,* (Amsterdam University Press 1998), 152 suggests to read ECJ and ECHR case law 'as proposals for the shape and contents of the European community at the supranational level' and as 'sources of European self-understanding' Jeanne Gaakeer, 'Reverent Rites of Legal Theory: Unity – Diversity – Interdisciplinarity,' (2012) 36 *Australian Feminist Law Journal,* 19, 42.

[69] See for an interesting approach to conceptual convergence in European law Sacha Prechal and Bert van Roermund (eds), *The coherence of EU law: The search for unity in divergent concepts* (Oxford University Press 2008).

[70] James B White, *Heracles' bow: essays on the rhetoric and poetics of the law* (University of Wisconsin Press 1985), x-xi.

[71] Mark van Hoecke, *Law as communication* (Hart Publishing 2002), 64-65.

[72] Paul Gewirtz, 'Narratives and rhetoric in the law' in Peter Brooks and Paul Gewirtz (eds), *Law's stories* (University Press 1996), 3; See also Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing 2013), 96.

> a community, a set of relations among actual human beings. The law can thus be seen at once as a language, as a culture and as a community.[73]

Furthermore, on a more general level, the 'Law and Literature' perspective creates an awareness of the constitutive effect of the law as a community of readers and writers.[74] It reveals how these different actors interact both with and through the text.

Consequently, the application of 'Law and Literature' methodologies to EU substantive law can contribute to a better understanding of the tension between the EU internal market and fundamental and social rights as noted above in paragraph 1.2. EU jurists have to balance these competing interests in all kinds of cases while keeping in mind the aim (or the narrative) of a shared future, and the particular challenges of the EU's multi-cultural and multi-lingual character.[75] Such a multi-layered legal reality requires a practice of everyday interpretation, translation and storytelling – literally and figuratively speaking, that is. My research therefore aims to make 'Law and Literature' scholarship accessible and actionable for EU law scholars and practitioners. More particularly, it aims to contribute to the development of a particular European style of 'Law and Literature' scholarship by connecting the ideas of James Boyd White with those of French philosopher Paul Ricoeur.

1.6 The structure of the book

The book is divided into three parts. Part I 'Theory', consists of Chapter 2, in which I bring the works of Ricoeur and White into dialogue with each other in order to develop a hermeneutic for EU law and ECJ case law. Part II is called 'Prefiguration', which consists of Chapter 3, which provides background knowledge of the ECJ as institutional author, and Chapter 4, which provides background knowledge of the internal market as well as of fundamental rights protection in the EU. In Part III ('Configuration') I will exemplify the way of reading developed in Chapter 2, namely by close reading of ECJ judgments in the two thematic case studies mentioned above, i.e. on EU citizens' access to social benefits (Chapter 5) and on data protection (Chapter 6). The analysis of case law and important legal provisions will, I expect, reveal important central, overarching themes and recurring concepts and forms of

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73 James B White, *Heracles' bow: essays on the rhetoric and poetics of the law* (University of Wisconsin Press 1985), x-xi.

74 James B White, *Heracles' bow: essays on the rhetoric and poetics of the law* (University of Wisconsin Press 1985), 4.

75 Sybe A de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon: An Endeavour for more Harmony' in Sybe A de Vries, Xavier Groussot and Gunnar T Petursson (eds), *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'Tightrope' Walker* (Eleven International Publishing 2012) 9.

legal arguments. Finally, Part IV ('Refiguration') consists of Chapter 7 which combines the insights from the two case studies and attempts to 'read one work in light of another' in a synthesis, and Chapter 8 presents the final conclusions and recommendations.

PART I

Theory

CHAPTER 2

A Hermeneutic Approach for EU Law

2.1 The phenomenology of legal practice

This research explores what it must be like to draft a judgment at the ECJ, to think and read and write about EU law, in particular about balancing economic and fundamental rights. Although this is an academic publication, and we will make an excursion into hermeneutic philosophy soon, I keep the concrete experience of legal practice, and the training for that professional life, at both the starting and the end point of our thinking. We will only revert to theory if – and because – it helps us to think well, not as an end in itself.

What, then, does this practice of law, of EU law, consist of? What is interpretation, what is good interpretation, and what is good writing about this interpretation? What does it require? I believe that, in essence, all we do is reading and writing: words are the tools of the jurist's trade.[1]

> We read the arguments of the various parties, and write about them, whether in the form of a judgment, a legal brief or an academic paper.
> We read legal provisions, and write about them.
> We read judgments in earlier cases, and write about them.
> We read our colleagues' comments on a text which we have drafted, and respond to their feedback.
> We read someone else's work, and we formulate feedback.

Reading involves establishing a relationship with the text, and deciding on a strategy for interpretation, i.e. a search for its meaning. Writing includes deciding how to order the things you write about, the facts and the arguments, and how much detail to include, and for what reasons. It also concerns the decision, conscious or not, not to write about something, to remain silent on certain topics. Furthermore, most of the time, writing is not a verbatim copying of the original texts, but a rephrasing: often we write about other, earlier texts in our own words. So even if we are trying to say the same thing, and to do no more than to reflect or record the original message, for instance, when we summarise the facts of the case or the arguments of the parties, in the act of writing about a text, we at once interpret and project into the future.

However, what is that thing that we, i.e. jurists, do with words?[2] What does meaningful speech about, on the one hand, economic rights and interests, and on the other hand, fundamental rights, require? Do these categories of rights demand the same things of a jurist's mind, of his or her ways of expression? Are economic rights and fundamental rights comparable at all, and therefore capable of being weighed against each other? And what does that 'weighing' look like, is it a cost-benefit analysis, or can we think of different approaches? Are the ways of speaking about, claiming meaning for, economic interests the same as for

[1] Paraphrasing Lord Denning, *The Discipline of Law* (Buttersworths 1979) 5.

[2] Paraphrasing linguist John L Austin, *How to Do Things with Words: The William James Lectures delivered at Harvard University in 1955* (Clarendon Press 1962).

fundamental rights, or is the vocabulary of one kind of rights somehow inadequate for the other? How is the community that we aspire to create for the EU represented in our use of language about these rights and interests?

In order to ground and structure our venture into the realm of hermeneutic philosophy and 'Law and Literature', let us make an inventory of what we imagine are the concerns of a jurist working at the ECJ who will have to draft a judgment in a preliminary reference procedure,[3] in which both economic interests and fundamental rights may be at stake. The questions referred to the ECJ require interpretation of various kinds of EU law: primary (Treaty) law and secondary legislation, as well as an interpretation of the ECJ's own previous case law that may contain authoritative precedent. The work of this jurist will have temporal dimensions or stages, which require particular actions.

1) The beginning of the interpretative exercise: arrival of the case file, initial inventory of the legal issues and framework.
2) The engagement with the concrete, particular legal texts, provisions and precedent as objects to be interpreted.
3) The forward-looking evaluation of the 'outcome' of the interpretative exercise: the application of the interpretation to the preliminary questions at hand, in the form of a judgment (which the jurist will realise may, in turn, become the object of interpretation not just by the national court and the litigants, but also by the general (EU) legal community and the general public).

I think that in order to think carefully about these stages and the three, previously mentioned questions, it is helpful to draw upon the works of American 'Law and Literature' scholar James Boyd White, and those of the French philosopher Paul Ricoeur. As we will see, there are striking parallels that can be drawn between their works: both argue for a complex, dynamic view of language, which, in turn informs and complicates their thoughts about the interpretation process – their 'hermeneutics' – which is always grounded in the concrete experience, i.e. the phenomenon of reading. Both argue for a stage consisting of structured, close reading of a text, that we will call 'explaining', and a more dynamic, participatory and creative stage of engagement with the world proposed by the text, that we will call 'understanding'. Their suggestions as to how to go about these two stages are particularly informative for EU jurists, as they can help us to think about the interpretation process in EU law – with the preliminary reference procedure at the centre – in a different way. More specifically, since this interpretation process in their view invites reflection about the 'self' and our relationship with the world and with the community we live in with 'others', i.e. our self-understanding and vision of humanity, it may shed new light on the difficulties inherent in the balancing of fundamental rights with economic rights in the EU legal order.

The interdisciplinary theory and methodology presented here is not completely different from the way in which jurists normally regard the law, what

[3] For an explanation about this procedure, see Chapter 3.

we could call the 'classic' doctrinal approach to legal research. The added value lies in pointing out things that seem self-evident, in order to be able to think about them in a more structured way, and to offer more (theoretical) resources and underpinnings where needed. However, a novel element of our hermeneutics is the attention for the sense of self, other and community that texts may convey in the details of their configuration. Hermeneutics is a meta-process of reading: a theory that is more about the process of reading than about concrete outcomes, asking what it is that we do when we read a (legal) text and claim meaning for it. Part of this meta-process of reading is to make conscious a process that is largely unconscious, and to enhance the set of skills that the jurist may already possess.

In order to develop our theoretical framework, this chapter is structured as follows. Section 2.2 discusses crucial preliminary issues that frame our subsequent discussion, namely, what kind of view of law and of language is adopted in this research (Section 2.2.1), and what kind of knowledge we may hope to acquire from our hermeneutic approach (Sections 2.2.2 and 2.2.3). From the foundations set out in those sections, Section 2.3 discusses the notion of 'prefiguration', Section 2.4 examines what Ricoeur means by 'configuration', and Section 2.5 formulates an idea of what 'refiguration' could mean and could look like in our present project. This latter stage of our hermeneutic process also ventures into the realm of ethics. Section 2.6 summarises the premises upon which the subsequent chapters of this study will be built.

2.2 The beginning of the interpretative exercise – preliminary issues

At the start of this interpretative exercise, we need to talk about our views about law and about language, since this influences the attitudes and methodology that we, as jurists, will adopt throughout the interpretation process, and the expectations that we have for its 'completion', for the kind of knowledge which we can hope to obtain at the end of our interpretative process.

2.2.1 Law and language: two views

View 1: System of rules – mechanical application

One possibility is to think about law as a mere system of rules, and about jurists as operators who apply these rules to factual situations. One could also think about language in this way. Legal education and research (doctrine) is sometimes based upon this kind of thinking, and the idea of law and of language as systems of rules that represent the world unambiguously, leading to objective knowledge, and premised on the separation between the observer and

the observed, has been the paradigmatic outlook of scientific positivism.[4] The premise is then, that if you know the syntax[5] and the lexicon[6] of these rules, you can generate the outcome: a legal decision in the case of the law; or a meaningful statement in case of language; or, to use a sports metaphor, if you memorise the rule book, you know how to play the game. However, this perspective on languages and on law is of limited help once you transition from the law school to legal practice. An athlete will know that mastering the rules and tactical moves does not guarantee that you actually know how to play a game, let alone a successful one. Similarly, in our communications, having a more or less extensive or refined vocabulary and a certain level of grammar, will not ensure that what we say makes any sense or has any meaning.

Likewise, the application of law is almost never a matter of mere rationality and logical syllogisms applied in a mechanical way to a given set of 'objectively' determined and described facts. Rather, the task of judges very often involves the interpretation of either the legal rule or the facts, and often of both. Moreover, in the particular case of the ECJ, a large part of its workload is made up of the preliminary reference procedures (see Chapter 3 below), the whole point of which is to provide the national court with the correct interpretation of EU law, in order to enable the national court to apply that interpretation to the facts of the case at hand. This means that the task of the ECJ judges and law clerks is often not the application of the law, but only its interpretation.

So where do we see this more mechanical view of law and of language, and where do we notice the need for a more complex view? Usually, the interpretation process in a preliminary reference procedure starts with reading the text, for instance a provision in the TFEU as it is there set out: the words, the sentences, the paragraphs. The starting point is the text itself, and the (legal) interpreter's inquiry starts with asking whether the ordinary meaning of the words is sufficient to understand the text, or whether they leave such room for uncertainty that additional interpretative methods need to be used.[7] Accordingly, we see that most ECJ judgments indeed start with an assessment of the legislative text, i.e. with what is also called a 'plain meaning' or semantic, textual, literal or grammatical interpretation.[8] However, often the meaning of a word

4 James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), introduction ix–x; see Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 47-48.

5 Syntax is the part of grammar that deals with the way in which words can be put together to form a meaningful whole, such as a clause or a sentence.

6 A lexicon comprises all the meaningful linguistic units, i.e., all words and phrases used in a particular language or concerning a particular subject.

7 Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 96-99.

8 Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 147-153 and 188-190; Henri De Waele, *Rechterlijk Activisme en het Europees Hof van Justitie* (Boom Juridische Uitgevers 2009), 104-105.

or of a longer text may not be as obvious as expected, because of polysemy (i.e. the plurality of possible meanings) and/or the linguistic vagueness in the way in which the legal provision is drafted.[9] An inquiry into the plain meaning of a word suggests that such a plain meaning is possible, which is not just problematic in a natural language, but even more complex and problematic, if not unlikely, in a multi-lingual legal system like EU law.

However, how do we talk about a text, about the possibilities and constraints that the textual object of interpretation gives for the solution to a problem? As noted by numerous academics, the interpretation of EU law is not merely an exercise in translation or a comparative exercise of various languages and legal concepts but, as the ECJ enigmatically states, EU law has a terminology that is particular to it ('sui generis'), and that therefore each provision must be subjected to a further contextualised interpretation.[10] The words are just the beginning, and there is often a decisional, creative surplus of meaning. This is confirmed by the very existence of the four distinct 'interpretative modalities' in legal interpretation: literal/grammatical/textual; historical/legislature's intent; systemic; teleological/purposive. The existence – and regular use – of these four categories tells us that a mere reliance on the text does not always provide a clear and useful solution. So how do we deal with this surplus of meaning? How do we know when it is appropriate to use one of the interpretative modalities other than 'literal'? If we want to use a systemic argument, how do we locate the relevant system, and identify the systemic demands and boundaries? And if we want to rely on the third interpretative modality, teleological arguments, how do we identify the objective, the *telos*, of a rule, and not just in the particular context of specific legislation, but in the larger whole of the EU legal order? What is that ultimate goal that we project into the future? And, more importantly, how do we discuss these matters in a meaningful way, first with our colleagues – of different nationalities and cultures – in meetings like the judges' deliberations, then on paper in the judgment, explaining the decision that we have taken to the parties and to the larger audience of the judgment? Moreover, the kind of writing that makes up the totality of a judgment involves much more, and is much richer, than the mere justification of which kind of interpretative modality one has used.

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9 See also, Hart on 'open texture' of language and legal rules: Herbert L A Hart, *The Concept of Law* (Clarendon Press 1961), 120-132; Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 4; See also Alain Thomasset, *Paul Ricoeur: Une Poetique de la Morale* (Leuven University Press 1996) p. 119; Winfried Nöth, *Handbook of Semiotics* (Indiana University Press 1995), 336-337.

10 See case 283/81 *CILFIT* ECLI:EU:C:1982:335 [1982] ECR 3415, paras 18-20; see also Jacobien E van Dorp and Pauline S Phoa, 'How to Continue a Meaningful Judicial Dialogue About EU Law? : From the Conditions in the CILFIT Judgment to the Creation of a New European Legal Culture' (2018) 34 *Utrecht Journal of International and European Law* 73.

As noted by Advocate General (AG) Stix-Hackl, the legal interpretation process 'always involves a process of understanding which, as such, cannot be turned into a mathematical formula – this is particularly true of [Union] law, with its many variables of interpretation, which themselves include the dynamic evolution of that system of law'.[11] This lies in the very nature of law

> which is intrinsically bound by the possibilities of linguistic expression and is therefore as imprecise and imperfect as language itself. A legal finding is by definition not an 'objective finding' in a scientific sense (although, even in a scientific context, that term must be used with caution). Case law is therefore hardly ever a matter of findings alone or a mechanical process of categorisation, but also involves an element of decision-making, a fact, moreover, which is very neatly expressed in the judicial formula 'hat für Recht erkannt'/'dit pour droit'.[12]

Nevertheless, if the legal interpretation process is not mathematical, and if legal findings are not objective in the scientific sense but neither should they be arbitrary, what are they then? How do we think well about this process?

View 2: Law and language as complex cultural practices

The previously mentioned kind of mechanical way of thinking about the law and about language misunderstands and misrepresents the complexity of both. There is another way of thinking about law and language, and that is to acknowledge their respective cultural, creative and performative character, that we can most meaningfully speak about in relation to the concrete experience of their use.[13] For the law, this means that we can draw upon literary theory and hermeneutic philosophy – such as the writings of Paul Ricoeur and James Boyd White – to help us understand its cultural performativity. This interdisciplinary way of thinking about law is called 'Law and Literature', or, more recently, 'Law and Humanities' as discussed previously in Chapter 1, Section 1.4.3.[14]

James Boyd White

A starting point for White's reflections on language is that language should not (exclusively) be talked about as if it were a neutral vehicle or container for meaning, as mere code to transmit messages. According to White, this mode of thinking about language reduces it to propositions and concepts that can

[11] Case C-495/03 *Intermodal transports* ECLI:EU:C:2005:215 [2005] ECR I-8151, Opinion of AG Stix-Hackl, para 101, reflecting on the CILFIT-doctrine.

[12] Case C-495/03 *Intermodal transports* ECLI:EU:C:2005:215 [2005] ECR I-8151, Opinion of AG Stix-Hackl, footnote 57.

[13] Jacobien E van Dorp and Pauline S Phoa, 'How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the CILFIT Judgment to the Creation of a New European Legal Culture' (2018) 34 *Utrecht Journal of International and European Law*, 79-81.

[14] See for a very comprehensive overview: Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019).

– supposedly – be translated into any language without loss of meaning, since that meaning, the knowledge that is transmitted, is something external to the particular language used.[15] By contrast, White suggest thinking and talking about language as having a real force of its own, shaping who we are and the ways in which we both observe and actively construe the world around us. In White's view,[16] language is not a neutral vehicle for meaning, 'writing is never merely the transfer of information (...) from one mind to another, but is always a way of acting both upon the language, which the writer perpetually reconstitutes in his use of it, and upon the reader'.[17] Accordingly, 'reading is not merely the process of observing and receiving, but an activity of the mind and the imagination, a process that requires constant judgment and creation'.[18] Language, seen in this way, is a series of cultural performances.[19] Similarly, White argues that the law should not (exclusively) be thought of as a mere system of rules, but (also) as a culture of argument.[20] In White's view, the law is a branch of rhetoric in three senses: as the *art of persuasion*, as the *art of deliberation*, that is, the art of 'thinking well about what ought to be done when reasonable people disagree', and as – what White calls – *constitutive rhetoric*: constituting a world of actors and possibilities for meaningful speech and action, thereby establishing a community, 'defined by its practices of language'.[21]

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[15] James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), ix-x.

[16] That we could characterise as later-Wittgensteinian. See also Jacobien E van Dorp and Pauline S Phoa, 'How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the CILFIT Judgment to the Creation of a New European Legal Culture' (2018) 34 *Utrecht Journal of International and European Law*, 79-81.

[17] James B White, *When Words Lose Their Meaning* (University of Chicago Press, 1984), 6.

[18] James B White, 'Reading Law and Reading Literature: Law as Language' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 78; see also James B White, *When Words Lose Their Meaning* (University of Chicago Press, 1984), 276.

[19] James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), xi-xii.

[20] See also Gaakeer who noted that 'according to Paul Kahn, the question defining law is: "What are the conceptual conditions that make possible that practice that we understand as the rule of law?" and on this view he speaks of cultural inquiry as "itself a social practice that cultivates the practice of simultaneously standing *within* and *without* [emphasis mine], of articulating beliefs in order to subject them to critical examination."' Jeanne Gaakeer,'Reverent Rites of Legal Theory: Unity – Diversity – Interdisciplinarity' (2012) 36 *The Australian Feminist Law Journal*, 25, referring to Paul Kahn, *The Cultural Study of Law. Reconstructing Legal Scholarship* (University of Chicago Press, 1999), at 36 and 35.

[21] James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), xiv.

Paul Ricoeur

Ricoeur's view of language reveals itself as much in his discussion of Saussure's distinction between 'langue' and 'parole', as in the rest of his (numerous and wide-ranging) publications on language, hermeneutics and ethics.[22] 'Langue', the preferred object of study in Saussure's linguistics, is an abstract, closed system of signs and rules that functions independently from its users. However, as stressed by Ricoeur, 'language [la langue] says nothing',[23] it is only in the concrete experience of the use of language, i.e. in the act of speaking, that meaning is made. 'Parole' refers to the individual performance of language by a subject who speaks to someone about something. Accordingly, without denying the relevance of structural and formal analysis, Ricoeur privileges speaking, and (later) discourse as writing, as event over structure.[24] Furthermore, Ricoeur as a phenomenologist focused on the experience of language use for human subjectivity, i.e. the conscious experience of life and agency,[25] and therefore found that meaning is produced at the level of discourse, rather than the level of syntax and lexicon.[26]

We therefore learn from the work of both White and Ricoeur that the activity of reading and writing legal (or other) texts cannot be completely reduced to descriptive or analytic terms, even though what a text says can, to a certain extent, be explained by, for instance, narrative or structuralist analysis. However, to arrive at any real understanding of the meaning of a text, of the message it conveys, the scholar must also explore his or her own personal engagement with it as a cultural practice.[27] It must also be noted though, that the consequence of such a more complex view of language and law as culturally embedded practices is that it becomes harder to say something definitive and universal about them.

2.2.2 Hermeneutics: aim and method

As noted above, both White and Ricoeur advocate a complex view of language (and of law) as a culturally embedded practice. However, this

[22] See in more detail Michael Sohn, 'Word, Writing, Tradition' in Scott Davidson and Marc-Antoine Vallée (eds), *Hermeneutics and Phenomenology in Paul Ricoeur: Between Text and Phenomenon* (Springer International Publishing 2016), 92-93.

[23] Paul Ricœur, *Les incidences théologiques des recherches actuelles concernant le langage* (Institut catholique de Paris 1968) p. 10.

[24] Paul Ricœur, 'Le Symbolisme et l'explication structurale', Cahiers internationaux du symbolisme 4 (1964), 81-96, at p. 83-84; See also Paul Ricoeur, *Interpretation Theory: discourse and the surplus of meaning* (Texas Christian University Press 1976), 1-23.

[25] Gary B Madison, 'Ricoeur and the hermeneutics of the subject' in Lewis E Hahn (ed), *The Philosophy of Paul Ricoeur* (Open Court 1995), 75.

[26] Mario J Valdes, 'Paul Ricoeur and literary theory' in Lewis E Hahn (ed), *The Philosophy of Paul Ricoeur* (Open Court 1995), 262.

[27] Paul Ricoeur, *Hermeneutics and the Human Sciences* (Cambridge University Press 1981), 36, 93.

view has repercussions for the kind of knowledge that we can hope to obtain through the interpretative process, and also for the process itself: the kind of methodology that may or should be used. This is the traditional field of hermeneutics. 'Hermeneutics' can be understood as an umbrella term for a wide variety of *theories about the process of interpretation.*[28] Throughout history, different scholars have approached interpretation in different ways.

One of the problems of hermeneutics is what we conceive of as the goal of the interpretation process: is it possible to arrive at an absolute, stable truth about the meaning of a text? In addition, how and where exactly do we find this truth (or another kind of authoritative claim for meaning): is it in recovering the exact original intention of the author? Or is there an objective truth contained in the text in and of itself? Or is the meaning created by a 'community of readers', or a combination of author, context, text and reader? Our position in these matters will have repercussions for the methodology that we adopt and for the respective importance we place on author, context, text and reader as sources of meaning. For instance, for a long time, hermeneutic theories saw as the ultimate goal of interpretation the reconstruction of the intention of the author.[29] However, this proved to be a problematic enterprise, as with most texts we may never know the exact original intention of the author. The relevance of the author's intention – if at all known – is in this regard therefore questionable and, indeed, questioned by various theorists.[30] An alternative approach was to place the reader at the core of the interpretative enterprise, stating that the 'community of readers' alone made the meaning of a text.[31] Finally, yet other theories saw interpretation as a combination of author-text-audience, such as, as we will see, the theories of White and Ricoeur.

Before we can dive further into a methodology for the interpretative process, let us first make clear what kind of knowledge we can expect from the process: what is the goal of interpretation?

Explaining and (self-)understanding

The questions about the goal of the interpretation process constitute an important debate among hermeneutic philosophers. The debate has centred on the question of what the relationship is between, and respective value of, explanation and understanding in relation to the humanities, and what the

[28] For instance, Lawrence K Schmidt, *Understanding Hermeneutics* (Routledge 2014).

[29] Such was the premise of Friedrich Schleiermacher (1768-1834) and Wilhelm Dilthey (1833-1911). See Lawrence K Schmidt, *Understanding Hermeneutics* (Routledge 2014), 6-7 and 10-49; See for a modern proponent of the focus on the author's intention Eric D Hirsch, *The Aims of Interpretation* (University of Chicago Press 1976), 24-30.

[30] James B White, 'Reading Law and Reading Literature: Law as Language' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 81; See also Roland Barthes' famous essay 'Death of the Author' in *Aspen*, 1967.

[31] See for instance Stanley Fish, *Is There a Text in this Class?The Authority of Interpretive Communities* (Harvard University Press 1980).

status of the humanities is vis-à-vis the natural sciences. Those on the side of 'explanation' (*Erklären*) argue for a general, objective and universalizable empirical method of analysis of texts akin to the method employed in the natural sciences, and leading to objective, universal knowledge. By contrast, those arguing for 'understanding' (*Verstehen*) contend that the humanities need a distinct method with a different goal: leading to a more psychological, contextual, or critical comprehension of the meaning of human behaviour, and a claim for meaning that is discursive.[32] When responding to this debate, Ricoeur argued that there is a dialogical relation between the attempt at explaining a text (*Erklären*) and understanding its meaning (*Verstehen*); these concepts are gradual stages on one hermeneutic arc, and they are both indispensable for the interpretation process.[33] Ricoeur has thus taken an intermediary position in the *Erklären-Verstehen* controversy.[34] What is more, the hermeneutic 'arc' is perhaps a misleading metaphor, as it suggests a certain start point and end point. In Ricoeur's view, however, the interpretation process is continuous: a kind of naive pre-understanding 'envelops' the explaining of a particular text that the reader encounters, while the explaining mediates the later, more enriched understanding, which, in turn, is the starting point for a new, unknown text that we will encounter in the future.[35]

Distanciation as a liberating principle for the phenomenon of the reading experience

Like many of his contemporaries, Ricoeur opposed the focus of the 'Romantic' hermeneutic philosophers[36] on the intention of the author as the goal of understanding, and he found a solution in the notion of 'distanciation',[37] and he identified four elements or effects of distanciation. First is what he called 'exteriorisation': the fixation of the expression in writing, leading to a text.[38]

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[32] See for a discussion of these notions Paul Ricoeur, 'The Task of Hermeneutics' (1973) 17 *Philosophy Today* 112; Ricoeur P, *Interpretation Theory: discourse and the surplus of meaning* (Texas Christian University Press 1976), 71-80; see generally Lawrence K Schmidt, *Understanding Hermeneutics* (Routledge 2014), chapter 7; see also Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 51-53 and 78-79.

[33] Paul Ricoeur, 'What is a text? Explanation and understanding' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 123.

[34] Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 51ff.

[35] Paul Ricoeur, *Interpretation Theory: discourse and the surplus of meaning* (Texas Christian University Press 1976), 74-75.

[36] Such as Friedrich Schleiermacher (1768-1834) and Wilhelm Dilthey (1833-1911), as discussed by Lawrence K Schmidt, *Understanding Hermeneutics* (Routledge 2014), 6-7.

[37] Which he took up from the work of Gadamer. See Paul Ricoeur, *Interpretation Theory: discourse and the surplus of meaning* (Texas Christian University Press 1976), 43-44; Paul Ricoeur, 'The hermeneutical function of distanciation' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 93-106.

[38] Instead of the temporary act of speaking, where no such fixation happens.

Secondly, this fixation leads to a distance in the relation between the inscribed expression and its author. The text, once 'fixated' and exteriorised, gains autonomy from the original psychological intentions of the author. Thirdly, the distance between the inscribed expression and the original audience for which the author intended the text, means that the text is de-contextualised from its original audience, the social and historical conditions of its production, and that it is now available to a potentially unlimited future audience which will, in turn, re-contextualise the work. Fourthly and lastly, 'distanciation' refers to the emancipation of the text from the limits of its 'ostensive references', the here-and-now of the text relating to the origins of its production. The reality to which it referred no longer exists at the time of each subsequent reading.

The distanciation causes alienation, a *Verfremdung*, which is the start of the interpretative exercise. According to Ricoeur, the aim of interpretation is to overcome this alienation, while at the same time dealing with or accepting the loss of the original context and, consequently, accepting the relative unimportance (but not the total irrelevance) of the author's intention. Furthermore, given the distanciation between the text and the author, created by the event of the fixation of thought in writing, the text loses its original context and has a potentially unlimited audience. 'The text's career escapes the finite horizon lived by its author. What the text means now matters more than what the author meant when we wrote it.'[39] Distanciation therefore liberates the reader from the limited focus on the author's intentions, and allows for a renewed focus on the text itself and his or her own experience of reading it as the basis for the interpretative exercise.

In Ricoeur's hermeneutical theory, the *distanciation* of the text – and its analysis by means of, for instance, structuralist narratology – is followed by *appropriation* (*Aneignung*) and subsequently by *application* (*Anwendung*) by a particular reader in a particular, present-day situation.[40] In later writing, Ricoeur has refined this three-pronged or three-step view of the interpretative enterprise by distinguishing prefiguration, configuration, and refiguration.[41] This division in three parts matches the stages of the (jurist's) interpretative

[39] Paul Ricoeur, *Interpretation Theory: discourse and the surplus of meaning* (Texas Christian University Press 1976), 29-30.

[40] Paul Ricoeur, 'The hermeneutical function of distanciation' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 93-106.

[41] Actually, there is a subtle difference between these two sets of terms. Ricoeurs triad of distanciation, appropriation and application is the reader's relationship to the text as object of the interpretation process, and therefore a heuristic to describe the phenomenon of the hermeneutic process. Mimesis (1,2,3) is Ricoeur's conceptualisation of the relationship between narrative and the human experience as a narrative arc. There is a considerable overlap or connectedness between the two triads, but it goes beyond the scope of this book to discuss the differences in more detail. See for a deeper discussion Henry Venema, 'Paul Ricoeur a Refigurative Reading and Narrative Identity' (2000) 4(2) *Symposium* 237.

process: there is some kind of beginning, let us say the arrival of a case file, then the actual engagement with one or more texts as objects of interpretation, and finally a kind of forward-looking evaluation and application, which is the situation of the judge or law clerk working at the ECJ, in the form of a judgment. As will become increasingly clear in the following chapters, *prefiguration* inquires into the pre-understandings that are necessary to participate in a particular situation of meaningful communication at all, *configuration* is the more formal inquiry about the structure and content of a text, and *refiguration* is the 'final' stage of evaluation and forward projection, i.e. what the interpreter brings together what is needed to arrive at a proposal for meaning that is future-oriented.[42] It is within these three stages that the elements of author, context, text and reader receive due attention.

Although White does not identify himself as a hermeneutic philosopher nor does he explicitly address this debate, his writings have always advocated for both a certain methodology, a way of (close) reading that is structured around several specific questions that is therefore repeatable, and a more profound, intuitive and open reflection about the things that these questions have unearthed in the text.[43] In his reflections on the possible meaning of a text, White invites lateral thinking: he compares and contrasts different kinds or genres of texts in a participatory, creative kind of reading. White's work may therefore be viewed as compatible with, or similar to, Ricoeur's intermediary position in the *Erklären-Verstehen* controversy.

If we follow the lines of argument set out above, and combine the suggested complex view of language with Ricoeur's (and, implicitly, White's) intermediary position in the *Erklären-Verstehen* controversy, the respective and relative importance of author, context, text and reader in the interpretative process is affected as well. Following Ricoeur and White, we can conclude that the meaning of a text is not at the surface level of the text by itself, nor in the historicity of the author's intentions alone, but in the totality of the experience it offers its reader. In other words, 'the meaning of a text is thus not simply to be found within it, to be dug out like a kind of mineral treasure, nor does it come from the reader, as if he were a kind of movie projector. It resides in the life of reading itself, to which both text and reader contribute'.[44] This view of language means that there cannot be a single, objectively determinable and universal meaning of any text that is valid at all times. However, the intermediary position that we have defined above enables us to avoid the extreme of this view, i.e. such

[42] I put 'final' between parentheses because, as mentioned above, the interpretation in our approach does not have a stable end-point.

[43] Although White prefers not to address capital "T" theoretical matters in most of his writing, and instead focuses on the concrete and personal reading experience, his works are informed by various theories, such as the "New Criticism" movement and the "reader response" theories, which he provided some comments on in James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 286-291.

[44] James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 19.

interpretative openness that it collapses into nihilism, since it acknowledges the need for the structured, formal analysis of the text in the 'explaining' stage of interpretation. In this view, the interpretation process leads to knowledge that is discursive, plural, and practical: *phronesis*, i.e. practical wisdom, rather than purely *episteme*, i.e. objective, theoretical knowledge.[45] It is about the way in which the subject encounters the world of facts – including the 'fact' of the text – and orients him- or herself in it.

2.2.3 Implications for a methodology

What can all of this mean for the definition of the methodology for this study? As mentioned above, both Ricoeur and White stress that a true comprehension of the meaning of a text is more than the sum of the insights gained from any type of formalised analysis of the workings of a text. Ricoeur urged us to accept that one needs to move from (or through) explaining what the text says, to understanding what it speaks about. More importantly, both Ricoeur and White have consistently held that every interpretative process is self-reflective, inviting us to consciously think about what it is that we are doing and what our own role is in the process of reading and writing. As we will see later in more detail, a text can be viewed as referring to a world and establishing social roles and relationships for persons in that world (including for the reader and the author) and, therefore, through the activity of interpreting these proposals for a world and for characters in it, one gains self-understanding. Our methodology will therefore need to account for, and accommodate, the indissociable elements of explaining and understanding.

The 'explaining' stage of interpretation is, as we will see in the following sections, more familiar analytic territory for the classically trained jurist who is used to the traditional views on language and interpretation discussed above. However, the self-reflective stage of 'understanding' the world proposed by the text may encounter some hesitations from this classic jurist –- who we can assume will be largely unfamiliar with these philosophies of language and hermeneutical theories. It is therefore important to stress again that the self-understanding and the new claims for meaning that the interpretative process leads to are always mediated by a more structured and formal process of textual analysis. White has emphasised and shown the importance of a more or less structured way of close reading:

> [T]he source of meaning is the language plus the way of reading it that it invites, the kind of life it makes possible as it is manifested in particular performances.

[45] For a more profound discussion of phronesis versus episteme, see Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 55-56 and 107-113.

> And this can be different, in good ways as well as bad, for different readers, who will bring different suppositions and expectations to the task.[46]

Furthermore, both Ricoeur and White have emphasised the participatory and experiential character of the interpretative process.[47] A central question in White's oeuvre is therefore: 'How are we to understand and to judge our acts of language – including our use of language in the law – and the character and community we propose therein?'[48] As we will see, acquiring, understanding and judging the art of (legal) reasoning will require an identification of the kinds of resources for meaningful speech which our culture offers, the kind of art by which they can be reconstituted, and perceiving the proposals for a kind of world or community which they contain. White has also called this law's quality of *constitutive rhetoric*: constituting a world of actors and possibilities for meaningful speech and action, thereby establishing a community, 'defined by its practices of language'.[49] This is a pathway into the ethical or communal character of the law which we will consider later in Section 2.5.4: every time a jurist writes a legal text, she (re-)establishes an ethical identity, not only for him or herself, but also for the audience and those he or she talks about, and by the use of legal language he or she proposes a relationship among these three parties.[50]

Our project in the following Sections and Chapters will thus consist of proposing a way of reading that can be used as a type of structured methodology and subsequently to demonstrate the usefulness of this kind of reading by documenting the reading experience, the phenomenon of reading, in two case studies as well as providing a synthesis of our insights. Our methodology will identify the elements that we will focus on, and a way of documenting the reading experience in the case studies.

To summarise the theoretical debate above, for the 'outlook' of our project these preliminary lines of thought mean that the interpreter, and his or her audience, need to accept the fact that – despite our best efforts to use a clear methodology – there will remain ambiguities and uncertainties about the interpretation of a text. Different readers may arrive at different conclusions about its meaning. However, as White stresses:

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46 James B White, *Edge of Meaning* (The University of Chicago Press 2003), 101.

47 Paul Ricoeur, 'What is a text? Explanation and understanding' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 123.

48 James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), ix.

49 James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), xiv.

50 James B White, 'Rhetoric and law: the arts of cultural and communal life' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 34.

> [ambiguities and uncertainties] are a necessary part of what we mean by both law and by literature and are in fact essential to the highest achievement of both of these forms of expression. It is not only necessary but right that there be serious argument and disagreement about the meaning of such texts. Indeed the establishment of such arguments, and the management of the terms in which they proceed, is one of the major purposes both of literary and of legal texts.[51]

Accordingly, the goal is not to reach an absolute truth, or universal knowledge about the meaning of a text. Interpretation is a continuous process, an experience in which the reader participates and that is only meaningful in the application of what we have come to understand, to the new context at hand.[52] It is a creative and dynamic process of development of the meaning of legal concepts.

Gaakeer suggests a further point at which this kind of scholarship might be relevant for legal practice. She refers to the notion of 'negative capability' as coined by John Keats, i.e. the way the literary form (literature, poetry, but I think also visual arts) can teach a jurist 'what it means to write (and be) a great work of literary art'.[53] The line she refers to from Keats is '...that is when man is capable of being in uncertainties, ...doubts, without any irritable reaching after fact or reason'.[54] This, according to Gaakeer, may be a grounding principle for the future of the Law and Literature movement, since it helps to focus on a literary quality 'which is also normative for the way in which judges are expected to treat their materials: impartially, with full attention to the different aspects of a case, and without the inclination to come to a final position too quickly'. Gaakeer refers to Keats' idea that a poet needs to be able to be 'in uncertainties', and compares it to the ideal judge's ability to deal with ambiguity, openness of legal norms, and contingency.[55] Gaakeer continues with a reference to Coleridge's principle of 'willing suspension of disbelief': reading literature can teach lawyers to do this, in the moment of persuasive argument, to suspend their disbelief and accept, for a moment/momentarily, the world as it is portrayed by the (other) parties in legal proceedings, a basic willingness to agree to disagree:

> Being in uncertainty about how to interpret a text or a case and entertaining different possibilities for their interpretation are potential areas of resemblance

[51] James B White, 'Reading Law and Reading Literature: Law as Language' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 78-79.

[52] This is also the distinction between episteme, theoretical knowledge, and phronesis, practical wisdom. It is the difference between 'knowing that' and 'knowing how'. See Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 55-56 and 95-116; James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 14. See also Paul Ricoeur and Kathleen Blamey. Oneself As Another (University of Chicago Press 1992), p. 179.

[53] Jeanne Gaakeer, '(Con)Temporary Law' (2007) 11 *European Journal of English Studies* 29, 31-32.

[54] Taken from Meyer H Abrahams and others, *The Norton Anthology of English Literature*, vol 2 (Norton 1974), 705.

[55] Jeanne Gaakeer, '(Con)Temporary Law' (2007) 11 *European Journal of English Studies* 29, 32.

> between legal and literary practices inasmuch as the two overlap in their discursive use of language and text.[56]

Furthermore, as we will see later in Sections 2.4 and 2.5.3, the basis in the close reading of the text, as well as the sharing of the reading process, extends the relevance of the interpretation offered beyond nihilistic subjectivism. At best we can hope for plausibility, a consensus among readers, which can be sought by describing and sharing the reading process and thought process, thereby making a discussion possible. The goal is not perfect understanding, for there can never be a universal standard of perfection, but rather 'the gradual reduction of ambiguity and uncertainty, stage by stage, including the clearer specification of what is uncertain. It is a matter of having questions, and pursuing them as far as one can'.[57] As White puts it: 'The best reading thus includes a retelling, one reader's version, which can be checked by other readers against their own'.[58]

Structuring the hermeneutic process along these (heuristic) lines has the purpose of providing a meta-level vocabulary for talking about the interpretation process in an ordered way, including the different skills and competences that are required at each stage. Furthermore, this structured way of thinking about, and undertaking, the interpretation process can help, as we will see later on, to lay bare problems and expose blind spots on various levels, and it enables the reader to share his or her reading experience, not just the 'outcome', but the process, with other readers, and to engage actively, imaginatively, and critically with the text.

2.3 Prefiguration – pre-understandings

As we have seen in the previous section, interpretation is a more or less continuous process that starts with a state of 'naive' understanding that, through the stage of explaining, achieves a refined, enriched state of understanding. There is a tension between the freedom afforded by 'distanciation' (the text's emancipation from its original author, context and audience) and the acknowledgement that law and language are cultural competences and practices, and therefore require some cultural pre-understandings in order for the reader to participate meaningfully in this cultural practice. This is where

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[56] Jeanne Gaakeer, '(Con)Temporary Law' (2007) 11 *European Journal of English Studies* 29, 32. Similarly, Kieran Dolin has suggested that the way forward for "Law and Literature" scholarship is to form a new "legal aesthetics, in which the literary realm is not merely valued for the cultural traditions that it represents (and the power structures it thereby serves), but in which the literary is also valued for its capacity to imagine alternatives. Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press 2007), 27.

[57] James B White, *Edge of Meaning* (The University of Chicago Press 2003), 101.

[58] James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 287.

Ricoeur's notion of prefiguration comes in.[59] Ricoeur calls prefiguration a 'preliminary competence', i.e. the reader must be able to identify (written) action in general by means of its structural, symbolic and temporal features: 'the composition of the plot is grounded in a pre-understanding of the world of action, its meaningful structures, its symbolic resources, and its temporal character'.[60] A reader must be able to understand the structural features of a text. In narrative, action has a 'conceptual network': actions imply goals, refer to motives, actions have agents, and context or circumstances. Being able to ask and understand these questions, to master the conceptual network of action, is to have practical understanding that is a prerequisite to any real understanding of a text. 'Every narrative presupposes a familiarity with terms such as agent, goal, means, circumstance, help, hostility, cooperation, conflict, success, failure, etc on the part of its narrator and any listener.'[61] Or, in different terms as expressed by Valdes: 'Prefiguration is the area of cultural participation through language and, as such, is the pre-condition for textuality. There can be no text if there is not the common ground of language and culture'.[62] With other words, you need to be familiar with how things are normally, traditionally done, in order to have a basic grasp of a text.

In altogether different terms that are less capital 'T' Theory,[63] White asks us to become 'expert' or 'ideal' readers of our own (legal) culture in order to undertake the process of interpretation.[64] This question leads us in the same direction as Ricoeur's concept of prefiguration: what competences and pre-understandings do we need in order to become this ideal reader, to be able to read a particular text well? If we see law as a language, a set of resources for expression and social action, then what resources for understanding does our particular language, i.e. EU law, offer, and what is asked of me, the legal professional, to be proficient in reading and speaking this language? According to White '...one

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59 Ricoeur developed this notion from the teachings of Martin Heidegger (1889-1976) who wrote about 'Vorverständnis' in *Being and Time*, and Hans-Georg Gadamer (1900-2002) who continued Heidegger's meditation on Vorverständnis in light of tradition in *Truth and Method*. See also Lawrence K Schmidt, *Understanding Hermeneutics* (Routledge 2014), 8 and 95-132; See also Eileen Brennan, 'The History of Hermeneutics' in Niall Keane and Chris Lawn (eds), *The Blackwell Companion to Hermeneutics* (John Wiley & Sons 2015), 11-21.

60 Paul Ricoeur, 'Time and Narrative: Threefold Mimesis' in Paul Ricoeur, *Time & Narrative Vol. 1* (Kathleen McLaughlin and David Pellauer trs, The University of Chicago Press 1984), 54.

61 Paul Ricoeur, 'Time and Narrative: Threefold Mimesis' in Paul Ricoeur, *Time & Narrative Vol. 1* (Kathleen McLaughlin and David Pellauer trs, The University of Chicago Press 1984), 55-56.

62 Mario J Valdes, 'Introduction' in Mario J Valdes (ed), *A Ricoeur Reader: Reflection and Imagination* (University of Toronto Press 1991), 28.

63 But not uninformed by 'Theory', as White was trained in the school of thought known as 'New Criticism', see White's note on literary criticism in James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 286-291.

64 James B White, 'Reading Law and Reading Literature: Law as Language' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 96.

cannot understand the experience of a text unless one understands the language (and that includes the cultural situation) of its author'.[65] More particularly in regard to the language of the law, White has suggested that:

> ... law is not merely a system of rules and principles, nor is it reducible to policy choices or class interests, but is rather what I call a language, by which I do not mean just a set of terms and locutions, but a whole cluster of habits of mind and expression. [...] The law makes a world. It is our task to acquire the art of reading and speaking the language of that world.[66]

Only if we have a good grasp of our legal culture in general, can we undertake the process of closely reading a specific text, and judge it as a particular (ethical) performance within this culture. As we will see, a text, particularly a narrative text,[67] is a field of *mimesis* in the sense that it 'imitates' ideas that are already established in the culture, for instance about suffering, action, or good and bad behaviour. In that sense 'storytelling is based on an experience of an ethics already realised'.[68] Subsequently, exploring our pre-understandings will lay bare certain assumptions and expectations about the legal issue that we set out to study, and these expectations will form a basis for the evaluation of the configuration of a particular text.[69]

A significant drawback of prefiguration is that it can seem hard to grasp and almost endless: there is almost too much to know, and how do we know what we should know before we start reading? Thus, the reflection on prefiguration is hard to 'close' or finalise before starting the reading process: how do we know if we possess, or lack, certain pre-narrative understanding before we are confronted by the narrative, by the text itself (and our possible lack of comprehension if we miss the pre-narrative understanding)?[70] The reader must keep

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[65] James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 7.

[66] James B White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1st edn. The University of Chicago Press – 45th anniversary edition, Wolters Kluwer 2018), xxii.

[67] Although 'narrative intelligence' (see Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 141) could be viewed as a necessary pre-understanding as well, I think it is more closely connected with the way in which a text functions, so I will discuss this under "Configuration".

[68] Paul Kemp, 'Ethics and Narrativity' in Lewis E Hahn (ed), *The philosophy of Paul Ricoeur* (Open Court 1995), 376.

[69] Hilde Bondevik and Inga Bostad, 'Core principles in argumentation and understanding: hermeneutics and human rights' in Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing Limited 2017), 71-72.

[70] Furthermore, it can be hard to clearly distinguish chronologically between prefiguration and the other stages. Prefiguration: not everything that you need to know in order to read well, is knowable/identifiable before actually starting the reading process. So sometimes during the more analytical phase of mimesis2/configuration, the reader may come across something that makes her think: in order to understand this here YYY well, I need to have background knowledge of XXX.

in mind that the distinction between prefiguration, configuration and refiguration is more of a heuristic device than the true reflection of formal stages of the interpretative process. Actually, these stages bleed into one another, and are part of a circular process: knowledge of the parts informs understanding of the whole, but understanding of the whole, in turn, refines the understanding of the parts.[71] The problem of the uncertain boundaries of pre-understandings is remedied by the concept of distanciation, as discussed above. Distanciation, the emancipation of the text from its original context, author and audience, allows the contemporary reader to take the text more or less at face value, and stop the seemingly endless inquiry into the pre-narrative understandings and the historical context of the text and its author.

What, then, do we need at the beginning of the interpretation process, and what does this 'naive' understanding look like in the case of a jurist working at the ECJ? What kinds of pre-understandings are necessary in order to make sense of/appreciate the actual application of these EU law resources in the concrete performance of the ECJ? For the professional audience, the stage of prefiguration could almost be taken for granted, or at least taken for normal: in order to be able to read ECJ judgments effectively, there is assumed general knowledge of how they are written in order to understand the type of discourse of which a particular judgment forms part. The institutional setting, procedural rules, and work traditions of the ECJ are important determining factors for the style, voice, and structure of its judgments and for other constraints to the legal language employed therein. This general knowledge of the work process at play within EU law will help in the better understanding of the narration, i.e. the particular form and style of writing that is at work in its judgments. Moreover, knowing more about the work processes as well as general evaluative criteria applicable to the ECJ helps in the asking of better questions about the kind of role performed by the Court in a given judgment, i.e. the kind of self-understanding displayed in its texts. We will explore this background knowledge about the Court's organisation, work process, cultures and traditions in Chapter 3. Furthermore, a person working in EU law may be expected to have a reasonably good grasp of EU law as a whole, and of the legal area that is at play in the particular case: the legal framework consisting of the legislation, case law (precedent), and classic EU law concepts such as general principles like direct effect, effectiveness, autonomy, primacy and proportionality. We will explore this background knowledge about the internal market and about fundamental rights protection in Chapter 4, and we will make a more particular inventory of the background for each case study in Chapters 5 and 6 respectively.

[71] Also called the 'hermeneutic circle'. See Lawrence K Schmidt, *Understanding Hermeneutics* (Routledge 2014), 6-7 and 10-49.

Prefiguration thus requires us to make an inventory of the values and norms that the text draws upon as materials and which it 'remodels' in turn.[72] The knowledge that we possess as part of our pre-understandings equips us to appreciate the particular use of these materials in a concrete text. What is more, our pre-understandings will lead to the identification of certain expectations: based on our pre-understandings of these cultural resources, we have ideas about what to expect in a text:

> The resources that establish the possibilities of expression in a particular world thus constitute a discrete intellectual and social entity, and this can be analyzed and criticized. What world of shared meanings do these resources create, and what limits do they impose? What can be done by one who speaks this language, and what cannot? What stage of civilization does this discourse establish? [...] The relationship that a speaker has with his language may range from the comfortable to the impossible. Sometimes one's language seems a perfect vehicle for speech and action; it can be used almost automatically to say or to do what one wishes. But at other times a speaker may find that he no longer has a language adequate to his needs and purposes, to his sense of himself and his world; his words lose their meaning.[73]

Therefore, in each particular text we find moments of a more or less easy continuation of the cultural discourse, but also moments of tension – or even a complete loss of meaning – if our expectations are not met. The question is then: what does that mean, why is this so, and what can be done?

2.4 Configuration

2.4.1 A process of close reading

As mentioned above in Section 2.2.2 Ricoeur saw understanding as mediated by the insights into the inner workings of the text gained through explanation: a process of structured analysis.[74] This more analytical inquiry is what he called the stage of 'configuration'.[75] The analysis of a text's configuration will reveal what Ricoeur has called the 'depth semantics' of a text, which the subsequent stage of understanding or comprehension tries to grasp

[72] See Liesbeth Korthals Altes, 'Le tournant éthique dans la théorie littéraire: impasse ou ouverture?' (1999) 31(3) *Études Littéraires* 39, 53.

[73] James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 7.

[74] See also Mario J Valdes (ed), *A Ricoeur Reader: Reflection and Imagination* (University of Toronto Press 1991), 27-28.

[75] Paul Ricoeur, 'Time and Narrative: Threefold Mimesis' in Paul Ricoeur, *Time & Narrative Vol. 1* (Kathleen McLaughlin and David Pellauer trs, The University of Chicago Press 1984); In his earlier work on hermeneutics, he used the term 'appropriation'.

as a whole. 'In explanation we explicate or unfold the range of propositions and meanings, whereas in understanding we comprehend or grasp as a whole the chain of partial meanings in one act of synthesis.'[76] Furthermore, according to Ricoeur, through the stage configuration, the interpretation process avoids arbitrariness in so far as it is the recovery of that which is already present, at work, in the text.[77] 'What the interpreter says is a re-saying which reactivates what is said by the text.'[78] In Ricoeur's theory of interpretation, the role of the reader is therefore not a pure projection of his or her subjectivity upon the text, but an understanding of oneself 'in front of' the text. More particularly, Ricoeur argued that every text points towards a (possible) world, and to understand is 'to explicate the type of being-in-the-world unfolded in front of the text'.[79] Every text thus proposes a world for which it claims meaning, and which the reader could inhabit and wherein she could project his or her 'ownmost possibilities'.[80] A text, and its structure and narratives, is therefore a medium through which we come to understand ourselves.[81]

> It implies that the meaning of a text lies not behind the text but in front of it. The meaning is not something hidden but something disclosed. What gives rise to understanding is that which points towards a possible world, by means of the non-ostensive references of the text. Texts speak of possible worlds and of possible ways of orienting oneself in these worlds.[82]

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[76] Paul Ricoeur, *Interpretation Theory: discourse and the surplus of meaning* (Texas Christian University Press 1976), 72.

[77] See also Liesbeth Korthals Altes, 'Le tournant éthique dans la théorie littéraire: impasse ou ouverture?' (1999) 31(3) *Études Littéraires* 39, 52.

[78] Paul Ricoeur, 'What is a text? Explanation and understanding' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 126.

[79] Paul Ricoeur, 'The hermeneutical function of distanciation' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 104.

[80] Paul Ricoeur, 'The hermeneutical function of distanciation' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 103-104.

[81] Paul Ricoeur, 'Metaphor and the central problem of hermeneutics' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 140; See also Paul Ricoeur, 'Appropriation' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 144-145.

[82] Paul Ricoeur, 'Metaphor and the central problem of hermeneutics' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 139.

Ricoeur's concepts of configuration and refiguration (or appropriation and application) therefore form a kind of self-reflective philosophical enterprise:

> The interpretation of a text culminates in the self-understanding of a subject who thenceforth knows himself better, understands himself differently, or simply begins to understand himself. [...] Self-understanding passes through the detour of understanding the cultural signs in which the self documents and forms itself [...] In short, in hermeneutical reflection [...] the constitution of the self is contemporaneous with the constitution of meaning.[83]

Or, as he put it in *Interpretation Theory*:

> Interpretation is the process by which disclosure of new modes of being – or, if you prefer Wittgenstein to Heidegger, of new forms of life – gives to the subject a new capacity for knowing himself. If the reference of the text is the project of a world, then it is not the reader who primarily projects himself. The reader rather is enlarged in his capacity of self-projection by receiving a new mode of being from the text itself.[84]

We see a similar train of thought in White's writings in which he, too, shows the importance of a descriptive, analytical step in the reading process. After identifying the cultural inheritance of a language, he asks how this inheritance is used, and how, by what art and to what end, the speaker acts upon it.[85] Furthermore, White observed:

> The fundamental characteristic of human life is that we all tell stories, all the time, about ourselves and others, both in the law and out of it. [...] [A]t some level we are constantly engaged in the process of telling and retelling the stories of our lives, trying to make sense of what is past and to allow for the force of what might happen next. We perpetually process new material, checking it against old claims, revising our story where necessary, repressing parts of it when that is the only alternative. This is among other things a central way in which our sense of our own individual character is made. [...] Our need and capacity for narrative is collective as well as individual, and we constantly tell the stories of our communities... [...]. The stories we tell about our own lives, individual or collective, have

[83] Paul Ricoeur, 'What is a text? Explanation and understanding' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 120.

[84] Paul Ricoeur, *Interpretation Theory: discourse and the surplus of meaning* (Texas Christian University Press 1976), 94.

[85] James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 6-14; also summarised in James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), 18. See also James B White, *Edge of Meaning* (The University of Chicago Press 2003), 114-116.

> the fixed characteristic that they are always incomplete, always unfolding, and we accordingly find ourselves constantly trying to work into our narrative new events that may or may not fit comfortably with what has gone before.[86]

In other words, by the use of narrative (about which we will come to speak more extensively in Section 2.4.2), and by our reaction to narratives, we are making sense of our own character and the world around us.[87] The issue of the possible worlds, the narratives that the texts opens up, not only relates to a complex understanding of the self-understanding of the reader – including his or her worldview and vision of humanity – but it also relates to the question of the normative (ideological) world, the *nomos*, of the legal text that is established through narrative forms. Here we can see a link with Robert Cover's seminal publication '*Nomos* and Narrative' in which he considered that

> we inhabit a nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. [...] No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.[88]

Put more plainly (as I find this talk of ostensive and non-ostensive references, or 'being-in-the-world' rather cryptic), I think Ricoeur and, in a sense, White and Cover, mean the following. In the stage of configuration, the reader is invited to explore the art by which the resources for meaningful speech and action (which were identified in the prefiguration stage) have been employed in the emplotment of a particular text. This inquiry will bring to the surface certain patterns, norms and themes, certain narratives that are at work in the legal reasoning. The question then is: what kind of action with words is this, what kind of character (for him or herself) and what kind of world and/or community (with and for others) does the author establish here?[89] As we will see in the next section, the stage of 'refiguration' concerns the subsequent, evaluative question: what is possible for us to say and do after reading this text, given this vocabulary, these narratives and these patterns?

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[86] James B White, 'Telling stories in the law and in ordinary life: The Oresteia and "Noon Wine"' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 169-170.

[87] James B White, 'Telling stories in the law and in ordinary life: The Oresteia and "Noon Wine"' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 169; See also Paul Ricœur, Charles E Reagan and David Stewart. 'Existence and Hermeneutics' in Charles E Regan and David Stewart (eds), *The Philosophy of Paul Ricœur: An Anthology of His Work* (Beacon Press 1978), 101 and 106.

[88] Robert M Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

[89] James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), ix.

2.4.2 Narrative and narratology

The analytical stage of explaining can be approached in different ways and with different methodologies, and, as we have concluded above, 'narrative' plays a crucial role in this analysis. Although there is no consensus about the definition of 'narrative,' it could be defined as follows:

> A narrative is a representation of a possible world in a linguistic and/or visual medium, at whose center there are one or several protagonists of an anthropomorphic nature who are existentially anchored in a temporal and spatial sense and who (mostly) perform goal-directed actions (action and plot structure).[90]

Ricoeur drew upon the work of Russian Formalists and French structuralist narratologists, his contemporaries such as Propp, Barthes and Greimas, to examine the inner workings of a text.[91] In short, most structuralist narrative analysis distinguishes between the levels of *story* (the chronological sequence of events as they actually happened), *narrative* (the events as played out/presented and ordered in the text, including temporal setting, characterisation and relationships), and *narration* (the way in which the story is told: voice, style, point of view).[92] A risk, however, inherent in relying too heavily on structuralist narratology, lies with the fact that this discipline has aimed at an objective, universal and exhaustive description or taxonomy of what texts do,[93] which is an outlook that we have rejected in Section 2.2.1 above. Furthermore, the structuralists have failed to provide an actual, concrete method to arrive at the deep structure of a text, and that the very fact that a whole variety of structuralist theories exists, contests the structuralists' claims for universality.[94] Another critique of structuralism is that it tends to focus on grammar and logic, and neglects rheto-

[90] Monika Fludernik, *An Introduction to Narratology* (Routledge 2009), 6.

[91] Paul Ricoeur, 'What is a text? Explanation and understanding' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 117-119. See also Paul Ricoeur, 'The Narrative Function' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 244-247.

[92] See for a more detailed overview of the various approaches to narrative analysis and narratology Luc Herman and Bart Vervaeck, *Handbook of Narrative Analysis* (Nebraska University Press 2005), 41-101; See also H Porter Abbott, *The Cambridge Introduction to Narrative* (2nd edn, Cambridge University Press 2008), 57-58.

[93] See David Herman, 'Histories of Narrative Theory (I): A Genealogy of Early Developments' in James Phelan and Peter J Rabinowitz (eds) *A Companion to Narrative Theory* (Blackwell Publishing 2005), 30; See also Monika Fludernik, 'Histories of Narrative Theory (II): From Structuralism to Present' in James Phelan and Peter J Rabinowitz (eds) *A Companion to Narrative Theory* (Blackwell Publishing 2005), 38.

[94] Luc Herman and Bart Vervaeck, *Handbook of Narrative Analysis* (Nebraska University Press 2005), 43-44; See for the observation of the lack of conceptual clarity in narrative theories Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 160-161.

ric which is, however, an equally crucial element of reading.[95] Moreover, a pitfall for structuralist theories is that they depend heavily on the reader to distinguish the elements that a given theory proposes to analyse: for instance, one reader could distinguish three events, while another reader could distinguish as many as thirty.[96] However, Herman and Vervaeck do observe that there is merit in the structural analysis of texts, as it offers ways to better understand the interplay of form and content.[97]

At this point in our exploration of narrative and narratology, it is also important to note that Ricoeur opposed the aim of the structuralists to provide a stable, universal and exhaustive method of textual analysis. Instead, Ricoeur observed that the value of interpretation lies in the dialectic between past significance and present, applied meaning, mediated by the text. Therefore, Ricoeur's hermeneutics can be characterised as 'post-structuralist'.[98] However, in post-structuralist literary theory, which focused on detailed readings of individual texts and allowed for the researcher's attention to difference (in and between texts, as opposed to the focus on commonalities), the value of structuralist narratology survived.[99]

As we can learn from Ricoeur in *Time and Narrative*, as well as *(Reflections on) The Just*, identity and self-understanding emerge through narrative, which for Ricoeur means not just simply 'story', but the human experience of time: our mental organisation of the past, and our understanding of future potentialities,

[95] Ravit Reichman, 'Narrative and Rhetoric' in Austin Sarat, Matthew Anderson and Cathrine O Frank (eds), *Law and the Humanities: An Introduction* (Cambridge University Press 2009), 397; referring to Paul de Man, *The Resistance to Theory* (University of Minnesota Press 1986), 15.

[96] Luc Herman and Bart Vervaeck, *Handbook of Narrative Analysis* (Nebraska University Press 2005), 50 and 101.

[97] Luc Herman and Bart Vervaeck, *Handbook of Narrative Analysis* (Nebraska University Press 2005), 45.

[98] See Mario J Valdes, 'Introduction' in Mario J Valdes (ed), *A Ricoeur Reader: Reflection and Imagination* (University of Toronto Press 1991), 29 and 39. The term post-structuralism is actually a bit misleading: instead of a coherent school of thought, post-structuralism was formed by a diverse group of academics with vastly different theories. Although there was no complete break with classical narratology, most of the post-1960s literary theorists have the following elements in common:

1. They distance themselves from the structuralist/formalists assumption that there can be a unified/universal structure that underlies (and therefore explains) all cultural expressions;

2. They emphasise that there is no objective position from which the literary theorist can study literature – the literary theorist/reader's cultural and socio-economic background determine his or her perspective;

3. They emphasise that all meaning is plural, dynamic and instable;

4. They abandon the attempts to catch literature in a systematic scientific framework, and doubt the possibility of such a scientific approach to literature;

5. They no longer hold onto the Enlightenment ideal of rationality, and they radically questioned the usefulness of binary oppositions (e.g. culture/nature, rationality/feelings, mind/body, male/female) that have been central to Enlightenment thought. See for an overview, Luc Hermans and Bart Vervaeck, *Handbook of Narrative Analysis*, (Nebraska University Press 2005), 103-111.

[99] Luc Herman and Bart Vervaeck, *Handbook of Narrative Analysis* (Nebraska University Press 2005), 111.

which guide our interpretations of, and reactions to, current events. In other words, it is through narrative that we claim meaning for our past, present and future. In Ricoeur's theory of ethics, one must be able to handle one's life and one's character with 'narrative coherence', i.e. as a concordant plot, despite the changes, obstacles, and challenges that life throws in our way.[100] If we establish our identity through narrative, and that it is a way of claiming meaning, this means that narrative inherently influences our ways of claiming meaning, i.e. not just our reading – interpreting other people's texts – but also our writing. In that light, narrative can be understood symptomatically, that is, a narrative can be regarded as a symptomatic expression of the conditions out of which it came.[101] These conditions consist of the personal conditions, the character of the author, and his or her context, that is, the social, cultural and political conditions in society. Herman and Vervaeck go even further by pointing out the more critical questions asked in recent narrative analysis, namely questions about the context and ideology of a text: 'the collection of conscious or unconscious views of the world and what it is to be human'.[102] Therefore a critical reading (interpretation) and writing process is important for and reflective of our self-understanding, our vision of humanity and of the society we live in, and we could say that these three levels are all levels of (narrative) identity: personal, interpersonal, and global or communal.

In his own writings about the reading process, White identified four guiding questions that are helpful in understanding narratives within legal reasoning:

1) How is the world of nature defined and presented in this language? [...]
2) What social universe is constituted in this discourse, and how can it be understood? Who are the characters in the texts (including the speaker)? [...]
3) What are the central terms of meaning and value in this discourse, and how do they function with one another to create patterns of motive and significance? [...]
4) What forms and methods of reasoning are held out here as valid? What shifts or transitions does a particular text assume will pass unquestioned, and what does it recognize the need to defend. What kinds of argument does it advance as authoritative? What is the place here, for example, of analogy, deduction, of reasoning from general probability or from particular example? What is unanswerable, what is unanswered?[103]

[100] See for instance Paul Ricoeur, 'Autonomy and Vulnerability' in *Reflections on the Just* (David Pellauer tr, The University of Chicago Press 2007), 74-80; This may explain why in Time & Narrative Vol. 2, in the chapter 'The Fictive Experience of Time', Ricoeur himself analysed three novels with a particular focus on 'time'; Paul Ricoeur, *Time and Narrative,* Vol. 2 (Kathleen McLaughlin and David Pellauer trs, The University of Chicago Press 2012), 100-152.

[101] Henry Porter Abbott, *The Cambridge Introduction to Narrative* (2nd edn, Cambridge University Press 2008), 104-105.

[102] Luc Herman and Bart Vervaeck, *Handbook of Narrative Analysis* (Nebraska University Press 2005), 8.

[103] James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 10-12.

These questions invite an inquiry into the resources for meaningful speech and thought offered by this (legal) language, the art by which these resources are used, and the character and community we establish in our language for ourselves and for those about whom we speak. Both Ricoeur's and White's approaches focus on narrative structures, themes and symbols in order to explore how a text proposes a kind of world, and what roles, characters and relationships are possible in that world. For the purposes of the present study, namely to better understand the way in which the ECJ approaches economic and fundamental rights in its case law, we will therefore examine narratives of 'self' and 'other' in the judgments of the ECJ.

2.4.3 Configuration in EU law

By this, I mean that I pay particular attention to the possibilities and constraints that EU law, and the reasoning of the ECJ in particular, create for a sense of self-understanding, a vision of humanity and a world view. These three things, in turn, play out on different levels.

1. The self is in the first place the 'actor' of the legal professional self: what role, character and voice is possible for the ECJ? What is it possible to say, what is it not possible to say, and why or why not? In what type of voice does the ECJ write? What are the key moments in which a particular ECJ 'personality' shines through? These questions have a double reflexivity in our particular case since the audience I mainly address – as explained in Chapter 1 – is made up of jurists either presently working at the ECJ (such as judges, référendaires, legal administrators), or people aspiring to do so (students of EU law), or EU law scholars contributing to the general discourse about EU law. The inquiry into the self performed in a text is therefore not an external, passive categorisation or qualification of the ECJ, but an invitation to participate, to take ownership of this sense of self, and to imagine oneself trying to 'fit into the shoe'.

2. The inquiry into the 'self' is also immediately an inquiry into the 'other', namely the community that is created in the text, i.e. the relationship with the parties and the people about whom the text directly speaks, but also the ones who are excluded, as well as the normative, social universe created in EU law more broadly, the wider view of humanity and worldview that makes up the EU's *nomos*, normative universe. How are people talked about? What can man or woman do and be in EU law? What are their important characteristics or traits? What is valued? What is invisible?

These narratives can be found in the vocabulary employed in the text, in the ordering of the facts and the arguments; in central themes, norms that can be found in causal connections, relationships and other patterns or movements in legal reasoning, e.g. from general to specific or vice versa, evidentiary issues, distribution of the burden of proof. For instance, a close reading would reveal what kind of arguments are used, and allow for an identification of whether something (or someone) is defined as the norm, and something (or someone)

else as a deviation from the norm, which in narrative terms would be called the 'complication'.

For our reading of the case law of the ECJ, this means that we undertake several rounds of close reading of the texts of the judgments. We start by trying to get an overall grasp of the case. What was the story? How were the facts presented? What were the questions asked by the national court and what was the answer provided by the ECJ? Subsequently, the legal reasoning is analysed and attention needs to be paid to the structure of the judgment and to the narrative within the description of the facts and the legal argumentation by the ECJ. Particular attention will be paid to the interaction between the way in which the facts are described and the movements and structures of the ECJ's legal reasoning. More specifically, we will examine the textual configuration by focusing on the following two questions.

What kind of character does the ECJ perform in this text?

What we are looking at here are narratives that suggest a kind of institutional self-understanding: the character that the ECJ gives itself in its tone of voice and in its attitudes to the law, and to the persons about whom it speaks. The voice of the Court may be distant and impersonal and repetitive (citing precedent), or more original and real, by formulating a problem in its own words. Furthermore, in the establishment and expression of attitudes towards and relationships with the litigants, the national courts, other EU institutions, and the Member States, the Court not only says something about these actors, but at the same time reveals something about itself. For example, in showing deference, or not, to the Member States or to the EU legislature, or by focusing on the protection of individuals' lives through the foregrounding of fundamental rights, the ECJ places itself as an actor with a distinct role in this political system.

What kind of community does this text create with others?

In the way in which the ECJ narrates, i.e. summarises and selects, the facts, and how and to what extent it engages with the particular facts of the case and the persons of the litigants in the dispute at hand, it defines certain roles and establishes a relationship with 'others': the people that the text addresses, and/or speaks about. We could call this a vision of humanity and a worldview. What aspects of a person's life is the ECJ able to recognise, to hold as visible and to value, in the kind of discourse that EU law provides, for instance in the way in which individual factors are taken into account in a proportionality review? What assumptions does EU law and the ECJ make in its reasoning about what drives or motivates people? And who is invisible in this discourse, with whom does the ECJ fail to create a community? As White puts it: 'To realise that terms of description are terms of argument, and that they can be questioned, puts into the realm of the contestable the very language in which we talk, and of necessity does this on both sides.'[104]

This process of reading is not linear, but circular: we start with a description or analysis of the facts of the case, and subsequently the legal framework and

[104] James B White, *Acts of Hope* (The University of Chicago Press 1994), 93.

the legal reasoning. However, during the analysis of the legal reasoning, we may come to understand the way in which the facts are framed in a different light, once we have explored the possibilities or constraints for speech offered by the legal framework.[105]

2.5 Refiguration

2.5.1 'Being-in-the-world'

After exploring the resources for meaningful speech (prefiguration), and the art by which they are used in a concrete text (configuration), there will be certain themes, patterns or narratives that draw our attention, more particularly a sense of the self and a vision of humanity and a worldview that are at work in the text. What should we do with them? How do we understand them, and what new claim of meaning can we make? This is the final stage of our interpretation process: refiguration, the path to 'understanding' and new claims of meaning in our present-day context.

A recurring issue in Ricoeur's reflections on hermeneutics is the French word '*sens*', which can be translated in English by both 'meaning' and 'direction'. We could say that in the stage of configuration the structures and symbols that contribute to the meaning of a text are identified, where in refiguration the reader actively follows the direction into which the text invites him or her.

> What the text means for whoever complies with its injunction. The text seeks to place us in its meaning, that is (...) in the same direction. (...) to explain is to bring out the structure, that is the internal relations of dependence which constitute the statics of the text; to interpret is to follow the path of thought opened up by the text, to place oneself en route towards the orient of the text.[106]

Where configuration is a stage of perception and analysis, refiguration is one of reception, evaluation and creative action. On the actual process or form that the refiguration can or should take, Ricoeur is less clear. In some of the passages quoted in Section 2.4 above, he spoke about the 'orient of the text', a type of 'being-in-the-world' and to project one's 'ownmost possibilities' in the world of the text.[107] What does that mean, how does one go about that? Ricoeur did not

[105] Gaakeer has referred to this aspect of the hermeneutic circle 'Das Hin- und Her wandern des Blickes', see Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019) 96, referring to Karl Engisch, *Logische Studien zur Gesetzanwendung* (Winter, [1943] 1963), 15.

[106] Paul Ricoeur, 'What is a text? Explanation and understanding' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 23.

[107] Paul Ricoeur, 'The hermeneutical function of distanciation' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 104.

really give clear examples of or a method for this process of refiguration, and I think this re-emphasises the fact that his interpretation theory is about *phronesis*, practical wisdom, rather than *episteme*, theoretical, universal knowledge. The refiguration of a text, its application to the particular, contemporary situation of the reader is exactly that: dependent on the role, perspective and needs of the actual reader. This can therefore be different for the law student, for the judge or référendaire at the ECJ, for a judge or law clerk in a national court of law, for the policy maker or legislator, or for an academic. The question it raises is this: what would it be like to speak, to write in this way? It invites us to try on, to inhabit the character performed in the text and to adopt its vision of humanity and worldview.

2.5.2 Documenting a reading experience

As noted above in Section 2.2, Ricoeur and White emphasise the phenomenon of the reading experience, and this is important for the stage of refiguration too. One could think of White's oeuvre, in sharing his thoughtful reading processes of various texts (and even of the occasional painting in *The Edge of Meaning*), as a practice of the paradigmatic act of judging, of forming an opinion. His aim is not to say anything true and universal about the text that he read, but rather, by sharing his articulated experiences and reasoned opinions, he could extend an invitation to his readers to form their own opinions. Not separate from his opinion, but in an open and fundamentally critical, discursive way: I articulate my opinion, now form yours, so that we can talk about it and both learn from the experience of forming opinions, talking about our experiences, and reflecting upon the perspective offered by the other person. The resulting self-understanding is not about our individual person in isolation, but it is an always an understanding of the self in dialogue with a reflection on our understanding of humanity, and our vision of our society, and in relation to other readers.

This means that the value of the way of reading that we are outlining in this Chapter, is not just in the 'outcome' of our interpretative process, but also in the documenting of our reading experience and the crafting of a response to the texts that we have read. This brings about a new challenge. On the one hand, we have problematised the desire to attain any kind of stable, universal result of the interpretative process in Section 2.2 above and, on the other hand, we know that a more analytical stage of 'explaining' is a necessary part of the process and, moreover, we know that the legal profession, particular the judiciary, demands the process of interpretation to be coherent, consistent and therefore non-arbitrary. The desire to document and share the experience of reading/interpreting confronts the reader (who is, in this case a 'reader-writer') with the limits of his or her own language and competences as a writer:

> To focus on the experience of reading necessarily involves the critic in a struggle of expression and understanding, for how is that experience to be spoken of? One's

> attempt is always imperfect because all attempts to reduce experience to language are imperfect. The best reading thus includes a retelling, one reader's version, which can be checked by other readers against their own. [...] Such a method calls the reader's attention constantly to the relations between the writer and his language and between the reader and his language.[108]

Similarly, Ricoeur has observed that in the intersubjective redescription of the world of the text, and thus in the sharing of the reading experience, 'interpretation is carried to the level of communication'.[109] Consider also White's statement on what it meant for him to read Homeric Greek and to share that reading experience in the book:

> In asking here what meanings [Homeric Greek] offers (...) I do not mean to address these questions fully, for that would be a life's work, but to do so suggestively or in outline, as one might sketch out the major features of an island or valley one had visited, as a way of telling others something of what they might expect when they went there themselves. Even this will be a difficult process, asking a different kind of work from both writer and reader. In particular, to develop some shared sense of a foreign language will require us to move at a more deliberate pace.[110]

As pointed out by White, this is exactly the ground upon which we can learn from each other, checking our respective reading experiences against each other.[111]

Our project endeavours to contribute to the debate about the way in which the ECJ balances economic rights and interests against fundamental rights. In our reading of the Court's case law, we try, on the one hand, to imagine ourselves in the role of the judge or référendaire at the ECJ whose task it is to interpret a certain legal provision and/or precedent, and to write the next judgment. That is a stricter approach to refiguration, in the sense of application: one takes one text as object of interpretation, and the resulting knowledge (wisdom) is applied to the next, new situation with which the reader is confronted.

However, on the other hand, we have to admit that we are probably not actually in the position of a judge or référendaire at the ECJ – at least I am not at the moment of writing this study – and that we lack a concrete new case to which we need to respond. Our perspective of imaginary participation in the role of judge or law clerk is therefore necessarily, if not exactly, abandoned, but is then at least supplemented by a perspective on legal education: we will ask ourselves what

[108] James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 287. White notes that this is connected to both 'New Criticism' and to poststructuralist hermeneutics.

[109] Paul Ricoeur, 'Reply to Mario J. Valdes', in Lewis E. Hahn, *The philosophy of Paul Ricoeur,* (Open Court, 1995), 283.

[110] James B White, *Edge of Meaning* (The University of Chicago Press 2003), 70.

[111] James B White, *Acts of Hope* (The University of Chicago Press 1994), 43.

kinds of narratives we find at work in the text, and what we need to understand them. Our perspective is therefore perhaps more that of the law student, who may aspire to work at the ECJ one day, or perhaps of the professional ECJ jurist in a setting of professional education and training. This perspective allows us to approach the understanding of the text that we will read together, not definitively, but in an intuitive, exploratory way that does justice to our lived experiences.

2.5.3 Reading and (subsequent) writing: ethics

As we have learned in the preceding sections, both White and Ricoeur invite us to ask what kind of world the text proposes, what kinds of possibilities of understanding and claiming meaning it offers. More particularly, how does this text address us and how does it speak about other people? What vision of humanity is communicated? What is the social universe of the text and how is this made or influenced by its reasoning? Furthermore, White urges us to ask who the ideal reader of this text is, what is needed to become that ideal reader and, most importantly, what we think of such a prospect?[112] Or to go back to a different formulation of the central question in White's oeuvre: 'How are we to understand *and to judge* our acts of language – including our use of language in the law – and the character and community we propose therein?'[113] What is more, these questions are not limited to the text as object of interpretation; if we are to respond meaningfully to a new situation, we have to ask the same questions too, since any new situation always already requires a form of interpretation. The perception of narratives in a text thus eventually allows for a confrontation to take place between the ethos of the text, and that of the critic who, at that moment, leaves his or her descriptive role in order to engage in an ethical debate with the text (and with him or herself), leading to the 'understanding' phase of interpretation.[114] We may conclude that in the move from the descriptive to the evaluative, self-reflective and active level, interpretation becomes an ethical enterprise. This too is a necessary part of 'refiguration', and we need to say some more about this dimension.

At this point we need to ask a crucial question: why should we engage in this self-reflective process at all? The sceptic jurist may argue that not all areas of law or instances of judicial decision making have such ambiguities and/or normative implications that the hermeneutical theory that we have developed in the preceding sections would be useful to apply. Some areas of the law are merely concerned with ordering society, and some legal proceedings are predominantly

[112] James B White, 'Reading Law and Reading Literature: Law as Language' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 91.

[113] James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), ix (emphasis added).

[114] See Liesbeth Korthals Altes, 'Le tournant éthique dans la théorie littéraire: impasse ou ouverture?' (1999) 31(3) *Études Littéraires* 39, 53-54.

concerned with the application of law. In that sense, one could have just developed more 'regional' legal hermeneutics, which is more limited than the kind of literary philosophical hermeneutics into which we have ventured. The limits of this legal hermeneutics would perhaps place more emphasis on the need for legal certainty, the importance of tradition (precedent) and the sources of authority within the judicial hierarchy and legislative legitimacy,[115] and not include or warrant such an esoteric enterprise like self-reflection, or thoughts about worldviews or a vision of humanity at all (let alone an exploration of non-legal sources such as art and literature). However, my argument here is that this second stage of interpretation is not only useful but desirable, and even necessary, if one's task is to 'do' justice, to take just decisions.

Let us begin by considering Robert Cover's statement on the 'nomos' of the law once again. 'We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. [...] No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.'[116] Cover argued that all law and legal institutions are governed by certain narratives. Working with these rules and within these institutions, and desiring to do our job well, therefore requires us to be competent in understanding these narratives, to have 'narrative intelligence', as Gaakeer has it.[117] Furthermore, in *Time & Narrative III* Ricoeur has pointed out that:

> ...the strategy of persuasion undertaken by the narrator is aimed at imposing on the reader a vision of the world that is never ethically neutral, but that rather implicitly or explicitly induces a new evaluation of the world and of the reader as well. In this sense, narrative already belongs to the ethical field in virtue of its claim – inseparable from its narration – to ethical justice. Still it belongs to the reader, now an agent, an initiator of action, to choose among the multiple proposals of ethical justice brought forth by the reading.[118]

If this is true for the use of language in historical or fictional narratives, it is all the more true for legal language, which is an institutional language that imposes a certain normativity on both its subjects and its users.[119]

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[115] George Taylor, 'Ricoeur and the Distinctiveness of Legal Hermeneutics,' in Scott Davidson (ed) *Ricoeur Across the Disciplines* (Continuum 2010), 84-101 at 91-93.

[116] Robert M Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

[117] Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 141.

[118] Paul Ricoeur, *Time and Narrative,* Vol. 3 (Kathleen McLaughlin and David Pellauer trs, The University of Chicago Press 1988), 249; See also Peter Kemp, 'Ethics and Narrativity' in Lewis E Hahn (ed), *The philosophy of Paul Ricoeur* (Open Court 1995), 375.

[119] Dworkin has also emphasised the moral dimension to adjudication: 'there is inevitably a moral dimension to an action at law...', Ronald Dworkin, *Law's Empire* (Harvard University Press 1986), 1.

In this sense, we could see each instance of legal reading and subsequent legal writing in light of Ricoeur's (neo-Kantian) 'little ethics' which he introduced in *Oneself as Another* and continued elaborating upon in *The Just* and in *Reflections on The Just*: each person has the desire to live a good life, for and with others, in just institutions.[120] Ricoeur's 'little ethics' start with the idea that every human being has *the wish to live a good life*. Let us assume that this is also the wish of all legal professionals working with EU law, and in particular judges and law clerks at the ECJ. In a professional setting, the wish to live a good life translates into a desire to perform optimally in our jobs, to do work that we are proud of: drafting judgments that would – ideally – be considered excellent examples of our trade, well-written, logically sound, and contributing not only to the elegant and fair resolution of a particular dispute between parties, but also to the development of EU law. A human life, however, is not experienced in isolation, but always in relationships with closer and more distant others. The wish for a good life is therefore complemented by *solicitude and friendship*,[121] i.e. justice towards the close other (family, neighbours) that we know and also, in a larger sense, in the preservation of a 'just distance' with the distant, unknown other, by way of having *just institutions*, such as laws, statutes, treaties, and courts of law. Similarly, in *The Just*, Ricoeur observed that the application and interpretation of the law in a particular case is, in the short term, aimed at resolving the conflict between parties. However, it should also – ideally – contribute in the long term to public peace: the stability and development of a just society. In the professional setting of the work at the ECJ this could mean the desire to do justice to the parties concerned in the actual case at hand, and to do justice to the EU legal order/system, the 'community' as a whole.

White's thoughts about reading and writing, within and outside the legal domain, bear a remarkable similarity to Ricoeurs ethics and hermeneutics. The common thread in White's oeuvre is the issue of what he calls 'constitutive rhetoric', and what he has explicitly and repeatedly called an 'ethical enterprise'[122]: not merely identifying what resources for speech this discourse offers, but also asking what kind of character we can establish for ourselves and for the persons about whom we write, and for the community that we live in, as well as asking the important question: what do we think about such a proposal for a way of being and acting?[123] The kind of world proposed by the text is one we may

[120] Paul Ricoeur, *Oneself As Another* (Kathleen Blamey trs, The University of Chicago Press 1992).

[121] Friendship in the Aristotelian sense.

[122] James B White, *Edge of Meaning* (The University of Chicago Press 2003), 114: 'verbal action is action with or upon other people, with or upon a language (...) [which] is (...) necessarily ethical.'

[123] James B White, *Edge of Meaning* (The University of Chicago Press 2003), 102 formulates his idea of excellence by pointing out that the object of great writers is not just writing down a story or expressing an idea, but also the language in which they themselves think and write, their culture. In White's view, excellence in writing is thus both in the subject of the story, and in the way the language reflects both on the subject and on the writer at work.

wish to adopt and inhabit, but a text may also offer a kind of rhetoric and a kind of world that we wish to reject.[124] The narrative identity (of an individual or of a society) is 'born of an incessant rectification of a preceding narrative by a later narrative and of the whole chain of refigurations which follows'.[125] The activity of evaluating texts written by others, the demands and/or possibilities that they create for us and for our societies, as well as our own attempts at writing about these texts, all invite ethical self-reflection.[126]

If thus we combine Ricoeur's theory of 'little ethics' with his thoughts on how interpreting a text is a process of self-understanding, and thereby combine his hermeneutical theory with his thoughts about ethics and adjudication, and if we add White's perspective summarized above, we could formulate a benchmark for the evaluation of each legal professional's work/output: does this piece of legal writing, this judgment and the way we wrote it, do justice to ourselves in our endeavours to lead a good life, does it do justice to the persons whom it concerns directly (i.e. the parties in the dispute), and does it do justice to the just society in which we desire to live?

The combination of Ricoeur's 'little ethics' and White's ideas about 'constitutive rhetoric' as a plausible theory on the drivers of a legal professional's behaviour, also explains the need for a hermeneutical theory for EU law: in order to live a good professional life in EU legal practice, to reach a good understanding of the meaning of a text such as the EU Treaties, i.e. to interpret well, it is necessary to undertake this process of (critical) reflection on the self (or, as White says, the character that is possible for the speaker/writer) and on the vision of humanity and society that the text proposes and/or makes possible or impossible. Furthermore, the ideal of the just, of justice, requires that the reader/writer undertakes this process in order to do justice to him or herself, and to the near, and to the distant, unknown, other, thereby contributing to the creation and preservation of just institutions. There is therefore an intimate connection between the ethics and the aesthetics of sound legal reasoning.[127] This is true for law in general, and it is even more pressing for the process of balancing internal market law and economic interests against fundamental rights protection, since

[124] Peter Kemp, 'Ethics and Narrativity' in Lewis E Hahn (ed), *The philosophy of Paul Ricoeur* (Open Court 1995), 379; See also Liesbeth Korthals Altes, 'Le tournant éthique dans la théorie littéraire: impasse ou ouverture?' (1999) 31(3) *Études Littéraires* 39, 53.

[125] Paul Ricoeur, *Time and Narrative*, Vol. 3 (Kathleen McLaughlin and David Pellauer trs, The University of Chicago Press 1988) 248.

[126] See Liesbeth Korthals Altes, 'Le tournant éthique dans la théorie littéraire: impasse ou ouverture?' (1999) 31(3) *Études Littéraires* 39, 53: 'Une telle hermeneutique n'aboutit pas à une comparaison de la teneur morale de textes selon une norme morale du genre "plus une oeuvre m'apprend à bien vivre, plus elle est bonne en tant que littérature". Chez Ricoeur, la norme serait plutot "plus une oeuvre m'apprend à bien (me) lire, me soumet à ce grand écart entre l'identification-avec et ma résistance, plus elle est éthique", sans préjuger du contenu moral de la vision du monde transmise.'.

[127] See Liesbeth Korthals Altes, 'Le tournant éthique dans la théorie littéraire: impasse ou ouverture?' (1999) 31(3) *Études Littéraires* 39, 54.

this area of law/these types of cases have important constitutional, norm-setting consequences.

2.6 Concluding remarks

The exploration of White and Ricoeur's works allows us to formulate the following premises.

- In law, reading and writing are inherently connected.
- In his or her writing, the author cannot help but leave 'fingerprints', his or her word choices, structures and narratives (in terms of relations and connections made, symbolism used, etc.), reflect his or her self-understanding and world view.
- In reading (interpreting), a reader is confronted not only with this worldview of the author (if at all conveyed), but also with (the projection of) his or her own worldview and self-understanding.
- The meaning of text is a complex interplay of the institutional background that makes up the author's intention and context *in abstracto*, the structure, semantics and narratives that are at play in the text itself (with a complex, culturally embedded understanding of both language and law as a prerequisite and/or complicating factor), and the understanding of a particular reader and his or her particular cultural background and competences.
- Writing is at once a craft and an art: there are tools you can learn to use, but the meaning of a text cannot be wholly reduced to a sum of these tools. Analysing the use of these tools is only a part of the process of understanding the meaning of a text.
- Understanding is always a form of self-understanding.
- Writing and interpreting is an inherently ethical activity: a text, particularly a legal text, sets up a normative universe (a nomos) in which people (including the author and the reader) have designated roles and obey certain explicit as well as implicit rules.

Our project in the next chapters is to demonstrate and understand the workings of a text at three different levels, that is: the level of the character that the writer constitutes for his or herself (and, thereby, permits for the next writer who wishes to respond to her text); the level of the persons and/or events that the story of the text is about; and the higher, more abstract level of the community that is made possible or impossible by the text. A reflection on self-understanding on all of these levels, through the paradigm of narrative, is the objective of this exercise.

The chronological stages of the interpretative process of prefiguration, configuration, and refiguration will structure our reflections. It is important to keep in mind, however, that these stages are not entirely separate, and that they are not an accurate description of the cognitive processes that are at work when we read a text. Nevertheless, the triad may serve as a useful heuristic device.

By way of *prefiguration*, we make a prospective inventory of what we think are some of the most important pre-understandings and legal/cultural competences that a jurist who either works or aspires to work at the ECJ possesses. Our subsequent grasping of the actual text in the stage of *configuration* depends heavily on these pre-understandings and competences, and they may lead to the identification/formulation of certain expectations: what is considered ordinary practice in this 'genre' of text? What do we expect to find at work and, if we observe a deviation, why is that so? Subsequently, in each thematic 'case study', we start with a brief exploration of the pre-understandings that are more particular to that legal field: the legal (and perhaps political/social) framework and context that preceded the cases.

We then describe the structure (configuration) of the text, in particular the description of the facts and the legal reasoning of the Court, with a particular attention to elements that could contribute to narratives of self, a vision of humanity and a worldview more generally. As we will see in the case studies and the synthesis, the process of documenting the reading process – the explaining of the configuration of the texts – already involves a kind of narration, an act of ordering and selecting, based on what we have come to think of as useful and relevant. It is unavoidable, therefore, that the stages of *configuration* and *refiguration* blend into one another, although the descriptive parts of the case studies will be distinguished as much as possible from the refigurative parts.[128] The stage of configuration is thus descriptive, and asks questions like: what do we find at work in this text? How does this text function? As we have seen in the previous sections, *refiguration* is the ethical and evaluative engagement with whatever is found to be at work in the configuration of the text, asking questions like: what could we say is the meaning of the text? How have we come to understand it? How can we use this understanding in the new context (i.e. a new preliminary reference procedure), in the new text that we need to create (which, in itself, is a creative act that leads to a new text, a proposal for new meaning, that will, in turn, be the object of another interpretative exercise)? How have we learned to understand ourselves better during the reading process? The response to these questions is inherently and unavoidably open-ended.

In this work of reflection on all of these topics, the triad of Ricoeur's 'little ethics' is again at play: first, what kind of opportunities or possibilities does this text offer us as a legal professional to live a good life, that is, to write in a way that does justice to our own sense of self? Secondly, what does this text say about the persons whom it concerns directly, and indirectly? What kind of (good) life is possible in the EU law that is 'spoken' in this text?

[128] Mario J Valdes, 'Ricoeur and literary theory' in Lewis E Hahn (ed), *The Philosophy of Paul Ricoeur* (Open Court 1995), 277-278.

PART II

Prefiguration

The ECJ's Institutional 'Self'

3.1 Pre-understandings for the ECJ's legal reasoning

We concluded in Chapter 2 that it is a helpful and necessary step in the interpretation process to reflect upon the pre-understandings that one ought to have before being able to enter into a meaningful discussion of a text. As explained in Chapter 2, our aim differs from that of the so-called Romantic hermeneutics philosophers, who thought that the true meaning of a text was to be found in the author's original intention only, placing, therefore, great emphasis on knowing the author and his or her context and motives. However, this does not mean that the author, particularly an author like a judicial institution which has a certain authority within a political system, is entirely irrelevant. 'Prefiguration is the area of cultural participation through language and, as such, is the pre-condition for textuality. There can be no text if there is not the common ground of language and culture.'[1] One aspect of this common ground is to know the speaker and his or her direct (institutional) environment. Moreover, as we learn from White, all verbal action, be it speaking or writing, (1) defines the speaker (as a character/persona) in tone of voice, attitudes, etc., and (2) defines the audience in terms of qualities of mind and knowledge which it assumes that the reader has. Furthermore, in defining both speaker and audience, all verbal action also (3) constitutes a community between speaker and audience, based upon the relationship in which they engage.[2] In the present research, as mentioned in Chapter 2, these propositions acquire a double reflexivity since we examine the self-understanding of the ECJ not from an external point of view, but rather from an internal, participatory perspective in which we imagine ourselves in the shoes of the jurist who actually works at the ECJ and who writes these judgments. The proposals and performances in the Court's writings of a 'self' are, in important ways, not only about the self-understanding of the Court, but they also provide grounds for a process of self-reflection of this audience.

What, then, should we know about the institution? What do we need to know about the ECJ that will help us to understand and adequately appreciate the kind of narration, the expression of the (collective) legal minds at work in the judgments? What factors contribute to the creative process to make the narration and the reasoning not just particular, but perhaps also inevitable? What possibilities for and constraints on thought and expression are at work within the ECJ, and how do you deal with those if you were to work within this institution? If any good interpretation process requires a reflection on the self and on the relationship with others, what self do we find in the ECJ's case law, and what pre-understandings do we need to identify this self, and to say something meaningful about this at all?

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[1] Mario J Valdes, 'Introduction' in Mario J Valdes (ed), *A Ricoeur Reader: Reflection and Imagination* (University of Toronto Press 1991), 28.

[2] James B White, *The Edge of Meaning* (The University of Chicago Press 2003), 115.

There are several ways to approach the ECJ's style and authorship and its (institutional) self, and we will discuss these as a series of concentric circles, slowly moving closer to what it is actually like, on a daily level, to draft a judgment at the ECJ. The first of these circles starts with the provisions of the Treaties that establish the Court and describe its mandate, its jurisdiction, its composition and the various types of procedures that can be brought (Sections 3.2 and 3.3). Given that I write with EU jurists in mind, and particularly those who work or aspire to work at the ECJ, I presume that most of this information will be known already, so the discussion will be brief. Moreover, there are numerous academic handbooks about the ECJ that provide more detailed and practical information about the Court's functioning that I will refer to where appropriate.

A second circle or layer is to look into the particular work process, and the culture and tradition that influence the way in which ECJ judgments end up looking like they do (Section 3.4). This is information that I could presume to be known to the reader as well; however, there are dimensions to the work process that are under-exposed in most of the legal literature on this topic, but which are nevertheless crucial to our understanding of the work of the ECJ.

The third step (Section 3.5) would be to identify standards of judicial quality or excellence or, conversely, recurring criticisms of the ECJ's style of reasoning, in order to have a more critical or evaluative idea of what to expect from the judgments that we will study more closely as part of our case studies in Chapters 5 and 6. We will do so based on a review of key academic publications about the Court's functioning and its legal reasoning. Two categories of authors should be distinguished here: the voice and viewpoints of academics who comment upon the work of the ECJ from an external perspective, and those of members or former members of the Court (Judges and/or AG's) or staff/former staff who have written about the Court from an internal perspective.[3]

These concentric circles, or layers, of pre-understandings will give us (1) background information about the workings of the ECJ that determine the shape, form, style, and boundaries of the ECJ's output; and (2) expectations and evaluative criteria that have been set both externally and from an internal point of view. This, in turn, will enable us to speak from an informed position about the concrete cases that we will read together in the case studies. This is important because a legal text, and specifically a judgment is not an 'innocent' text: it is written by an institutional actor with a considerable amount of power, but also with constraints that the institutional context puts on it.[4] The authors of these

[3] See Antoine Vauchez, *Brokering Europe: Euro-lawyers and the making of a transnational polity* (Cambridge University Press 2015), 159; who used contributions by (former) members in Festschrifts as a discursive practice about the ECJ's self.

[4] Lessons from Critical Legal Studies and Postmodernism – law is not innocent, but often a conservative tool of power, authority, violence; see Robin West and Daniela Carpi, 'Renaissance into Postmodernism: Anticipations of Legal Unrest' in Daniela Carpi and Jeanne Gaakeer (eds), *Liminal Discourses: Subliminal Tensions in Law and Literature* (De Gruyter 2013), 183.

texts are not free to write as creatively or personally as, for instance, a poet or a novelist. Even within the ECJ, the drafters of ECJ judgments are less free than the drafters of AG's Opinions. There are, perhaps, very many, very good reasons for these constraints, but what are the possibilities for meaningful thought and expression, and agency, even within, or despite, these constraints?

This chapter does not pretend to be able to characterise the ECJ in any sort of definitive or exhaustive way, or to prescribe a certain kind of thinking about the ECJ and its adjudication. Rather, it suggests a way of asking questions about an institution and about oneself in relation to that institution that may help give more concrete form to the examination of what the hermeneutic stage of prefiguration may mean for the reading of ECJ case law.

3.2 Formal provisions and arrangements

3.2.1 Treaty provisions

The Court of Justice of the European Union is one of the EU's seven institutions, and it comprises the Court of Justice (which I refer to in this research as 'ECJ' or 'the Court') and the General Court ('GC'), which absorbed the specialised Civil Service Tribunal in 2016.[5] Article 19(1) TEU also sets out the CJEU's task: to 'ensure that in the interpretation and application of the Treaties the law is observed'. Much has been written about what constitutes 'the law' in the EU legal order,[6] but let us for now assume that 'the law' means the EU Treaties, the Charter, EU secondary legislation and general principles of EU law as identified in the case law of the ECJ.[7]

Articles 251 to 281 TFEU determine the membership and composition of the ECJ and GC, list the different types of procedures that can be brought to the ECJ and/or the GC, and set out rules for the effects of the various judgments and/or decisions of the EU courts. Protocol No 3 annexed to the Treaties on the Statute of the Court of Justice of the European Union[8] (hereinafter 'the Statute'), gives

5 See Art. 19(1) TFEU.

6 See for instance Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993), Chapter 2.

7 See also Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 15. See for a general, comprehensive commentary on the ECJ as institution, among others, Anthony Arnull, *The European Union and its Court of Justice* (2nd edn, Oxford University Press 2006); Gráinne De Búrca and Joseph Weiler, *The European Court of Justice* (2nd edn, Oxford University Press 2008); Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek T Nowak ed, 1st edn, Oxford University Press 2014).

8 Protocol No 3 annexed to the Treaties on the Statute of the Court of Justice of the European Union, OJ 2016 C 202/210.

further, more detailed rules on the organisation and functioning of the CJEU as a whole, while the ECJ and the GC each have their own Rules of Procedure.[9]

3.2.2 Judges and AGs

The ECJ is composed of one judge for each Member State and 11 Advocates-General (AGs). According to Article 252 TFEU, the AGs are to 'assist' the ECJ, by making, 'with complete impartiality and independence, (...), in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement'.[10]

Article 253 TFEU stipulates that the judges and AGs of the Court must possess the qualifications required for appointment to the highest judicial offices in their respective countries or be jurisconsults of recognised competence.[11] Article 2 of the Statute of the ECJ provides that the members must take an oath, declaring that they will perform their duties 'impartially and conscientiously'.

Judges and AGs are appointed for a period of six years which is, at the discretion of their Member State of origin, renewable. Furthermore, the ECJ and the

9 Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013, p. 65), on 19 July 2016 (OJ L 217, 12.8.2016, p. 69), on 9 April 2019 (OJ L 111, 25.4.2019, p. 73) and on 26 November 2019 (OJ L 316, 6.12.2019, p. 103). Rule of Procedure of the General Court of 4 March 2015 (OJ 2015 L 105, p. 1) amended on: (1) 13 July 2016 (OJ 2016, L 217, p. 71) (2) 13 July 2016 (OJ 2016, L 217, p. 72) (3) 13 July 2016 (OJ 2016, L 217, p. 73) (4) 31 July 2018 (OJ 2018, L 240, p. 67) (5) 11 July 2018 (OJ 2018, L 240, p. 68).

10 Since the Nice Treaty, it is possible that the Court decides the determine the case without submission of an Opinion by an AG, because the case raises no new point of law (Art. 20 Statute ECJ).

11 The Lisbon Treaty introduced Art. 255 TFEU, on the Advisory Panel on the candidacy of judges and AGs. This advisory panel consists of seven people chosen from among senior members of national judiciaries, former members of the Court and one person chosen by the European Parliament. The Member State selects a candidate, and the Panel hears the candidate and delivers a non-binding opinion on his or her suitability for office, after which the Member States by common accord decide on the appointment. The Panel makes its assessment on the following criteria: the candidates' legal capabilities; their professional experience; their ability to perform the duties of a Judge; their language skills; their ability to work as part of a team in an international environment in which several legal systems are represented; whether their independence, impartiality, probity and integrity are beyond doubt; in future, the panel will also take into account the physical capacity of candidates to carry out demanding duties which require considerable personal investment. Although it has been criticised for its lack of transparency, the Art. 255 TFEU Panel has helped increasing the legitimacy and quality of the appointment process. See Angela Huyue Zhang, 'The Faceless Court' (2016) 38 *University of Pennsylvania Journal of International Law* 71, 81-91; Thomas Dumbrovsky, Bilyana Petkova and Marijn Van der Sluis, 'Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States' (2014) 51 Common Market Law Review 455; See for various (critical) perspectives: Michal Bobek (ed), *Selecting Europe's judges: a Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015).

GC have a rather complex system of triennial renewal. In terms of their effect on the quality of legal reasoning, the limited period of appointment has been criticised as presenting a risk to the independence of the judges of the ECJ, while the triennial renewal system is seen as a constraint on the stability and expertise of the members.[12]

3.2.3 Other components of the ECJ

Although much academic commentary makes it sound as if the judges and AGs are the only ones working at the ECJ, they are in fact a small part of its actual workforce. I mention here the other groups which are most directly relevant for understanding the workflow and the legal reasoning of the ECJ in preliminary reference procedures.

Référendaires

Each judge and AG is assisted by at least three, and sometimes four, référendaires (legal secretaries or, in the US, law clerks) who are tasked with analysing the law, the facts and the various arguments submitted in each case, and with drafting the various reports and notes and, ultimately, the various drafts of a '*projet de motifs*' that will lead to the final version of a judgment (or order). In that sense, référendaires are the ECJ's 'ghost writers',[13] in their invisibility and in the amount of the actual drafting which they do.[14]

Registrar

The Registry is tasked with handling various procedural aspects of pending cases, and is in control of all correspondence with the lawyers and agents for parties. The Directorates for Research and Documentation and for Protocol and Visits are under the direct responsibility of the Registrar. Furthermore, the Registrar is responsible for all the other organisational departments of the ECJ, i.e. the administrative support services in the Directorate-General for Administration; the language services, such as translation, in the Directorate-General for Multilingualism; and the information services in the Directorate-General for Information.

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[12] Sophie Turenne, 'Institutional constraints and collegiality at the Court of Justice: A sense of belonging?' (2017) 24 *Maastricht Journal of European and Comparative Law* 565, 570-575; See also Joseph Weiler, 'Epilogue: Judging the Judges: Apology and Critique', in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 251-252.

[13] Michal Bobek, 'The Court of Justice of the European Union' in Anthony Arnull and Damian Chalmers (eds), *the Oxford Handbook of EU law* (Oxford University Press 2015), 153-169.

[14] Very little research is done about referendaires at the ECJ. See for a rare example: Angela Huyue Zhang, 'The Faceless Court' (2016) 38 *University of Pennsylvania Journal of International Law* 71.

Research and Documentation

The Research and Documentation Directorate performs several important tasks: carrying out the *pre-examen* of new preliminary references (see Section 3.3 below), drawing up research notes (at the request of the ECJ or GC) about Member State law in a particular area or on a particular topic, preparing the summaries of judgments and order that will feed into the various (digital) research tools and case law directories such as the 'Digest of case law', tracking annotations of ECJ judgments, and providing the Court with information about legal developments with an EU interest (the '*Reflets*').

Translation

The CJEU's Directorate-General for Multilingualism comprises the Interpretation Directorate and the Directorates for Legal Translation, and is currently composed of 606 lawyer-linguists, and 71 interpreters, who provide direct interpretation during hearings and meetings. It is tasked with translating (almost) all incoming documents – that may be submitted in any of the 24 official languages of the EU – into the CJEU's internal working language (French), as well as translating the final judgment or order into not only the particular official language of the procedure, but also as soon as possible (nowadays on the same day of publication) into all other languages. As announced on the Court's website, the volume of pages translated by this Directorate exceeds 1 million per year. The translation work is done by lawyer-linguists, i.e. persons who have a degree in law, a perfect command of one main language (usually their mother tongue) and a thorough knowledge of at least two other EU languages (one of which is usually French).[15]

3.3 Types of procedures

There are several types of procedures that can be brought to the ECJ, four of which are the most well-known and make up the majority of the ECJ's case law. When the EU Commission (or, very rarely, a Member State) finds that a Member State has failed to fulfil its duties under EU law, it can start an *action for failure to fulfil obligations* (Articles 258 and 259 TFEU), also known as an 'infringement procedure'. Legislation and other measures adopted by an EU institution, body, office or agency that have legal effects can be challenged by individuals or Member States in the form of an *action for annulment* (Article 263 TFEU). Furthermore, parties can bring an *appeal* on points of law of judgments and orders of the GC before the ECJ (Article 256(1) TFEU). The direct actions and appeals procedure are perhaps the most familiar to national lawyers, as they closely resemble the work of national courts. The *preliminary reference procedure* (Article 267 TFEU) makes up almost 70 per cent[16] of the ECJ's case law and is

[15] Court of Justice, 'Working as an English-language lawyer linguist' <https://curia.europa.eu/jcMS/upload/docs/application/pdf/2009-03/brochure_en.pdf>.

[16] See ECJ Annual Report of judicial activities 2018, p. 126 and 131.

a more peculiar feature of the EU judicial system that we will now discuss in more detail.[17]

The Preliminary Reference Procedure

Article 267 TFEU provides that any national court may (and national courts of last instance must) refer questions to the ECJ in case of doubt about the interpretation of EU law. This system is extremely rare, and unknown to most national legal orders or international courts of law. It allows national courts to enter into a dialogue with the ECJ if the resolution of a case requires the interpretation of EU law. The ECJ enjoys exclusive competence to rule on the interpretation and validity of EU law,[18] but it is for the national court to apply the ECJ's interpretation to the facts of the case at hand. The preliminary reference procedure has been of invaluable importance in the development of EU law, and it has been called 'a kind of central nervous system for the enforcement of [EU] law and the co-ordination of the [EU] and national legal orders'.[19] Because of its primary importance in the development of EU law, we will take the legal reasoning of the ECJ in preliminary reference procedures as the main focus of our inquiry.

The preliminary reference procedure works as follows.[20] During the course of national proceedings, a question arises on the correct interpretation of EU law (raised either by the parties, or by the national judge him or herself). If the national judge deems it necessary, he or she stays the proceedings, and refers these 'preliminary questions' to the ECJ. The national courts enjoy a level of

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[17] The preliminary reference procedure has been described and analyzed in a large number of academic publications, see for instance Anthony Arnull, *The European Union and its Court of Justice* (2nd edn, Oxford University Press 2006), 95-131; or Martin Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd edn, Oxford University Press 2014).

[18] Article 19(3)b TEU and Article 267 TFEU.

[19] Quote by Alec Stone Sweet, 'The Juridical Coup d'Etat and the Problem of Authority: CILFIT and Foto-Frost' in Miguel P Maduro and Loic Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 201; See also for instance former ECJ judge Federico Mancini who called the preliminary reference procedure a "keystone" in the "edifice" of the EU's legal system in his essay: Federico Mancini, 'The Constitutional Challenges Facing the European Court of Justice' in Federico Mancini (ed), *Democracy and Constitutionalism in the European Union: Collected Essays* (Hart Publishing 2000), 18-19; George Tridimas and Takis Tridimas, 'National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure' (2004) 24 *International Review of Law and Economics* 125, 127; See also Martin Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd edn, Oxford University Press 2014), 2.

[20] See for a very elaborate discussion Martin Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd edn, Oxford University Press 2014), 346-409.

discretion (1) as to whether they deem it necessary to refer questions at all, and (2) in phrasing the question(s).[21]

The Court has to rely on the facts stated in the referral decision by the national court. It is not provided with the entire file of national proceedings and it has no fact-finding role. Furthermore, the relevant parties to the national procedure have a right to submit their views on how the preliminary question is to be answered. Finally, all Member States and EU institutions are invited to present their observations.[22] After all the parties and interested Member States and EU institutions have submitted their observations in writing and orally during the hearing, usually one of the AGs presents his or her Opinion on the case.

The Court hands down its judgment in the case after the AG has given his or her Opinion, on average within 16 months from the lodging of the case.[23] In this judgment, the Court clarifies how EU law should be interpreted and (ideally) answers the national court's questions. The national proceedings, which had – up until that moment – been stayed, are resumed, and it is up to the national court to apply the interpretation of EU law as explained by the ECJ, to the particular facts and circumstances of the case at hand.

3.4 Elements of work process, culture and tradition

All of these formal, institutional details provide us with some context, that is to say, some general information on how this institution is organised. What we can glean is that this is a multicultural and multi-lingual institution, with a broad jurisdiction, which is undoubtedly complex to work for. However, it does not give us a real idea of what it means to use, and be part of, its discourse. Let us go a layer deeper in the organisational and the cultural context of the ECJ's legal reasoning.

3.4.1 No docket control: time pressures

The ECJ has to pronounce itself upon all cases that are brought to it, unlike the Supreme Court of the United States (SCOTUS), which can select the cases it hears through the writ of certiorari. This means that the ECJ's docket, and the annual output, is quite voluminous: according to the Court's Annual Report, in 2018 there were 849 new cases brought to the Court, 760

[21] To assist the national courts that want to refer a preliminary question, Court has published guidelines and best practices. See OJ 2016 C 439/01, Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings.

[22] See Art. 96 Rules of Procedure.

[23] See the statistics of the duration of preliminary reference proceedings between 2012-2016 in the CJEU's 2016 Annual Report on judicial activities, p. 100.

cases closed (426 of which by judgment), and 1,001 cases still pending.[24] By way of comparison: although between 7,000 and 8,000 new cases are filed at the SCOTUS every year, only about 80 cases are granted plenary review (with an oral hearing), and another 100 are decided only on the basis of a written procedure. The sheer volume of cases that need to be dealt with by the ECJ within a reasonable time obviously has repercussions for the amount of time that is dedicated to the reflection upon, and drafting of, a single case, and therefore, for the quality of the drafting.[25]

3.4.2 Tradition and precedent

Although there is no formal principle of '*stare decisis*' at the ECJ, the ECJ's judgments are strewn with references to, and direct, often verbatim, citations from, its own previous case law. There is, thus, a *de facto* rule of precedent.[26] However, this practice is not entirely the same as that of common law courts: the ECJ does not discuss or distinguish the 'material' facts of the prior cases to demonstrate that the holding of that case is really also relevant for the case at hand. Moreover, there is no clear distinction between the '*ratio decidendi*' of a judgment and any '*obiter dicta*' contained therein. This means that any statement of the law in an ECJ judgment has a persuasive, and potentially binding, force.

Very helpfully, Beck distinguished several '*topoi*' or modalities for the interpretation or use of previous case law, such as proportionality, uniform application of EU law and useful effect (discussed more fully in Section 3.5.2 hereafter), but he notes that at the ECJ there is at least one other technique of precedent: the gradual extension of precedent through the use of building blocks and their application to new material facts.[27] The ECJ tends to refer to, or cite, passages from previous decisions in order to outline the steps in the argumentation that are already settled in earlier cases, in order to pave the way for a discussion of what is new or different in the case at hand. However, research has also shown that the ECJ often only cites cases that are supportive of its argument, and sometimes even cites cases as if they were supportive of the reasoning, whereas in reality, upon closer inspection, the 'precedent' does not support the argument

[24] ECJ 2018 Annual Report of judicial activities, p. 125 and 132.

[25] Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous legislative tests, laconic pronouncements and the credibility of the judicial system', (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 409, 413, and 418-423; see also Joseph H H Weiler, 'Epilogue: Judging the Judges: Apology and Critique', in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 252. See also former President of the ECJ Vassilios Skouris, 'The Court of Justice of the European Union: A Judiciary in a Constant State of Transformation', in Allan Rosas and others (eds), *Constitutionalising the EU Judicial System*, (Hart Publishing 2012), 3-13.

[26] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 237.

[27] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 98.

made.[28] Furthermore, the ECJ has been criticised for not always making clear if and why it departs from earlier decisions, which reduces cohesion, uniformity and legal certainty.[29]

To sum up, it is common to see in an ECJ judgment many references to, and phrases from, its own previous case law. However, what the exact argumentative status or rationale is of these references, needs to be critically analysed in each case, particularly also with a view to the influence of the 'linguistic precedent' that will be discussed hereafter.

3.4.3 Multilingualism

It is worth taking a closer look at the language regime at the ECJ. Since language diversity is one of the central values of the EU,[30] it is possible to bring a case to the ECJ in any of the 24 official languages of the EU.[31] However, the internal working language at the ECJ is French.[32] This means, as mentioned in Section 3.2 above, that practically all documents[33] that are received by the Registry have to be translated into French before the judges and their respective référendaires can start their work (unless, of course, the original language of the case happens to be the mother tongue of the judge or one of his or her référendaires), and that in principle all drafting occurs in French and judgments in their final form are subsequently translated by lawyer-linguists

[28] Urska Sadl and Sigrid Hink, 'Precedent in the Sui Generis Legal Order: A Mine Run Approach' (2014) 20 *European Law Journal* 544, 548-549; This is in clear contradiction to what is asserted by ECJ Judge Jean-Claude Bonichot, who actually asserts that when the Court cites a precedent, 'elle indique avec soin pourquoi elle distingue telle affaire d'une autre.' [my emphasis], in: Jean Claude Bonichot, 'Le précédent dans la jurisprudence de la Cour de justice de l'Union européenne: plus continentale ou plus anglo-saxonne?' in Olivier Dubois (ed), *Melanges à l'honneur de Bernard Pacteau – Cinquante ans de contentieux publics* (Mare & Martin 2018), 138.

[29] Jan Komarek, 'Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation' (2009) 11 *Cambridge Yearbook of European Legal Studies* 399, 400-401; Again, there is an interesting contrast with the assertion made by Judge Jean-Claude Bonichot, who alleges that while the whole of the ECJ's organisation is designed to ensure coherence and stability in the case law, it does not prohibit evolutions or changes. However, these need to be 'mûrement réfléchis' and the ECJ should – and, according to Bonichot, does – also explain them. Jean Claude Bonichot, 'Le précédent dans la jurisprudence de la Cour de justice de l'Union européenne: plus continentale ou plus anglo-saxonne?' in Olivier Dubois (ed), *Mélanges a l'honneur de Bernard Pacteau – Cinquante ans de contentieux publics* (Mare & Martin 2018), 148-150.

[30] See Article 3 TEU, Article 165 TFEU and Article 22 Charter.

[31] Article 36 Rules of Procedure. See generally Chapter 8 of the Rules of Procedure.

[32] Time and again there are calls to change the working language to English, but they have been unsuccessful in securing the backing of the Court and/or Member States. It is unlikely that this will change in the near future. See for example Anthony Arnull, 'The Working Language of the CJEU: Time for a Change?' (2018) 43 *European Law Review* 904.

[33] With the exception of annexes, which are translated upon request by the Judge or AG.

into the language of the procedure and the other EU languages. More particularly, the unique multilingualism at the ECJ has the following implications for the style of the ECJ.[34]

Discomfort and disadvantage of non-native speakers

Although the working language is French, a large number of the members of the Court and their référendaires are not native speakers of that language. Furthermore, whilst there are interpreters present during hearings, they are not present during the judicial deliberations afterwards, which means that, despite the requirement that members of the Court master French and despite their best efforts to do so, non-francophones sometimes cannot play a full part during deliberations and during the drafting process in general.[35]

In anonymised interviews with researcher Karen McAuliffe, non-francophone référendaires admitted to feeling constrained by the working language – only in our mother tongue, the language and logic in which we have received our legal education, do our reflections upon and reasoning about a case really 'flow'. Not working in our mother tongue therefore may result (depending, of course on the level of mastery of French and experience in legal drafting in that language) in awkwardness of phrasing and reasoning and, as we will see, a reliance on standard phrases and formulas.[36]

Many of the référendaires interviewed by McAuliffe insisted that having to work in French led them to conclusions which might have been different from those which they would have reached had they been writing in their own language:

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[34] See for a general discussion of the Court's language regime Leo Mulder, 'Translation at the Court of Justice of the European Communities' in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2009).

[35] Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous legislative tests, laconic pronouncements and the credibility of the judicial system', (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 409, 417; Jean-Claude Bonichot, 'Le style des arrêts de la Cour de justice de l'Union européenne' (2013) *Justice & Cassation*, 253, 257.

[36] Karen McAuliffe, 'Precedent at the ECJ: The Linguistic Aspect' in Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues*, vol 15 (Oxford University Press 2013), citing a référendaire: "*Drafting in a language that is not your mother tongue makes a big difference to the way that you write. When you write in your mother tongue it flows more naturally, it is an unconscious exercise (language-wise), words and phrases flow from associations made by your brain by drawing on a lifetime's use of the language ... When you are writing in a language that is not your mother tongue you have to boil down the semantics of what you want to say into one thread, into the essential of what you want to say—then you have to put your sentences together and you end up using clumsy and clunky connections.*" See also Karen McAuliffe, 'Behind the scenes at the Court of Justice: drafting EU law stories' in Fernanda Nicola and Bill Davies (eds), *EU law stories* (Cambridge University Press 2017), 46-48. Furthermore, see James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), p. 241-244 for a similar discussion of problems of multilingualism in Canada.

> [I]t can be difficult to find terms in a foreign language that meet your exact thinking, [but] working in a foreign language can also help you to find answers to legal problems that you wouldn't have found in your own language.

Although many référendaires interviewed felt that way, it is in fact more likely that they reach a similar solution through slightly different reasoning:

> It is often difficult to say exactly what you want to say in a judgment ... Often the Court will want to say X but in the very rigid French of the Court that is used in the judgments you have to get around to X by saying that it is not Y![37]

Practical constraints codified: linguistic (and digital) precedent

Furthermore, having French as the working language at the ECJ while most judges and référendaires are not native speakers, has led to the recurrence of 'building blocks' in the case law: a repetition of certain standard paragraphs taken from earlier decisions in the Court's case law on certain subjects. As noted by Beck:

> The reliance on such pre-fabricated materials or 'building blocks' has become a common feature of Court of Justice judgments since the 1980s and occurs primarily in areas governed by established precedents where the Court supports its line of reasoning by referring back to settled aspects or axiomatic assumptions of the case law.[38]

McAuliffe's empirical research reveals that this is not necessarily a bad thing, since one référendaire suggested that

> ...in your own language you have a huge choice of words and phrases and so there is more risk of making a mistake where you are drafting a judgment concerning an area of EU law that you may not be expert in.[39]

Moreover, the translation of the ECJ's judgments in all 24 official languages, is made considerably easier if certain recognisable turns of phrases, or even entire passages, are used, creating what McAuliffe has termed a 'linguistic precedent'.[40] The ECJ's translation services make increasing use of translation software, which makes it even more important to use passages, cited word-for-

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37 Karen McAuliffe, 'Behind the scenes at the Court of Justice: drafting EU law stories' in Fernanda Nicola and Bill Davies (eds), *EU law stories* (Cambridge University Press 2017), 46-48.

38 Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 174.

39 Karen McAuliffe, 'Behind the scenes at the Court of Justice: drafting EU law stories' in Fernanda Nicola and Bill Davies (eds), *EU law stories* (Cambridge University Press 2017), 46-48.

40 Karen McAuliffe, 'Precedent at the ECJ: The Linguistic Aspect' in Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues*, vol 15 (Oxford University Press 2013), 483-493.

word from past judgments that have already been translated.[41] Such a practice is further consolidated by the creation of the 'Canevas', which is a software application which creates, for certain cases, a pre-generated form for, or at least a start of, a *projet de motifs*, including the formulas that are considered to be standard in the type of case at hand. This aspect of the ECJ's culture is also further consolidated by the *Bibliothèque des Phrases* (a repertory of standard, accepted phrases) and the *Vademecum*, which is a type of drafting hand/rulebook, as well as the 'policing' of these rules by the *cellule des lecteurs d'arrêts* and the *correctrices*.

Notwithstanding the merit of stabilising the legal language and offering ease of translation, all of these factors lead to an environment where repetition is the norm, and to a reluctance on the part of the person drafting to try to say something new, different or original in order to respond adequately and meaningfully to the facts and legal problems presented by the case:

> Because we are writing in a foreign language there is a tendency to do a lot of 'cutting and pasting' and so the style [in which the CJEU's judgments are written] reproduces itself. If something along the lines of what I want to say has been said before by the Court, then I will just use that same expression – I'll 'cut and paste' it.[42]

Beck formulated further important criticism of the use of these building blocks: it gives the Court's judgments a formulaic and mechanistic appearance, also appearing fossilised and inflexible, whereas the Court actually often subtly changes the meaning and wording. This creates rule instability and exacerbates precedent uncertainty.[43]

In light of all the foregoing, we may conclude that the ECJ's judgments have specific textual characteristics due to the Court's multilingualism.[44] Apart from any normative statements of whether or not this is detrimental to the quality of the judgments, from an external point of view, knowing these facts may invite us not to judge textual, rhetorical imperfections too harshly, as a certain awkwardness in reasoning may be due to the language issues. Moreover, from an internal point of view we could ask ourselves questions such as: if I am not a native speaker of French, how would I handle the language regime at the Court? What does writing in a different language ask of me that is different from working in my mother tongue? And (especially if you are a native speaker): you could

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41 See Antoine Vauchez, *Brokering Europe: Euro-lawyers and the making of a transnational polity* (Cambridge University Press 2015), 187. See also, more extensively, Karen McAuliffe, 'Precedent at the ECJ: The Linguistic Aspect' in Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues,* vol 15 (Oxford University Press 2013), 483-493.

42 Karen McAuliffe, 'Behind the scenes at the Court of Justice: drafting EU law stories' in Fernanda Nicola and Bill Davies (eds), *EU law stories* (Cambridge University Press 2017), 46-48.

43 Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 175.

44 See generally, Mattias Derlen, 'Multilingual interpretation of ECJ case law: rule and reality' (2014) 39 *European Law Review* 295.

ask yourself if writing in your mother tongue about EU law, in the style of the ECJ, is any different from writing in your mother tongue about your domestic (presumably, French or Belgian) law? And if so, in what ways? And what would it be like, what would you need to communicate effectively with colleagues who have a different mother tongue?

Knowing all of this also raises the question, what language version should you read? Although French is the working language, and as such the 'original' language of the judgments, the principle of multilingualism in the EU is so strong that all language versions are held to be equally authoritative; this liberates the reader to read the judgments in any language version.[45]

3.4.4 The many hands working on ECJ judgments

The judgments that are pronounced by the ECJ are not the work of a single author, far from it. The complexity of their creation may have an impact on the end result, and knowing through which hands a case passes may therefore be part of the pre-understandings that we need in order to understand the ECJ's judgments properly.

A request for a preliminary ruling arrives at the Registrar's office and is, after formal processing, sent to the *Direction de Recherche et Documentation* (*RechDoc*). Jurists from all Member States work at this directorate, so the *pre-examen* is undertaken by a jurist with the nationality of the Member State from which the preliminary reference originated, since the *pre-examen* happens even before the request is translated into French; the *RechDoc* jurist's '*fiche*' (report), which is written in French, is actually already an unofficial translation of the case. The *pre-examen* is a document that not only signals the type of procedure and adds *descripteurs* (key words or phrases indicating the procedure and the substance), but it also makes recommendations about whether the case can be handled by way of an order (because of admissibility issues, or because of it being 'manifestly' unfounded[46]) or whether it should get a full procedure. The *RechDoc* jurist summarises the facts, translates the questions, and summarises any observations that the referring national court has made, identifies the relevant legal framework and related (pending and closed) cases before the GC or ECJ. Furthermore, the *RechDoc* jurist also identifies the important contentious points and may suggest solutions to the questions.[47] These reports are sent to the President's cabinet, and help the President to decide to which *juge-rapporteur* (reporting judge) he will assign the case, i.e. the judge who is to be the primary drafter of the reports and judgments.[48] Similarly, the First Advocate-General

[45] Therefore, it justifies our use the English version in the present study.

[46] Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek T Nowak ed, 1st edn, Oxford University Press 2014), 90.

[47] See Dominik Hanf, Klaus Malacek and Élise Muir, *Langues et construction européenne* (Peter Lang 2010), 147-148.

[48] Article 15 of the Rules of Procedure of the ECJ.

assigns the case to an AG.[49] The assignment of cases to a certain chamber formation,[50] i.e. a chamber of three, five or fifteen (the Grand Chamber)[51] members, is decided by the General Meeting that assembles all judges and AGs, after considering the preliminary report presented by the reporting judge and depending on its importance. A case will nowadays only be treated by the full court in exceptional situations or for very particular types of procedures.

The assigning of cases to reporting judges is determined by a complex interplay of several factors. First of all, as a rule a case is never assigned to a reporting judge from the same Member State. Furthermore, the President takes into account the expertise that a certain judge or a certain chamber has built up in dealing with earlier, similar cases. Of course, to avoid a dominance of certain judges on topics, the specialisation is not formalised, and cases regularly get assigned to a 'fresh pair of eyes' with no prior expertise in the subject matter. Judges may, however, also express a preference for a certain subject matter (and it is at the discretion of the President whether or not to take this into account), and the workload of the cabinets is also a matter of consideration in the assigning of a case. Once the case is assigned and arrives at the reporting judge's cabinet, the judge and his or her référendaires decide which of the référendaires takes point on the case, depending, *inter alia*, on expertise in the subject matter, the level of experience in drafting, and their workload in terms of time-management and variety. The same goes for the assigning of a case to a particular AG and his or her référendaires.[52]

The real work usually starts once the case is considered fully ready that is, once the exchange of written observations has taken place and the case file is complete, and once these documents have been translated into French. Upon instruction by his or her judge, the référendaire then starts drafting the preliminary report which 'contains proposals as to whether particular measures of organisation of procedure or measures of inquiry should be undertaken, and in the case of the Court of Justice, whether requests for clarification to the referring court or tribunal should be made in the context of preliminary ruling procedures'.[53] Concretely, such proposals may consist of questions that need to be asked to the parties or other interested parties at the hearing or in writing during the written procedure. Another important suggestion that the preliminary report may contain is to request the *Direction de Recherche et Documentation*

[49] Article 16 of the Rules of Procedure of the ECJ.

[50] Article 16 of the Statute ECJ provides that the Court shall form chambers of three and five judges, and that the members shall elect presidents for these chamber formations for the duration of three years.

[51] The Grand Chamber consists of 15 judges: the President and Vice-President of the Court, three of the Presidents-of-Chambers of the chambers of five judges, supplemented by ten other ECJ judges.

[52] See generally on the assignment of cases and the functioning of the various chamber formations: Sacha Prechal, 'The Many Formations of the Court of Justice: 15 Years after Nice' (2016) 39 *Fordham International Law Journal* 1273.

[53] Article 59(2) of the Rules of Procedure of the ECJ; See Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek T Nowak ed, 1st edn, Oxford University Press 2014), 763.

to prepare a research note about a certain issue that is important to the preliminary questions. Furthermore, it proposes the type of formation (a chamber of three or five judges, the Grand Chamber, or even a full court) and, if necessary, a suggestion to dispense with the oral hearing and/or with an Opinion of the AG. These proposals are decided upon after hearing the AG.

Moreover, the preliminary report may contain the 'skeleton' of a judgment, a draft structure for the response to the questions, which enables the référendaire in charge to start working on a draft judgment efficiently after the oral part of the procedure is declared closed, once the AG's Opinion (if any) has been presented the hearing (see for more detail hereafter) and the first judge's deliberations are over. This draft judgment will be the object of a round of rigorous discussions and (usually written) feedback from the members of the chamber formation before the judges convene in another round of formal deliberations in which the judgment is substantively finalised. The reporting judge's cabinet makes the final amendments that were agreed upon in the deliberations, and the final draft is submitted to various linguistic and stylistic checks by the *cellule des lecteurs d'arrêts* and the *correctrices*.[54] Finally, the draft judgment is sent to the translation department for translation, as soon as possible at least into French and several other languages, and eventually into all 24 official languages.

3.4.5 The Role of the AG's Opinion

After all the parties and interested Member States and EU institutions have submitted their observations, usually one of the AGs presents his or her Opinion on the case. Opinions of AGs are not binding, but are considered influential and persuasive, and the reporting judge drafts a careful 'note post-conclusions', discussing whether the AG's Opinion should be followed (and to what degree) or not, sometimes sparking an additional 'tour de table' if the reporting judge's position on the AG's Opinion does not lead to a consensus.

The character and form of the Opinion allows the AG to take a more personal, discursive and/or academic point of view, and to approach the questions from different angles.[55] Many AGs give more in-depth background to the legal problems that are at stake, and they are sometimes more progressive in the solutions they suggest than the Court of Justice.[56] However, the reader should be cautioned against seeing the AG's Opinion as a dissenting or concurring opinion, or as an explanatory companion to the ECJ's judgment: it is a self-standing document that is published before the deliberations have started. The

[54] Sometimes, the case at hand presents such particular or complicated questions, that the judges find it necessary to have the Research and Documentation Department draw up a research document reporting on the various national approaches to these issues. This document is never published, and it is never made public in which cases such a report was requested, nor to what extend it was used.

[55] They are also allowed to write in a language of their own choosing.

[56] See, generally, Noreen Burrows and Rosa Greaves, *The Advocate General and EC Law* (Oxford University Press 2007).

AG does not participate in the deliberations, and therefore has no knowledge of (or real voice in) why the Court decides the way it does.[57] Furthermore, since the Court does not usually fully and directly address the AG's Opinion, it is hard to discern when, if and why the Court does or does not follow the AG, making it hard to estimate how influential the AG's Opinions really are.[58] All in all, the AG is generally considered to be a useful voice in the judicial process at the ECJ, but, as we will see, how to think, talk and write about their role and their Opinions in a concrete case is not at all straightforward.[59] For these reasons, the close reading undertaken in the case studies will focus on the Court's judgments and will only in passing, and where appropriate, refer to the AG's Opinion.

3.4.6 Collegiate decisions: unity of voice

As we have seen in the previous sections, there are many hands working on any given judgment of the ECJ. However, the ECJ (as well as the GC) delivers a single judgment, that is based upon the consensus (or majority) reached by the members of the formation in secret deliberations. This is sometimes called the 'principle of collegiality': no dissenting or concurring opinions are allowed to be published in the EU system. Collegiality, combined with the secrecy of the deliberations, is said to protect the independence of judges vis-à-vis national interests and their national governments concerning renewal of their terms.[60] It has also been asserted that allowing dissenting and concurring opinions, and the more elaborate discursive style found in common law jurisdictions, would make the case law of the ECJ, and thereby the multilingual and multicultural EU legal system as a whole, even more complex than it already is.[61]

However, whatever its merits, the collegial nature of the ECJ's judgment is also seen as a reason for flaws and a lack of flow in its reasoning. The final product is often a flawed result of 'committee drafting',[62] and not only is there a

[57] Turenne notes that sometimes the AG and ECJ argumentations "can also be seen to run in parallel without always meeting at any point." Sophie Turenne, 'Advocate Generals' Opinions or Separate Opinions: Judicial Engagement in the CJEU' (2011-2012) 14 *Cambridge Yearbook of European Legal Studies* 723, 726.

[58] An impressive econometric analysis does seem to indicate that AG's Opinions are indeed influential, see: Carlos Arrebola, Ana Julia Mauricio and Hector Jimenez Portilla, 'An Economic Analysis of the Influence of the Advocate General on the Court of Justice of the European Union' (2016) 5 *Cambridge Journal of International and Comparative* 82.

[59] Cf. Michal Bobek, 'Fourth in the Court: Why Are There Advocates General in the Court of Justice', (2011-2012) 14 *Cambridge Yearbook of European Legal Studies*, 550-558.

[60] Sophie Turenne, 'Institutional constraints and collegiality at the Court of Justice: A sense of belonging?' (2017) 24 *Maastricht Journal of European and Comparative Law* 565, 573.

[61] Michal Bobek, 'Of feasibility and Silent Elephants: The legitimacy of the Court of Justice through the eyes of national courts' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 205.

[62] See former Judge David Edward, who has observed: 'A camel is said to be a horse designed by a committee, and some judgments of the Court of Justice are camels.' David Edward, 'How the Court of Justice works' (1995) 20 *European Law Review* 539, 556-557.

pressure to arrive at a consensus, it may also occur that the judges agree on the outcome of the case, but not on the reasoning offered as a justification for that result. In those cases, it may be easier to simply leave out certain arguments, which is, of course, to the detriment of the coherence of the legal reasoning.[63] A member of the Court has also noted that once an agreement has been reached in the deliberations, it is very difficult to modify the text afterwards, even for stylistic purposes.[64] Time and again, commentators have called for an abandonment of the principle of collegiality, and an introduction of dissenting and concurring opinions, so as to develop a more discursive style, which is supposed to enhance the overall quality of reasoning and, hence, the legitimacy of the ECJ.[65] So far, however, these calls have been fruitless, as there are equally good reasons to maintain the Court's principle of collegiality.[66]

The elements of the organisational set-up of the ECJ that we have examined in the previous sections present us with the following problem: we know now that there are numerous people involved in the drafting process. For at least half of these people (the référendaires, the lawyer-linguists and *lecteurs d'arrêts*) we do not know their identity, or their cultural background, or the amount of influence which they have had on the substance of the legal reasoning.[67] The ECJ thus bundles a cacophony of voices into one product, one text, for which, of course, not just the reporting judge, but the entire chamber formation assigned to the case bears responsibility. As Gaakeer notes: 'The difficulty arises from the narratological question of "Who speaks" when applied to the judge's voice', particularly for a judicial panel which often writes in a single voice, as an 'impersonal, omniscient third-person narrator, speaking with authority'.[68]

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[63] Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous legislative tests, laconic pronouncements and the credibility of the judicial system', (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 409, 416-417. See, for a kinder and more generous reflection on the principle of collegiality: Jean-Claude Bonichot, 'Le style des arrêts de la Cour de justice de l'Union européenne' (2013) *Justice & Cassation* 253, 257-259.

[64] Jean-Claude Bonichot, 'Le style des arrêts de la Cour de justice de l'Union européenne' (2013) *Justice & Cassation* 253, 257.

[65] One of the most vocal and well-known advocates for dissenting opinions at the ECJ is Joseph Weiler; see for instance Joseph H H Weiler, 'Epilogue: Judging the Judges: Apology and Critique', in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 251-252.

[66] Bobek M, *The Court of Justice of the European Union* (Research Paper in Law 02/2014) <https://www.coleurope.eu/sites/default/files/uploads/news/researchpaper_2_2014_bobek.pdf> last accessed 21 December 2020.

[67] The influence of the lawyer-linguists and *lecteurs d'arrêts* is, of course, much smaller than the référendaires and the judges.

[68] Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 202-203.

What are we to do, then, with the background knowledge that we have explored so far? Perhaps we should start by reminding ourselves that in our theoretical perspective developed in Chapter 2, we followed Ricoeur's hermeneutics in the abandonment of the pursuit of the authorial intention with the help of the concept of distanciation. Accordingly, we did not explore the structures and work processes as well as the traditions of the ECJ in order to find a concrete, identifiable author of the Court's judgments, nor to recover his or her intentions. Nor, however, is the opposite true: we will not adopt the cynical claim of nihilism, i.e. that the provenance of a text is immaterial,[69] that any stylistic or rhetorical elements of the Court's reasoning are a matter of pure and simple chance, and that therefore our examination of these materials has been in vain.[70] Moreover, such an argument could collapse into an argument to pay no heed at all to the Court's writing, and to ascribe any flaws, incoherencies, lack of clarity and other shortcomings to the complexities and pressures of the ECJ's daily life. Such cynicism and nihilism do not do justice to the effort of the jurists working there, nor to the powerful position of authority that the ECJ holds as the highest court in the EU legal system. How, then, can we think properly about this problem? Here we have occasion to revisit the work of Ricoeur and White.

While Ricoeur did not embrace the concept of the implied author[71] (and in the case of the ECJ it could be a shared implied author),[72] there is a shadow of such an abstracted author-figure in his writings on hermeneutics:

> Since style is labour which individuates, that is, which produces an individual, so it designates retroactively its author. Thus the word 'author' belongs to stylistics. Author says more than speaker: the author is the artisan of a work of language. But the category of author is equally a category of interpretation, in the sense that it is contemporaneous with the meaning of the work as a whole. The singular configuration of the work and the singular configuration of the author are strictly correlative. Man individuates himself in producing individual works.[73]

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[69] Cf. Foucault and Barthes' pronouncement of the "death of the author': see Mieke Bal and Christine van Boheemen, *Narratology: an introduction to the theory of narrative* (3rd edn. University of Toronto Press 2009), 15.

[70] See Mieke Bal, rejecting 'anything goes': Mieke Bal and Christine van Boheemen, *Narratology: an introduction to the theory of narrative* (3rd edn. University of Toronto Press 2009), 16.

[71] Cf. Luc Hermans and Bart Vervaeck, *Handbook of Narrative Analysis* (Nebraska University Press 2005), 16-20.

[72] H Porter Abbott, *Cambridge introduction to narrative* (Cambridge University Press 2008), 102: a work produced by a group of persons can be constructed as reflecting a shared sensibility – a shared implied author.

[73] Paul Ricoeur, 'The hermeneutical function of distanciation' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 100.

As noted by another author, 'as cultural objects, both law and literature convey a sense of communal self-image, of communal identity',[74] and we can thus ask what kind of communal identity the Court's judgments convey.

Furthermore, while it is also true that Ricoeur considered that

> an essential characteristic of a literary work, and of a work of art in general, is that it transcends its own psycho-sociological conditions of production and thereby opens itself to an unlimited series of readings, themselves situated in different sociocultural conditions. In short, the text must be able, from the sociological as well as the psychological point of view, to 'decontextualise' itself in such a way that it can be 'recontextualised' in a new situation – as accomplished, precisely, by the act of reading[75]

it is in our case not entirely de-contextualised, but rather continued, as we read case law of the Court from the perspective of students of EU law and/or jurists working at the ECJ. So, the institutional context matters. Taking a text at its face value, but from an informed position, therefore means that we are moving back and forth between an internal and an external position of knowing the internal culture, its opportunities as well as its challenges and constraints, and of trying to interpret the whole of the product in a de-contextualised, new situation nonetheless. This invites us to ask ourselves, in the kind of way that marks White's oeuvre, what kind of author we could be in such a situation, and we can ask by what standards we can judge – and, from the internal point of view, take responsibility for – the products of this culture. On the one hand we therefore study the institutional, organisational context of the Court in order to be aware of the circumstances of the creation of the Court's judgment so as to be able to identify its institutional voice and style and argumentative/rhetorical habits, which allows us to form expectations and, in turn, to notice any breaks in the usual style and voice of the Court and to start asking questions about their significance.[76] On the other hand, we find ourselves asking questions about the kind of self that is both present in and made possible by, these judgments.

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74 Barbara Villez, 'Law and Literature: A Conjunction Revisited' (2011) 5(1) *Law and Humanities* 209, 216, referring to Lawrence Rosen, *Law as Culture* (Princeton University Press 2006), 48.

75 Paul Ricoeur, 'The hermeneutical function of distanciation' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 101.

76 See Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013), 34: 'The working methods of the Court of Justice are something an outsider cannot know, and the only way to evaluate its judgments in this this sense – whether discrete or compound narrative is available – is simply to see if the reasoning is, or is not, unduly complex in terms of reasons, or chains of reasons, offered in support of legal interpretations.'

This is particularly relevant since this kind of reading connects the reader to 'the type of being-in-the-world unfolded in front of the text'[77] that we are supposed to explore in the hermeneutical stage of refiguration. The type-of-being-in-the-world is a particular kind of being in a particular, professional world that is the same as the source of the text. We read these judgments not merely for the meaning, i.e. the outcome, but also for their instruction as to what is it like to work at the ECJ, what type-of-being is possible, not just in the world in general, but (also) more particularly in the world of the ECJ. It is this internal perspective of 'imaginary participation'[78] and responsibility that remedies the 'narratological concerns' voiced by Olson, who pointed out that 'methods of interpreting narrative texts may be variously based on intrinsic textual signals, linguistic concerns, extratextual realities, or historical contingencies', and that EU law therefore resists a homogenous narrative analysis.[79] As Gaakeer noted, reading and writing legal judgments is also a back-and-forth between levels of the self, namely the professional, public, institutional self on the one hand, and the private self, the human doing the work, on the other.

> The demand of integrity of both judgment and judge transcends the general demands of clarity and coherence of the decision, in the sense that the judge's disposition should also be aimed at probing her inner motives and reflecting on the tensions that arise from the conflicting views, in herself and others, not least because the correctness of her decision is to a large degree measured by the losing party's acceptance. The judge's narrative identity, therefore, is intimately connected to self-knowledge, in the sense of knowledge of the activities of which the judge, as the knowing subject, is the author.[80]

Accordingly, '...judges should keep asking the question, "Who am I and what is my role in the world, as a judge and a human being?", and come to terms with the answers'.[81]

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77 Paul Ricoeur, 'The hermeneutical function of distanciation' in Paul Ricœur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (John B Thompson ed, Cambridge University Press 2016), 104.

78 James B White, *When Words Lose Their Meaning* (University of Chicago Press, 1984), 8-9.

79 Greta Olson, 'Narration and Narrative in Legal Discourse', in: Peter Hühn and others (eds.), *The Living Handbook of Narratology* (Hamburg University) http://www.lhn.uni-hamburg.de/, last accessed 16 December 2020, at section 3.0.3.

80 See Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 226-227.

81 Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019), 227.

3.5 Argumentative style – internal and external expectations

3.5.1 Formal provisions and practices

We return to our exploration of the experience of drafting a judgment at the ECJ, this time to think more substantively about legal reasoning and argumentative style. Let us start, again, at the more formal level of legal provisions, to see if they provide instructions or expectations as to the kind of legal reasoning we can expect from the ECJ.

Article 19 TEU merely states that the ECJ must 'ensure' that 'the law is observed'. Article 36 Statute of the ECJ provides that '[j]udgments shall state the reasons on which they are based'. Article 87 of the ECJ's Rules of Procedure is a bit more detailed, detailing thirteen (numbered a) to n)) elements that a judgment must contain. Most of these are formal, such as the date of delivery of the judgment, or the names of the judges who took part in the deliberations. However, items l) to n) are the more relevant for our inquiry, requiring (l) a summary of the facts, (m) the grounds for the decision, and (n) the operative part of the judgment including, where appropriate, the decision as to costs.

Notice how in these formal provisions it is clearly assumed that those working at the ECJ know how to go about the drafting, that they know how to formulate the grounds or the reasons for a decision. This is not something remarkable in itself, since there are very few legal orders in which the instructions to judges in the formal documents go further than this. And rightly so, since the content, style and structure of judgments may not only vary according to what the case itself requires, but also according to the period of time and the customs and judicial best practices during that period. For instance, this leeway has allowed the ECJ to abandon the archaic, but once considered 'standard' practice of writing in one grammatical sentence, each paragraph starting with '*attendu que*', in the 1980s, and adopt a more direct and therefore more readable style.[82]

However, in our project to understand the culture at the ECJ in order to be able to adequately assess the art by which it produces its judgments, these minimalist instructions of 'stating the reasons/grounds for a decision', are hardly helpful. As noted in Section 3.4.3 above, there are several documents that are used at the ECJ during the drafting of its judgments, such as the *Vademecum*,[83] the *Bibliothèque des Phrases* and the use of the *Canevas* software application. These texts provide guidance as to the kind of structure and formulations one should use, but not more substantively in how the reasoning should be built up. Furthermore, there is also an internal document called '*Guide pratique*

[82] See Jean-Claude Bonichot, 'Le style des arrets de la Cour de justice de l'Union europeenne' (2013) *Justice & Cassation* 253, 256.

[83] The Vademecum contains observations and instructions about content/structure of preliminary reports and projets de motifs. It was first drawn up by former judge Pierre Pescatore, see Antoine Vauchez, *Brokering Europe: Euro-lawyers and the making of a transnational polity* (Cambridge University Press 2015), 186-187.

relatif au traitement des affaires portées devant la Cour de Justice' referred to in the European Court of Auditors' report of 2017, which gives, inter alia, indicative time frames for the various steps in the processing of a case.[84] One of the effects of these documents is a high degree of uniformity in structure and voice of the judgments. What stands out when you read any judgment of the ECJ, at least the more recent ones, are the standardised structure and the recurring headings in judgments. All judgments have as headings the sequence of: 'Legal context' (with subheadings for EU law and national law); 'The facts of the main proceedings and the questions referred for a preliminary ruling'; 'Consideration of the questions referred' (with subheadings for the respective questions); and, finally, 'Costs'. Bobek has expressed an appreciation of this practice, comparing it to shopping in your favourite supermarket and finding everything where you expect to find it.[85]

One of the first things that a jurist turns his or her attention to is to get a clear picture of the facts, the procedural history and the context of the case. However, the sources for this information are often sparse since the ECJ is sent the entire case file in the national proceedings, but it is not translated in its entirety. It has to glean the facts from the national judge's referral decision, and sometimes from the various parties' submissions. Sharpston has pointed out that the ECJ has to make do with the material that it is offered, and not only is the quality and clarity of EU legislation at issue sometimes a problem, but the national court's reference and the parties' submissions also vary greatly in quality, despite the guidelines that the ECJ has published on its website.[86] As noted by Lasser, the treatment of the facts by the ECJ is often quite 'brusque',[87] only serving to provide context and cause to the proceedings, and as a way to make sure that the preliminary questions asked are not purely hypothetical.

In *Genc*, the Court commented upon its own role and responsibilities, and those of referring courts in the preliminary reference procedure as follows.

> Article [267] establishes a relationship of close cooperation between the national courts and the Court of Justice, based on the assignment to each of different functions, and constitutes an instrument by means of which the Court provides the

[84] European Court of Auditors, *Performance review of case management at the Court of Justice of the European Union* (Special Report, no 14, 2017), p. 35.

[85] Michal Bobek, 'Of feasibility and Silent Elephants: The legitimacy of the Court of Justice through the eyes of national courts' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 206.

[86] Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous legislative tests, laconic pronouncements and the credibility of the judicial system', (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 409, 411-415: 'Rubbish in, rubbish out!'. See also Sacha Prechal, 'Communication within the Preliminary Rulings Procedure: Responsibilities of the National Courts' (2014) 21 *Maastricht Journal of European and Comparative Law* 754, 754-756.

[87] Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009), 105.

> national court with the criteria for the interpretation of [EU] law which they require in order to dispose of disputes which they are called upon to resolve. [...] It is one of the essential characteristics of the system of judicial cooperation established under Article [267] that the Court replies in rather abstract and general terms to a question on the interpretation of [EU] law referred to it, while it is for the referring court to give a ruling in the dispute before it, taking into account the Court's reply. [...] The national court alone has direct knowledge of the facts giving rise to the dispute and is, consequently, best placed to make the necessary determinations.[88]

However, several authors have noted an inconsistent practice of the ECJ of either leaving the factual appreciation and application to the national courts, or giving such detailed guidelines that it practically leaves no room for the national court to apply the law in a different way.[89] What stands out in the academic discussion of the tradition of judicial decision-making in the context of the preliminary reference procedure, as well as in the various internal guidelines, is that the practice of summarising the facts is barely discussed. We will see later on, most notably in Chapter 5, how this can prove problematic.

Another important step is to summarise the arguments of the parties. Before the amendment of the Court's Rules of Procedure in 2012, the law clerks of the Court always summarised the arguments of the parties for a formal preparatory document called the *rapport d'audience* (report for the hearing). The summary of the arguments of the parties had thus already been made, and subsequently inserted in more or less unaltered form into the judgment under a separate heading. However, as of 1 November 2012, the Court no longer prepares a Report for the Hearing and, as a consequence, it is nowadays quite rare to see a summary of the arguments of the parties in a judgment. As Gaudissart and Van der Jeught note, there has been a heated debate about the disappearance of the Report for the Hearing and the summary. Various Member States had argued before the Council of Minister's Working Group on the Court's Rules of Procedure that the Report for the Hearing was valuable for a better understanding of the case and for a greater transparency. However, the Court itself wished to abandon the Report, given the burden it presented for its workload.[90]

3.5.2 Internal and external expectations: literature review

As we have seen, the formal provisions governing the work of the ECJ give very few instructions on what to expect from the ECJ's legal

[88] Case C-14/09 *Genc v Land Berlin* ECLI:EU:C:2010:57 [2010] ECR I-931, paras 29-32.

[89] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 225-228; Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2014), 20.

[90] See M A Gaudissart and S van der Jeught, 'Het nieuwe reglement voor de procesvoering van het Hof van Justitie. Een overzicht van de belangrijkste wijzigingen' (2013) 4 *SEW, Tijdschrift voor Europees en Economisch Recht* 159, 165-166.

reasoning. The guidelines and practices internal to the Court show that there does not seem to be a general (or at least, public) habit of discussing substantive standards of judicial excellence and how to reach them. However, there may be a good reason for this: there is an important role for the secrecy of judicial deliberations in the independent functioning of a judicial body. At this point it may be fruitful to turn to publications in the academic realm in which standards of judicial quality are discussed in a more profound manner. These publications span the range from description to evaluation, offering at the bare minimum useful heuristics to structure our thinking about the art of judicial reasoning practised by the ECJ, as well as more detailed and normative analyses of quality.

Publications by ECJ members and AGs

A by no means exhaustive review of publications by various (former) members of the ECJ and AGs, shows that they generally also adopt or adhere to the analysis that distinguished the classic modalities of interpretation, i.e. textual, historical, schematic, teleological and comparative interpretation.[91] Furthermore, they more or less agree on the need for 'clear' and 'properly reasoned',[92] 'logical',[93] 'persuasive',[94] 'coherent',[95] 'complete'[96] legal reasoning. Furthermore, several of these authors state the expectation that the Court's

[91] Hans Kutscher, 'Methods of interpretation as seen by a Judge at the Court of Justice', Reports of the Court of Justice of the European Communities Judicial and Academic Conference, 27-28 September 1976, 1, available at: http://aei.pitt.edu/41812/1/A5955.pdf (last consulted on 1 April 2019).

[92] Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous legislative tests, laconic pronouncements and the credibility of the judicial system' (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 409.

[93] Sinisa Rodin, 'Esthétique de la jurisprudence de la CJUE' in Roberto Adam, Vincenzo Cannizzaro and Massimo Condinanzi, *Liber Amicorum in onore di Antonio Tizzano: De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (Giappichelli 2018), 834-846.

[94] Koen Lenaerts, 'How the ECJ thinks: a study on judicial legitimacy' (2013) 36 *Fordham International law Journal* 1302.

[95] Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous legislative tests, laconic pronouncements and the credibility of the judicial system' (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 409; Sinisa Rodin, 'Esthétique de la jurisprudence de la CJUE' in Roberto Adam, Vincenzo Cannizzaro and Massimo Condinanzi, *Liber Amicorum in onore di Antonio Tizzano: De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (Giappichelli 2018); Jean-Claude Bonichot, 'Le style des arrêts de la Cour de justice de l'Union européenne' (2013) *Justice & Cassation* 253; Thomas von Danwitz, 'Thoughts on Proportionality and Coherence in the Jurisprudence of the Court of Justice' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System* (Hart Publishing 2012); Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015).

[96] Jean-Claude Bonichot, 'Le style des arrêts de la Cour de justice de l'Union européenne' (2013) *Justice & Cassation* 253.

reasoning addresses the arguments of the parties in a 'profound' way,[97] whilst some also emphasise factors such as symmetry,[98] structure,[99] 'elegance',[100] 'concision'[101] and 'adaptability'.[102] Although these requirements seem uncontroversial, very few of the members really explain what they mean by these terms, bringing to mind something that AG Sharpston has said:

> Everyone brings to the Court his own individual package of assumptions, based on his own professional experience and rooted in his own legal tradition. Everyone knows that certain propositions are self-evident. The trouble is that what is obvious to me may not be obvious to you (or, worse, it may indeed be obvious, but obvious the other way).[103]

Or as Judge Garapon put it: 'to grasp a culture thus involves one in trying to formulate what is so obvious for the members that "it goes without saying"'.[104] The value of the stage of prefiguration is therefore obvious.

Notice also that these (former) members are generally rather uncritical of the ECJ's output, which may not be surprising, but does not contribute to a refined reflection, a self-reflection, on the function of the institution. For instance, Judge Bonichot considers that '*...La qualité des arrêts de la Cour de justice était en general reconnue. Elle est le fruit d'efforts constants des members, de leurs cabinets et de l'administration de la Cour dont le niveau est excéllent*'.[105] Former President of

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97 Jean-Claude Bonichot, 'Le style des arrêts de la Cour de justice de l'Union européenne' (2013) *Justice & Cassation* 253.

98 Sinisa Rodin, 'Esthétique de la jurisprudence de la CJUE' in Roberto Adam, Vincenzo Cannizzaro and Massimo Condinanzi, *Liber Amicorum in onore di Antonio Tizzano: De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (Giappichelli 2018).

99 Sinisa Rodin, 'Esthétique de la jurisprudence de la CJUE' in Roberto Adam, Vincenzo Cannizzaro and Massimo Condinanzi, *Liber Amicorum in onore di Antonio Tizzano: De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (Giappichelli 2018).

100 Sinisa Rodin, 'Esthétique de la jurisprudence de la CJUE' in Roberto Adam, Vincenzo Cannizzaro and Massimo Condinanzi, *Liber Amicorum in onore di Antonio Tizzano: De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (Giappichelli 2018).

101 Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous legislative tests, laconic pronouncements and the credibility of the judicial system' (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 409; Jean-Claude Bonichot, 'Le style des arrêts de la Cour de justice de l'Union européenne' (2013) *Justice & Cassation* 253.

102 Jean-Claude Bonichot, 'Le style des arrêts de la Cour de justice de l'Union européenne' (2013) *Justice & Cassation* 253.

103 Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous legislative tests, laconic pronouncements and the credibility of the judicial system' (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 409, 416.

104 Antoine Garapon, *Bien juger: Essai sur le rituel judiciare* (Odile Jacob 2001), 150.

105 Jean-Claude Bonichot, 'Le style des arrêts de la Cour de justice de l'Union européenne' (2013) *Justice & Cassation* 253, 259.

the ECJ Skouris offers only description and no evaluation in his contribution to the Liber Amicorum for former judge Pernilla Lindh.[106] Judge Rodin offers an interesting theoretical reflection on the aesthetics of a judgment, but remains at surface level and seems to be rather satisfied with the ECJ. Rodin considers that adjudication is an aesthetic enterprise. Once it is finished, it leaves a feeling of satisfaction. At the same time, it is complex, encompassing a number of aesthetic elements such as structure (internal and external), coherence, symmetry, style, 'fit', as well as proportionality and elegance. Rodin concludes '*Tous ces éléments sont présents dans le travail quotidien de la CJUE*'.[107] AG Sharpston is more critical, conceding that not every ECJ decision is 'a model of lucidity and clarity'.[108] Former judge Edwards refers to the Court's principle of collegiality as a constraining factor, observing with humour that 'a camel is a horse designed by a committee', and that some judgments by the ECJ 'are camels'.[109] Von Danwitz calls the Court's incoherent use of the proportionality principle 'quite irritating'.[110]

Academic publications

Next, we turn to external academic commentators on the work of the ECJ, and we ask if they are more helpful in our exploration of what we can learn as pre-understandings in order to read a judgment of the ECJ accurately. As mentioned above, there is a wealth of scholarly writing about the ECJ, ranging from descriptive to more evaluative or outright critical accounts. However, as noted by Bengoetxea, even a more descriptive account is indirectly but inherently normative.[111]

In the more descriptive accounts, we again find discussions of the traditional modalities of interpretation (textual, historical, schematic, teleological,

[106] Vassilios Skouris, 'The Court of Justice of the European Union: A Judiciary in a Constant State of Transformation' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System* (Hart Publishing 2012).

[107] Sinisa Rodin, 'Esthétique de la jurisprudence de la CJUE' in Roberto Adam, Vincenzo Cannizzaro and Massimo Condinanzi, *Liber Amicorum in onore di Antonio Tizzano: De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (Giappichelli 2018), 846.

[108] Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous legislative tests, laconic pronouncements and the credibility of the judicial system' (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 409, 416.

[109] David Edward, 'How the Court of Justice works' (1995) 20 *European Law Review* 539, 556-557.

[110] Thomas von Danwitz, 'Thoughts on Proportionality and Coherence in the Jurisprudence of the Court of Justice' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System* (Hart Publishing 2012).

[111] Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993), 139-140.

comparative),[112] with such additions as first order and second order interpretative methods[113] or meta-teleological interpretation.[114]

Both Bengoetxea and Beck have referred to rhetorical schemes and other devices that jurists have at their disposal in crafting a legal argumentation. Beck provides a refinement of the traditional modalities of interpretation, mentioned above, which comes a bit closer to how we may imagine that such arguments take more concrete shape. He identifies 11 types of criteria of justification in legal argumentation, divided into four categories.[115]

(A) Linguistic arguments:
  i. standard ordinary meaning of ordinary words
  ii. standard technical meaning of ordinary, technical words (legal and non-legal)
(B) Systematic arguments:
  iii. contextual-harmonisation arguments
  iv. arguments invoking precedent
  v. statutory analogies
  vi. logical-conceptual arguments
  vii. coherence with accepted legal principles (procedural or substantive, such as principles of free movement or non-discrimination)
  viii. historical argumentation (less important in EU law)
(C) Teleological/evaluative arguments:
  ix. teleological arguments: either actual historic purpose, or a purpose attributable to a rational/reasonable legislature
  x. substantive moral, political, economic or other social reasons
(D) Trans-categorical arguments
  xi. legislative intention.

Furthermore, Beck, drawing on the work of rhetoricians like Perelman, Viehweg and Llewellyn, describes several types of arguments that form a repertory of rhetorical schemes' that are more or less accepted or considered standard in the legal profession: *a contrario*, *a simili* or *a pari*, analogy, *a fortiori*, *a completudine*,

[112] See, for instance, the seminal publication of H Kutscher, 'Methods of interpretation as seen by a Judge at the Court of Justice' (Reports of the Court of Justice of the European Communities Judicial and Academic Conference, 27-28 September 1976) <http://aei.pitt.edu/41812/1/A5955.pdf> accessed 1 April 2019, 1-15; see also Anna Bredimas, *Methods of Interpretation and Community Law* (North Holland Publishing Company 1978); Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993), 229-260; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 130-133.

[113] Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013).

[114] Janneke Gerards, 'Judicial Argumentation in Fundamental Rights cases: the EU Courts' Challenge' in Ulla B Neergaard and Ruth Nielsen (eds), *European Legal Method: in a Multi-Level Legal Order* (DJØF Publishing 2012), 34-41.

[115] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 130-133.

a coherentia, ab exemplo, ad absurdum, lex specialis and *lex superior.*[116] These argumentative forms are neutral in the sense that they do not the confine the jurist to particular circumstances in their use. In that regard, studying these rhetorical forms as if in a vacuum is quite useless – they only acquire true meaning if seen in the whole or the *Gestalt* of the judgment.

Going one layer deeper – and much more substantively – into the rhetorical schemes is to identify what Beck calls 'legal *topoi*' for interpretation, which are 'tools for understanding and analysing the problem that shape the nature of the inquiry by simultaneously framing problems and assisting in finding a solution'.[117] Such interpretative *topoi* in EU law may be equal treatment and non-discrimination, proportionality, uniform application of EU law, useful effect, equivalence, legal certainty, loyal cooperation, respect for fundamental rights, supremacy, vertical direct effect, harmonious interpretation, the restrictive interpretation of exceptions, exemptions and derogations from the main treaty objectives, subsidiarity, conferral of powers, free movement, mutual recognition, fiscal neutrality and national procedural autonomy.[118]

With the more detailed accounts of legal *topoi* and modalities of interpretation we come to what White would call the resources for meaningful speech and to general rules or conventions about the 'art' by which these resources may be reconstituted. As such, these rhetorical tools can shape the 'seduction' performed by a legal argument,[119] and they contribute to the overall *configuration* of a text. Furthermore, the consideration of these legal *topoi* leads us closer to the substance, the material *about which* the legal reasoning will speak. We will discuss the substance of the reasoning in Chapter 4.

However, the mere description of these rhetorical structures and devices is insufficient if we want to have some guidance as to how to choose between them. As noted by Bengoetxea, EU law does not provide strict or fixed directives of interpretation. What counts as an adequate justification of a judicial decision, depends on what Bengoetxea calls 'the ideology of judicial decision-making and [...] the elementary legal culture of the legal audience', which is, however, very hard to identify clearly in the EU legal sphere, due to its multiculturalism.[120] The contours of such a judicial ideology or culture may be visible if one draws on publications that comment upon the quality of the Court's legal reasoning. We have already made an inventory of some of the criteria offered by (former) judges and AGs, and we will now turn to a sample of scholarly writing.

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[116] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 141 and 219-223. See also Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993), 175.

[117] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 195.

[118] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013), 195.

[119] Liesbeth Korthals Altes, 'Le tournant éthique dans la théorie littéraire: impasse ou ouverture?' (1999) 31(3) *Études Littéraires* 39.

[120] Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993), 132-134. He calls this legal culture a kind of "Vorverständnis".

Bengoetxea has also held that all judicial decisions must be 'adequately reasoned' in such a way that they may be subjected to scrutiny and control, 'whether at national or community level, by the executive and judicial branches, by the citizen body to which decisions are addressed, and by the wider audiences including *la doctrine juridique*'.[121] More particularly, he distinguished the rational acceptability based upon formal requirements of justificatory discourse, which are consistency, universalisability, efficacy, relevance, sincerity, coherence, and support of the arguments (e.g. proof), on the one hand, and so-called deep justification 'legal justification being regarded as an acceptable practice within that form of life' on the other hand. However, Bengoetxea does not explain what this 'form of life' is by which adequacy and acceptability will be assessed, which demonstrates the difficulty of using precise, non-normative language in the discussion of what the art of judicial decision-making entails.[122]

Similarly, we should note the way in which Snell describes the following 'minimum standards' for all (Western) judicial institutions: (1) 'employ normal judicial methods', which apparently entails using correct sources of law and ensuring that the rulings follow from them, in other words, 'judgments must be decisions according to the law'; (2) consistency, i.e. similar things decided in the same way, no arbitrariness; (3) reasoning must show that points (1) and (2) have been adhered to.[123] The very phrase 'normal judicial methods' reveals the inherent normativity, as well as subjectivity and culture-boundedness, of these standards.

Weatherill has offered slightly more detailed criteria, similar to those identified by Bengoetxea, emphasising transparency, persuasiveness, and consistency and coherence, the last-named having internal and external dimensions: 'whether arguments progress in an orderly manner', whether they fit with each other and with the broader purpose pursued by the rules at issue. Furthermore, Weatherill argues that judges should not intrude into the political sphere, and they should limit themselves to interpreting legislation, not amending or making it. However, as he also concedes, it is 'fiendishly difficult in practice to reduce to an operationally reliable test by which to separate out what is allowed and what is not'.[124] Weatherill also criticises the lack of clarity and transparency of the Court's legal reasoning, observing that some leading judgments of the

[121] Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993), 125.

[122] Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993), 176.

[123] Jukka Snell, 'The legitimacy of free movement case law: Process and substance' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 110.

[124] Stephen Weatherill, 'The Court's case law on the Internal Market: 'A circumloquacious statement of result, rather than a reason for arriving at it?'' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 88.

ECJ on the internal market could be accused of being merely 'a circumloquacious statement of result, rather than a reason for arriving at it'.[125]

Bobek holds the following as the key elements that give legitimacy to a judicial decision: (1) substantive reasons stated in the decision; (2) responsivity to the parties and potentially to broader societal interests; (3) clear and well-reasoned, resting on solid grounds of argument; (4) logical and consistent; (5) employing acceptable method and arguments. According to Bobek these parameters 'encapsulate the modernist belief in impersonal and rational authority. It is authoritative and thus legitimate'.[126]

The imprecision of the evaluative language is present too in the contribution by Mazak and Moser, who use normative criteria such as 'soundness', 'proper judicial decision-making process' and 'adequate judicial methodology'. Slightly more precise are the requirements of coherence, and that judgments ought to be reasonably predictable.[127]

The Court's voice and argumentative style has been frequently criticised as being cryptic and 'Cartesian',[128] or 'armoured and dogmatic',[129] lacking a transparent discussion of the complex interpretative questions that a case presents. Such criticism is based on a dichotomous view of a civilian, continental-European judicial culture, in which a concise, impersonal style is the rule,[130]

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[125] Stephen Weatherill, 'The Court's case law on the Internal Market: "A circumloquacious statement of result, rather than a reason for arriving at it?"' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 91.

[126] Michal Bobek, 'Of Feasibility and Silent Elephants: The legitimacy of the Court of Justice through the eyes of national courts' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 203.

[127] Jan Mazak and Martin Moser, 'Adjudication by reference to general principles of EU law; a second look at the Mangold case law' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015).

[128] Joseph Weiler, as referred to by Michal Bobek, 'Of Feasibility and Silent Elephants: The legitimacy of the Court of Justice through the eyes of national courts' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 203; Joseph H H Weiler, 'Epilogue: The Judicial apres Nice' in Gráinne de Búrca and Joseph H H Weiler (eds), *The European Court of Justice* (Oxford University Press 2001), 215, 225.

[129] See for instance Charles J Hamson, 'Methods of interpretation – A critical assessment of the results' in Reports of the Court of Justice of the European Communities Judicial and Academic Conference, 27-28 September 1976,, available at: http://aei.pitt.edu/41812/1/A5955.pdf (last consulted on 1 April 2019), II-19 – II-20, who notices that there is never a trace of hesitation or doubt in the reasoning of the ECJ: 'if there have been doubts or hesitations they have been ironed out before the answer is formulated: now it is "sic et non sic"' and that how the conclusion is reached is not shown in a transparent way: 'we have a recital ex post facto of the reasons which in the opinion of the Court justify the conclusion which has been reached.'

[130] One author commenting on the French judicial style described it as 'extremely expert ventriloquism': Jack Dawson, *The Oracles of the Law* (University of Michigan Press 1968), 410-411; For a detailed analysis of such 'magisterial' judicial styles, see Robert Summers and Michele Taruffo, 'Interpretation

and lengthy intimate discourse the exception, versus the more explicit, open, discursive style of the Anglo-Saxon legal culture.[131] As observed by Lasser, 'ECJ decisions are rather short, terse, and magisterial decisions that offer condensed factual descriptions, impersonally clipped and collegial legal reasoning, and ritualized stylistic forms'.[132] Vranken notes that the European civil law style often rests on 'veiled arguments', in which a judicial decision seems to be based only on strictly legal arguments, grounded in rules, principles and precedent, as opposed to policy arguments. This becomes problematic in hard cases that require the development of a new solution and, in those cases, pretending that the (sometimes radically) new solution/approach neatly fits within the existing system of rules, principles and precedents can lead to 'complicated or meaningless reasoning'.[133]

However, this dichotomous view can be misleading, as much of the criticism is voiced by people who are themselves trained in the common law tradition, and perhaps lack a sufficiently deep knowledge of the structures and habits of mind in the civil law legal culture so as to be able to assess adequately the appropriateness of this judicial style.[134] For instance, Bobek suggests that the professional audience of the ECJ has little 'time, energy and appetite' to spend hours analysing an abundantly reasoned, discursive judgment. Moreover, full disclosure of all arguments (plus dissent) would make the EU legal system even more complex than it already is.[135] According to Bobek, 'what national judges expect from the Court in term of output is not an abundance of reasons, but

and Comparative Analysis' in Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Dartmouth 1991), 496-502; See more generally Michal Bobek, *The Court of Justice of the European Union* (Research Paper in Law 02/2014) <https://www.coleurope.eu/sites/default/files/uploads/news/researchpaper_2_2014_bobek.pdf> last accessed 21 December 2020.

[131] See for a discussion Michal Bobek, 'Of feasibility and Silent Elephants: The legitimacy of the Court of Justice through the eyes of national courts' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 203-204.

[132] Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009), 104. This is also what Cardozo called the 'magisterial style', see See Benjamin Cardozo, 'Law and Literature' (1925) 14 *Yale Review* 489.

[133] Jan B M Vranken, *Exploring the jurist's frame of mind* (Kluwer & Kluwer Law International 2006), 23-24.

[134] See for an in-depth discussion, and reassessment of the common law vs civil law judicial styles Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009). See also Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013) 8; who also contributes the lack of dialectical reasoning to the principle of collegiality (no dissenting or concurring opinions), the particularities of the preliminary reference procedure, and the framing and phrasing of the preliminary questions themselves. See also the insider's experience of former UK and ECJ Judge Konrad Schiemann, 'From Common Law judge to European judge' (2005) 13 *Zettschrift for Europaïsches Privatrecht* 741, 747-748.

[135] Michal Bobek, 'Of feasibility and Silent Elephants: The legitimacy of the Court of Justice through the eyes of national courts' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 205.

feasible and practical judicial reasons, clearly discernible, free of contradictions and reversals, which can be implemented at the national level'.[136]

3.6 The ECJ's self

The publications discussed above show that there can be various criteria for evaluating the quality of the case law of the Court, with different levels of precision. However, there is a significant overlap in this discussion, with most authors (as well as members of the Court themselves) agreeing on the criteria of clarity, consistency, coherence and convincingness. However, these criteria, their substantive meaning as well as relative importance, are left to be determined in the light of a larger idea of the nature of the judicial function that we think the Court ought to perform, perhaps what Bengoetxea referred to as the 'form of life' of a judicial institution. In others words, what kind of court is speaking determines the parameters with which we evaluate its performance. What kind of court is the ECJ, particularly in the preliminary reference procedure?

Although there has been and still is a rich debate about the nature of the ECJ, it is now relatively uncontroversial to state that the ECJ is the EU's constitutional court, or at least that it performs its tasks like a (federal) constitutional court,[137] 'building a coherent legal system, ensuring the vertical as well as horizontal division of powers, and protecting individual rights', and doing so by referring to EU primary law as its standard of review,[138] as well as performing the task of ensuring uniform application of the law by lower courts, which is more of a 'supreme court' task.[139] In the EU legal order, the Treaties form the

[136] Michal Bobek, 'Of feasibility and Silent Elephants: The legitimacy of the Court of Justice through the eyes of national courts' in Maurice Adams and others (eds), *Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 233.

[137] See for instance Alicia Hinarejos, *Judicial Control in the European Union* (Oxford University Press 2009), 1; referring to, among others, Alan Dashwood and Angus Johnston, 'Synthesis of the Debate' in Alan Dashwood and Angus Johnston (eds), *The Future of the Judicial System of the European Union* (Hart Publishing 2001), 59; For a comprehensive review of the literature on the nature of the ECJ as a constitutional court, see Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006), 399; and ff. Francis Jacobs describes the constitutional role of the Court as 'inescapable': Francis G Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in Deirdre Curtin and David O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworths 1992), 32.

[138] See on the process of constitutionalisation, and de-constitutionalisation: Elise Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit' (2018) 3 *European Papers* 1353, 1360-1362 and 1365-1366.

[139] Alicia Hinarejos, *Judicial Control in the European Union* (Oxford University Press 2009), 1. In the preliminary reference procedure the ECJ performs a mix or hybrid of both constitutional court tasks, and supreme court tasks.

EU's constitutional charter (the ECJ also refers to them as such),[140] and the ECJ is its ultimate interpreter and guarantor, and competent to declare legislation unconstitutional. Furthermore, as observed by Hinarejos, the protection of fundamental rights has been an important milestone in the evolution of the ECJ as a constitutional court.[141]

Building upon the characterisation of the Court as a constitutional court, Nic Shuibhne has argued for a benchmark of 'constitutional responsibility' to evaluate the case law of the Court. A vital element of that responsibility is sustaining case law coherence, which is based on the fundamental value of fairness or justice,[142] a term that is conspicuously absent in most of the mainstream publications about the legal reasoning of the ECJ. Nic Shuibhne points out that coherence

> is not about striving for an unrealistic degree of perfection or rigidity. It allows for the recognition and management of necessary differences, and also for the extent to which court-made law is inherently messy to some degree at least. What coherence does demand is that differences must be explained and rationalized—and that requirement is connected to the manifestation of fairness and integrity. It is also important to emphasize that achieving coherent case law is, in broader terms, necessary but not sufficient—in other words, case law can be consistently problematic. For example, decisions can fit very well together, meeting a narrow or technical understanding of coherence, while consistently trampling across the EU/Member State competence boundaries established at a constitutional level by the Treaties. Or case law can consistently ignore or fail to adapt to more persuasive alternatives or critiques. [...] The value of fairness becomes important again here; as does the Court's position as a constitutional court—which inclines in favour of achieving systemic rather than individual fairness where choices have to be made.[143]

She thus connects coherence with fairness or justice, which is an underdiscussed issue in EU law,[144] and also with the value of integrity, i.e. the quality of

[140] See Case 294/83 Les Verts versus European Parliament ECLI:EU:C:1986:166 [1986] ECR 1339.

[141] Alicia Hinarejos, *Judicial Control in the European Union* (Oxford University Press 2009), 4-6; See generally, the contributions in Gráinne de Búrca and Joseph H H Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012).

[142] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2014), 1-4; noting that the ECJ 'is an influential constitutional court, with the implication in turn that its performance should therefore be evaluated in those terms'.

[143] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2014), 10.

[144] Sionaidh Douglas Scott is one of the rare persons who have published extensively on this topic. See for instance Sionaidh Douglas-Scott, 'Justice, Injustice and the Rule of Law in the EU' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing

the judgments, which she claims can be achieved 'in large part by the articulation and insightfulness of its reasoning'.[145] In Nic Shuibhne's theory of constitutional responsibility, attention is also paid to interpretative imagination, as well as judicial intuition.[146]

The present research takes the status of the ECJ as a constitutional court as a given, and it is not its aim to question this categorisation. Instead, our attention turns towards the way in which the Court performs its constitutional tasks. Following Muir, the ECJ's reasoning can be more or less constitutional in the sense of referring for its judicial review to primary law or to secondary legislation.[147] Furthermore, if we take Nic Shuibhne's notion of constitutional responsibility as an evaluative criterion, our assessment is a matter of degree: the more a judgment is coherent with other case law, fair and written with integrity, the more constitutionally responsible the Court shows itself to be.

In addition to the assessment of the more or less constitutional (or constitutionally responsible) reasoning of the ECJ, there is the claim or the question whether we can regard the ECJ as a fundamental rights court. As Nic Shuibhne observed: 'The Member States do not see the Court of Justice as a human rights court—but it would seem, from the outcomes of some free movement case law, that the Court has at times perceived itself in that way'.[148] The self-perception of the Court as a fundamental rights court, above and beyond the protection of individuals' rights that also forms part of its 'regular' constitutional tasks, may be observed in the centrality of fundamental rights in its reasoning, for instance, as a normative point of departure, instead of as an exception that needs justification.

3.7 Conclusion

This Chapter gives a backstory of what the ECJ can and cannot do, and explains – at least partially – why ECJ judgments look and sound the way

2015); and Sionaidh Douglas-Scott, 'Human rights as a basis for justice in the European Union' (2017) 8 *Transnational Legal Theory* 59.

[145] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2014), 9.

[146] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2014), 9.

[147] See on the process of constitutionalisation, and de-constitutionalisation: Elise Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit' (2018) 3 *European Papers* 1353, 136-1362 and 1365-1366.

[148] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2014), 51; For a denial of this characterization, see Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, 377.

they do. Accordingly this Chapter sheds some light on the 'pre-understandings', the prefiguration for the interpretation of EU law and ECJ judgments or, as White would call them, the legal-cultural resources as well as the art in which the creative process of text-making is located, and by which it finds some of its possibilities and constraints.[149] I hope to have made the human side of the ECJ visible, i.e. not only the members of the ECJ but also their staff, all those involved in the drafting of the judgments of the ECJ. We have examined the opportunities that the culture and work processes offer for expressing a certain kind of voice and style, the amount of freedom and creativity available to the jurists of the ECJ, as well as the important constraints on that creativity and freedom.

Our review of internal and external academic writing about the ECJ revealed the following observations, leading to some expectations or hypotheses for our subsequent reading of ECJ judgments.

- There is very little discussion of facts, and/or the role of framing: in preliminary reference procedures they are supposed to be irrelevant in the sense that the ECJ should only provide a neutral summary and not engage with them, and that they only provide a context to ensure that the preliminary questions are not hypothetical. However, as we will see, an account of the facts is not so innocent as may seem.
- There is the stabilising, but also potentially harmful use of 'building blocks', i.e. the citing of passages from previous case law, in the drafting process of judgments at the ECJ. There is a very real risk of copy-pasting passages in a quasi-automatic way.
- The voice and style of the Court is upheld through various instruments, resulting in a more or less uniform product that one could call magisterial, impersonal and concise/terse, leaving very little room for, and tolerance of, attempts at 'narrating' in a different, more personal voice.
- The details of legal rhetoric/reasoning are generally discussed abstractly, with a rather archaic vocabulary. The identification of the repertory of 'legal topoi' and rhetorical tools that are regularly used, are useful heuristics, but they only get real depth of meaning if their function and effect in the whole configuration of the judgment is considered.
- In the academic literature about the ECJ and about its case law, there seems to be no tradition of discussing details of the reasoning and rhetoric employed, and the evaluative standards often contain vague normative terms, such as 'proper' or 'adequate'. Recurring standards are, inter alia, clarity, consistency, coherence, persuasiveness, concision, but these notions are culturally, normatively laden and merit a dialogue between judges in a collegial setting.

If one tries to identify a certain kind of role, a certain kind of 'self' of the Court, it is almost a given to regard the Court as a constitutional court. Markers for

[149] James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 7.

constitutional reasoning are to refer to EU primary law, i.e. the Treaties and the Charter, as a standard of review. However, the tasks of a constitutional court generally comprise the protection of individuals' rights, ensuring respect for the division of competences between the EU and the Member States and between the various EU institutions, as well as ensuring the overall coherence of the EU legal system. A further benchmark for assessing the Court's performance in its role of constitutional court is the matter of constitutional responsibility, which focuses largely on coherence, fairness and integrity. Moreover, another possibility is to see the Court as a fundamental rights court, which is a kind of reasoning that places fundamental rights at its core and as its normative starting point.

As noted in Section 3.4.6 above, all this could make one cynical: it is very hard to say anything at all about the art of legal reasoning at the ECJ. I suggest the solution lies in taking the perspective of a jurist working there or aspiring to work there, who finds herself in a somewhat idealised or romanticised situation of intending to write the best first draft she can, and eventually to explain choices made in that draft to his or her colleagues. It is at this point that we may cite former ECJ judge Edward:

> I must say that I sometimes wonder whether I am on the same planet as some of the commentators. Taking part in the Court's deliberations, I see only a group of judges from different countries seeking to find acceptable legal solutions to practical legal problems.[150]

What opportunities and constraints do such well-intending jurists find themselves faced with? What are the relevant questions to ask in the light both of one's education and one's professional responsibility? How can jurists move back and forth between knowing the institutional and cultural constraints of everyday life at the ECJ, and the idealism of the external audience? How can they balance the competing interests of precision and clarity, with those of generality, abstraction and openness?[151] What 'type-of-being-in-the-world' is made possible in the life and language of the ECJ?

[150] D Edward, 'Direct effect: myth, mess or mystery?' in Jolande M Prinssen and Annette Schrauwen (eds), *Direct effect: rethinking a classic of EC legal doctrine* (Europa law Publishing 2002), 3.

[151] Jan B M Vranken, *Exploring the jurist's frame of mind* (Kluwer & Kluwer Law International 2006), 67.

CHAPTER 4

Prefiguration of the Internal Market and Fundamental Rights

4.1 Pre-understandings for internal market and fundamental rights case law

This Chapter returns to the problem that we placed at the centre of our research and that has been introduced briefly in Section 1.2, namely the ECJ's approach to the relationship between the internal market and fundamental rights. As explained in Chapter 2, the hermeneutic stage of prefiguration invites us to reflect upon the resources for meaningful speech and action, and the type of character(s) and sense of self and community which these resources offer, before examining the way in which these resources are 'configured' in a specific judgment. If we were to work at the ECJ, if we imagine that we will start working there tomorrow, what do we need to know of the internal market and of fundamental rights protection in the EU before taking up our first case file? White reminds us:

> ...part of any art is knowing one's materials well, [...] to examine the legal language system as it exists, as it comes down to you, made by others for your use. It is the stuff upon which you will work as a lawyer and writer, it is your marble and canvas [...] The nature of your inherited language shapes your task as a writer much as marble or steel shapes that of the sculptor – perhaps even more, since you cannot choose (as he can) among various materials, and since the language imposed upon you has, beyond its inherent limitations, the quality of defining the habitual expectations, the cast of mind of the audience with which you will necessarily deal.[1]

And if it is true that, in Robert Cover's oft-cited words we inhabit a 'nomos – a normative universe' and that 'no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning',[2] then how can we identify such narratives in these legal domains, particularly those suggesting a sense of 'self' of the ECJ and an 'other' that encompasses the litigants, but also the general population of the EU whose lives are affected by EU law, i.e. a certain vision of humanity?

In a way comparable to how we approached the ECJ's background in Chapter 3, we will again approach these questions as a series of concentric circles, moving from the more general backstory of the EU's legal framework of internal market rights on the one hand, and fundamental rights on the other hand, to recent developments and, subsequently, to more specific and critical discussions of this framework in academic commentary. This will allow us to begin to formulate a response to questions such as: what is the Court's habitual approach of the relationship between the internal market and fundamental rights? Is

[1] James B White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (45th anniversary edition, Wolters Kluwer 2018), 81-82.

[2] Robert M Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983-1984) 97 *Harvard Law Review* 4.

there a kind of narrative, perhaps to be found in the law's conceptual language, which we could say is particular to either the internal market, or to fundamental rights protection? And, subsequently, what do we expect, not just in terms of outcome, but in terms of reasoning and rhetoric? The answers to these questions can help us observe whether the narratives that may be at play in the Court's reasoning are compatible at all, and when and how the Court succeeds reconciling or uniting them.

This chapter is not meant to be a definitive, exhaustive examination of the internal market versus fundamental rights debate, or to provide a clear curriculum for EU jurists to complete before they participate in this debate. Rather, it is meant as a demonstration of the hermeneutic approach developed in Chapter 2. It therefore documents my own thinking process, delving deeper into the subject-matter, layer by layer, like peeling an onion. By doing so, I suggest elements of a way to talk about what the hermeneutic stage of prefiguration may mean for EU jurists, and to start not one, but perhaps several lines of inquiry that one could possibly follow on one's own exploration of what pre-understandings may be necessary before the actual reading of an ECJ judgment in this area can be undertaken.

The first layer that we peel off, is the historical context of the EU internal market and of the EU's fundamental rights regime, since the choices made in contemporary legal disputes cannot be correctly evaluated without placing them within, or in contrast to, the developments in the past. Sections 4.2 and 4.3 therefore each present an overview of this context. From the legal framework that has developed over time, Section 4.4 distils two schematic approaches to the encounter between economic interests and fundamental rights, namely one from the starting point of the internal market freedoms, and another starting from fundamental rights, and, more specifically, the Charter. However, these schemes are of limited help for our endeavour to refine our thinking about the relationship between these types of rights. Section 4.5 therefore turns to the academic debate, and identifies the main 'camps' in the debate. A fundamental issue dividing the academic authors is whether the economic rational of the internal market and fundamental rights are by their very nature compatible at all, and if there is an inherent bias in EU law and/or in the Court's legal reasoning for one over the other. Since such claims enter the domain of narrative, we revisit narrative theory in Section 4.6, in order to examine a possible narrative of 'the market' in Section 4.7 and one of human rights in Section 4.8. The chapter ends with concluding remarks in Section 4.9.

4.2 Historical background of the EU internal market

In order to understand the system and functioning of the internal market, and to evaluate new ECJ judgments in this area, a jurist needs to have, at the very least, a basic awareness of the reason why the EU's internal

market was created. Most handbooks about general EU law therefore start with a description of the historical background of the EU, since the question about the reason for the existence of the internal market goes back to the very reason why 'project Europe' was started in the first place.[3] This in itself is a kind of narrative: the origin-story of the EU, and since we are exploring the pre-understandings of a jurist who works with EU law, it is where we will start too.

4.2.1 Founding the EEC – 1950s-1960s

The atrocities of the First and Second World Wars had proved that the Bismarckian idea of the balance of power between nation states could not guarantee peace and stability.[4] Furthermore, from the 1920s to the 1940s there was a general trend in (geo)political thinking towards a federal ideal.[5] However, apart from the ideals of building a federal Europe, there were also very pragmatic reasons for the creation of the EEC. With the American Marshall Plan in the background, the future of Europe depended on the recovery of its economy. Furthermore, in the post-war years, global trade saw a wider trend towards intergovernmental economic organisations, such as the IMF, GATT, OEEC, NATO, and the customs union known as Benelux.[6] Against the background of these larger developments, on 9 May 1950 the French Foreign Minister, Robert Schuman, made the Schuman declaration, proposing to pool the coal and steel production of the six founding Member States[7] in a common organisation, the European Coal and Steel Community (ECSC). Such integration and mutual dependence and accountability in coal and steel production (the essential warfare industry at that time), would, in the words of Robert Schuman, make a new world war 'not merely unthinkable, but materially impossible'. The ECSC was formally founded in 1951, but it remained essentially intergovernmental and served a rather limited range of interests. However, the ECSC was also an economic success, creating the momentum for the EEC.[8] Hence, the Spaak report

3 See for instance Paul P Craig, 'Development of the EU' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press 2017); Paul P Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (6th edn Oxford University Press 2015), 2-3; August Reinisch, *Essentials of EU Law* (Cambridge University Press 2012), 1-14.

4 Ian Ward, *A Critical Introduction to European Law* (3rd edn, Cambridge University Press 2009), 4.

5 P. Craig and G. DeBurca, EU Law: Texts, Cases, and Materials, 6th edn. 2015, OUP, p. 2-3; Ward, I. (2009). *A Critical Introduction to European Law* (3rd ed.). Cambridge: Cambridge University Press, p. 4-6.

6 'Benelux' is an acronym for Belgium, the Netherlands and Luxemburg. Paul P Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (6th edn, Oxford University Press 2015), 2-3; Ian Ward, *A Critical Introduction to European Law* (3rd edn, Cambridge University Press 2009), 7-9.

7 France, West Germany, Italy, the Netherlands, Belgium and Luxembourg.

8 Paul P Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (6th edn Oxford University Press 2015), 3-4; Ian Ward, *A Critical Introduction to European Law* (3rd edn, Cambridge University Press 2009), 11-12.

observed that a general, horizontal integration of the Member States' economies would be more effective than a specific sector-by-sector integration.[9] The proposals set out in the Spaak report, and the subsequent discussions between the six initial Member States eventually led to the signing of the Treaty of Rome on 25 March 1957, founding the EEC and EURATOM.[10]

The founders of the EEC saw a clear connection between economic integration based on free trade, and peace and stability on the European continent, as evidenced by recital 8 of the EEC Treaty's Preamble ('Resolved by thus pooling their resources to preserve and strengthen peace and liberty, (...)'), and by Article 2 EEC Treaty which states that

> The Community shall have as its task, *by establishing a common market and progressively approximating the economic policies of Member States*, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it. (Emphasis added)

The hope was that as a consequence of free trade the Member States would become dependent on each other, thereby enhancing prosperity and boosting prospects for peace. In short, countries trading peacefully with each other are less likely to go to war.[11] There were further benefits to a free trade-based model: free trade allows for specialisation, specialisation leads to comparative advantage, comparative advantage leads to economies of scale which maximise consumer welfare and ensure the most efficient use of resources.[12]

The structures and central tenets of the EU's internal market were not all introduced in a fully-formed manner from the very first beginning. Rather, the internal market developed over time, and that development was not linear or steady, but had growth spurts and periods of (apparent) stagnation. Looking back on more than 50 years of this evolution, researchers have identified several chronological phases or eras that it is useful to distinguish and summarise here.

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9 The Brussels Report on the General Common Market was published by the Spaak committee for the Intergovernmental Conference on the Common Market and Euratom in 1956.

10 Paul P Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (6th edn Oxford University Press 2015), 4-5.

11 Catherine Barnard, *The Substantive Law of the EU* (3rd edn, Oxford University Press 2010), 6. This has caused cynical scholars to observe that 'the primary reason that the European Community exists is to make money...Prosperous Europeans, the rationale assumes, will make peaceful and contented Europeans.' Ian Ward, *A Critical Introduction to European Law* (3rd edn, Cambridge University Press 2009), 113.

12 Catherine Barnard, *The Substantive Law of the EU* (3rd edn, Oxford University Press 2010), 3; referring to Adam Smith, *The Wealth of Nations* (1776).

The 1957 Rome Treaty laid the foundations for the continuing process of not just economic but also incremental socio-political integration in Europe.[13] At first the internal market was concerned with the abolition of trade barriers, by creating a customs union combined with the free movement of production factors, namely labour, goods, capital, establishment and services.[14] The economic rationale for the right of free movement is quite straightforward: free movement facilitates the optimal allocation of resources within a market, it prevents protectionism and any other adverse effects on trade and free movement posed by national rules. In the choices made in the setting-up of the EEC's common market, one can discern an 'ordoliberal' influence originating in the 1930s in Freiburg, Germany. According to this school of thought, the constitution must protect economic freedoms which are 'as integral to the protection of human dignity, and as indicative of a free society, as political freedoms, which are themselves liberal in nature and which therefore underscore individual economic freedoms. These are the normative underpinnings of the choice for and structure of an internal market and the liberalisation of trade: they were not ends in themselves, but rather considered to be important tools to create welfare, promote sustainable development, and increase personal freedom and political stability.[15]

Therefore, the 'four freedoms' (of goods, persons and establishment, services, capital), as well as the regulation of the 'fairness' of the EEC economic playing field through competition law, formed the cornerstones of the Community.[16] During the initial period of development, i.e. the 1950s and 1960s, we see important additions to the initial bare bones of the Rome Treaty provisions: these provisions only provided what we call 'negative' integration, i.e. stipulating what states or private actors should refrain from doing.[17] However, in order to actively achieve economic integration, 'positive' integration was needed, and this was mostly done through secondary legislation, i.e. harmonisation measures,[18] for which the Rome Treaty had provided various legal bases.

The most significant ECJ case law in this early period can be characterised as 'constitutionalising' the EEC Treaty structure. In cases such as *Van Gend & Loos* and *Costa v ENEL*, the ECJ postulated the unique ('sui generis') character of the EEC: in creating the EEC, the Member States had curtailed parts of their sovereignty, thereby making the EEC an autonomous legal order, with EEC law possibly having direct effect and taking primacy over national

[13] Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 1.

[14] See Article 9, 10, 30, 48, 52, 59 and 67 EEC Treaty, respectively.

[15] Sybe A de Vries, *Tensions within the Internal Market* (Europa Law Publishing 2006), 14.

[16] Sybe A de Vries, *Tensions within the Internal Market* (Europa Law Publishing 2006), 13.

[17] Catherine Barnard, *The Substantive Law of the EU* (3rd edn, Oxford University Press 2010), 10; See also Sybe A de Vries, *Tensions within the Internal Market* (Europa Law Publishing 2006), 5.

[18] Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 3.

law.[19] Furthermore, the ECJ was instrumental in fleshing out the details of the EEC's budding internal market law by, for instance, clarifying the definition of 'goods',[20] and by determining its territorial scope of application.[21]

4.2.2 Developing the internal market – 1970s-1990s

Both the Member States, the EU legislature and the ECJ played in their own way important roles during the subsequent periods in the development of the EU's internal market. For instance, during the period of 'Eurosclerosis' in the 1970s and 1980s in which the quick rise of the EEC's common market was slowed down because of misalignment between the different visions of the Member States on the direction and intensity of economic integration, the ECJ acted as an important catalyst for the integration process, continuing the evolution of the internal market in its case law.[22] For instance, the ECJ gave direct effect to freedom of establishment and services,[23] in absence of secondary legislation. Furthermore, with seminal cases such as *Dassonville* and *Cassis de Dijon*, the ECJ made further important contributions to the expansion and refinement of the internal market's reach.[24] Furthermore, it clarified in Gaston Schul that

> the concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.[25]

The European Commission presidency of Jacques Delors in 1985 set truly ambitious goals to complete the internal market by 1992.[26] The first major Treaty

[19] Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 6.

[20] Case 7/68 *Commission v Italy* [1968] ECLI:EU:C:1968:51.

[21] Joined cases 2 and 3/69 *Sociaal Fonds voor de Diamantarbeiders/Brachfeld e.a.* [1969] ECLI:EU:C:1969:30.

[22] Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 5-7.

[23] Case 2/74 *Reyners v Belgian State* ECLI:EU:C:1974:68, [1974] ECR 631 and in case 33/74 *Van Binsbergen v Bedrijfsvereniging voor de Metaalnijverheid* ECLI:EU:C:1974:131, [1974] ECR 1299.

[24] Case 8/74 *Dassonville* ECLI:EU:C:1974:82, [1974] ECR 837; Case 120/78 *Cassis de Dijon* ECLI:EU:C:1979:42, [1979] ECR 649.

[25] Case 15/81 *Gaston Schul* ECLI:EU:C:1982:135 ECR 1409, para. 33.

[26] Delors published a White Paper called "Completing the Internal Market" which identified the principal obstacles to completion of the project, and suggested solutions, namely emphasising mutual recognition and equivalence of national standards, rather than active legislative top-down harmonisation. See Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 12.

amendment was adopted during this period, the Single European Act (signed on 17 February 1986, entered into force on 1 July 1987, hereafter referred to as 'the SEA'). The SEA not only prepared the European institutional framework for the enlargement with Spain and Portugal, but, more importantly perhaps, it introduced new procedures to facilitate the adoption of legislation. Where the original legislative procedures predominantly required unanimity, the SEA replaced unanimity in certain areas, for instance for internal market legislation (Article 95 EC, now Article 114 TFEU), by requiring qualified majority voting (QMV) instead, which made it significantly easier to adopt new legislation. Furthermore, the SEA enhanced the democratic character of the legislative process, as the European Parliament (hereafter 'the EP') was accorded a meaningful role in the legislative process. The SEA also strengthened social policy (health and safety of workers), and social and economic cohesion (to reduce the disparities between different regions). Moreover, the SEA inserted a new Article 8a on the internal market into the EEC Treaty. This provision consisted of two parts: the first indent setting the specific goal of progressively establishing the internal market by 31 December 1992, the second indent defining the internal market as follows.

> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

The period after the entry into force of the SEA was marked by intensive legislative activity in order to reach the goal of 'completing' the internal market by 1992, marking the SEA's relative success.[27]

The transfer of an increasing range of competences and responsibilities from the Member States to the EC which the SEA had brought about, meant that debates about the appropriate direction of governmental action (traditionally the realm of Member States' governments), had to take place at the Community level. This transfer was cause for several concerns, such as the protection of consumers' interests, and the impact of market integration on weaker economies, as increased European integration could present a threat to social and economic cohesion.[28] A third concern was about the nature, methods and limits of the internal market itself. Weiler noted that the debate embraced 'a highly politicized choice of ethos, ideology and political culture: the culture of "the market"'. As suggested by Weiler, the internal market was a means to maximise utility, premised on the assumption of formal equality of individuals, in which market efficiency was prized above other competing values.[29]

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[27] Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 12-19.

[28] Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 26.

[29] Joseph H H Weiler, 'The transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2478.

After the SEA more Treaty amendments followed in the relatively short period of the 1990s and 2000s: the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001) further amended the institutional organisation of the EC, for instance, further strengthening the EP's position,[30] accommodating future enlargements,[31] introduced the Area of Freedom, Security and Justice, and creating the EU in addition to the EC, in order to accommodate the three 'pillars' of competences that have developed over time. Furthermore, the Maastricht Treaty introduced competences and specific provisions for an economic and monetary union, establishing a link between the single market and a single currency,[32] leading to the adoption of the Euro as single currency by 11 Member States on 1 January 1999.[33] The Maastricht Treaty also introduced specific treaty provisions on EU citizenship (Articles 17 to 21 EC, see Chapter 5) and on consumer protection (Article 153 EC).

Meanwhile, the ECJ had to deal with the burden of its success during the previously mentioned period of 'legislative sclerosis' in the 1970s and 1980s. The concepts of internal market law that it had developed in its case law suffered from both over- and under inclusiveness, and there were developments in unexpected and unintended directions: *Cassis de Dijon* was hard to delimit, and there were large number of challenges to national regulatory norms.[34] Therefore, in the 1990s and early 2000s, the ECJ refined and limited the scope of the competences of the Community, for instance by developing its test in free movement of goods cases from a non-discrimination approach, to a 'market access' test.[35] The Court also ensured the effectiveness of EU law in the areas where the EC did have competence.[36]

This is also the period in which the ECJ had the opportunity to hand down judgments in important cases in which the weighing of internal market freedoms and fundamental rights was at stake, cases such as *Schmidberger* and

[30] Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 27.

[31] The biggest enlargement occurred in 2004 with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia joining the EU, followed in 2007 by Bulgaria and Romania.

[32] Catherine Barnard, *The Substantive Law of the EU* (3rd edn, Oxford University Press 2010), 13.

[33] At the time of writing, the eurozone encompasses 19 out of the 27 Member States of the EU.

[34] Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 22.

[35] See for instance case C-267/91 *Keck and Mithouard* ECLI:EU:C:1993:905, [1993] ECR I-6097, and case C-142/05 *Mickelson & Roos* ECLI:EU:C:2009:336, [2009] ECR I-4273; See for a general discussion Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014), 389-393; See for recent analysis of these developments, for instance, Ioannis Lianos, 'In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods' (2015) 40 *European Law Review* 225.

[36] Paul P Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 33; Case C-265/95 *Spanish Strawberries* ECLI:EU:C:1997:595, [1997] ECR I-6959.

Omega Spielhallen. We will discuss these cases in more detail in Section 4.4.2 below but it is relevant to note at this point that the Court indeed recognised that fundamental rights claims could justify a restriction on free movement.

By the end of the 1990s, there already seemed to be a shift in emphasis from a largely market-based vision to a recognition of a wider range of interests.[37] As the ECJ stated in *Deutsche Post*: 'the economic aim pursued by Article 141, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right'.[38]

4.2.3 Lisbon Treaty reforms: a 'social market economy'?

The 2000s brought new challenges for the EU. In 2004, the Treaty establishing a Constitution for Europe (TCE) (signed by all Member States in October 2004), was ratified by 18 Member States in the subsequent year, but rejected by French and Dutch voters in referenda held in May and June 2005, respectively. The agenda of reforms that was intended to be achieved by the TCE was renegotiated and refined and eventually adopted in the form of the 2009 Lisbon Treaty,[39] which reformed and amended the pre-existing EC and EU Treaties. Meanwhile, the global financial crisis of 2007/2008 had hit, leading to an official recession in 2008, and dampening the ambitions of the Lisbon Treaty's policy reforms.

Among the amendments introduced by the Lisbon Treaty were the expansion of the use of qualified majority voting in more policy areas and a change in the calculation of the required qualified majority; an enhanced role for the EP in ordinary legislative procedure, as well as an expansion of the role/involvement of national parliaments; the abolition of the three-pillar structure; and making the European Charter of Fundamental Rights legally binding and setting the objective for the EU to join the ECHR; and the creation of a formal legal right and procedure for leaving the EU.

A further significant change is that the new Article 3 TEU introduces the notion of 'a highly competitive social market economy', whereas its predecessor, Article 4(1) TEC, spoke of 'an open market economy with free competition'. The rhetorical lineage of the notion of 'social market economy' can be traced back to West German politics in the 1950s, designating a market-oriented liberalism for the general economy, aided by an ordoliberal vision of competition policy to prevent monopolistic tendencies, and supplemented by separate social policies to correct unintended inequalities resulting from market-oriented policies.[40]

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[37] Catherine Barnard, *The Substantive Law of the EU* (3rd edn, Oxford University Press 2010), 23-24.

[38] Joined cases C-270/97 and C-271/97 *Deutsche Post* ECLI:EU:C:2000:76, [2000] ECR I-929, para. 57.

[39] Signed on 13 December 2007, entry into force on 1 December 2009.

[40] See for instance Loïc Azoulai, 'The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization' (2008) 45 *Common Market Law Review* 1335, 1337.

The spirit of this kind of thinking was also present at the Paris Summit of 1972, where the heads of the EEC states had declared that

> economic expansion is not an end in itself [. . .] It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind.[41]

This declaration had led to the EEC developing regional, social and environmental policies that were the forerunners of the expanded competences attributed to the EEC/EC in the SEA and subsequent treaties.[42]

However, the notion of a 'social market economy' has, as noted by Roy, served various political purposes over time and it lacks a clear definition or philosophy.[43] Even today, more than a decade after its introduction in the Lisbon Treaty, commentators observe that it is still unclear what the notion of 'social market economy' means in terms of EU policy and (legal) practice.[44] At the very minimum, this notion is taken to indicate that the EU simultaneously pursues economic (the creation of the internal market and the prevention of unfair competition) and social (promoting peace, sustainability and enhancing the well-being of the peoples of Europe) objectives.[45]

Several issues seem to hamper the implementation of this 'social market' agenda, such as the fact that social protection is still predominantly within the sphere of competences of the Member States, not the EU, and that the EU, by opening up markets and promoting free movement across Europe, and through the deregulatory effects of its laws, is seen as a cause of problems in the domain of social protection.[46]

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41 Declaration adopted at the Paris Summit of 19-21 October 1972, published in the Sixth General Report on the Activities of the Communities 1972, 7.

42 See also Bruno de Witte, 'A competence to protect: The pursuit of non-market aims through internal market legislation', in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012), 28.

43 See Suryapratim Roy, 'Book Review: *The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU*, edited by Delia Ferri and Fulvio Cortese. (Abingdon: Routledge, 2019)' (2019) 56 *Common Market Law Review* 1427.

44 See for instance Catherine Barnard and Sybe A de Vries, 'The 'Social Market Economy' in a (Heterogeneous) Social Europe: Does it Make a Difference?' (2019) 15(2) *Utrecht Law Review* 47, 47.

45 Anna Gerbrandy, Willem A Janssen and Lyndsey E A Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How 'Social' is Public Economic Law?' (2019) 15(2) *Utrecht Law Review* 32, 32.

46 The judgment in the Viking case is often cited as an example of the detrimental effect of EU law. See Catherine Barnard and Sybe A de Vries, 'The 'Social Market Economy' in a (Heterogeneous) Social Europe: Does it Make a Difference?' (2019) 15(2) *Utrecht Law Review* 47, 47 and 61; See also Sybe A de Vries, 'Protecting Fundamental (Social) Rights through the Lens of the EU internal market: the Quest for a More 'Holistic Approach'.' (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 203.

So far, the notion of 'social market economy' is rarely explicitly referred to by the ECJ and, as noted by Barnard and De Vries, the Court's inclusion and recognition of social rights considerations in its legal reasoning may be just as much a result of tendencies that were long present in EU law, and more recently by the proclamation of the European Pillar of Social Rights in 2017, and by the inclusion of 'fundamental social rights' in the EU Charter,[47] than from the introduction of this phrase in the Lisbon Treaty.[48] Furthermore, as noted by Mulder, there is a line of cases in which national social objectives seem to lose out against economic free movement considerations, raising questions about the ECJ's engagement with the notion of 'the social' versus 'the market'.[49]

4.3 History of fundamental rights protection in the EU legal order

4.3.1 The development of fundamental rights protection

Although commentators note that fundamental rights were glaringly absent from the EEC founding treaties, this does not mean that they were not part of the discussion. In the early 1950s there was an ambitious proposal for a European Political Community Treaty, in which several provisions of the ECHR were to be incorporated. However, these proposals were abandoned after the failed ratification of the European Defence Treaty in 1952. The 1957 EEC Treaty was instead restricted to the aims of economic integration, and it did not mention a political union or any human right, save for Article 119 EEC Treaty, which required equal pay for men and women. For a long time, the EU Treaties did not contain a comprehensive 'bill of rights', i.e. a written list of fundamental rights.[50]

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47 See also the Court in joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871.

48 See Catherine Barnard and Sybe A de Vries, 'The 'Social Market Economy' in a (Heterogeneous) Social Europe: Does it Make a Difference?' (2019) 15(2) *Utrecht Law Review* 47, 62.

49 See Jotte Mulder, 'Unity and Diversity in the European Union's Internal Market Case Law: Towards Unity in 'Good Governance'?' (2018) 34(1) *Utrecht Journal of International and European Law* 4, 7; referring to controversial free movement cases such as Case C-212/97 *Centros Ltd v Erhvervsog Selskabsstyrelsen* ECLI:EU:C:1999:126, [1999] ECR I-1459; Case C-208/00 *Überseering* ECLI:EU:C:2002:632, [2002] ECR I-9919; Case C-167/01 *Inspire Art* ECLI:EU:C:2003:512, [2003] ECR I-10155; Case C-196/04 *Cadbury Schweppes* ECLI:EU:C:2006:544, [2006] ECR I-7995; Case C-341/05 *Laval un Partneri* ECLI:EU:C:2007:809, [2007] ECR I-11767; Case C-438/05 *Viking Line* ECLI:EU:C:2007:772, [2007] ECR I-10779; Case C-346/06 *Rüffert* ECLI:EU:C:2008:189, [2008] ECR I-1989; Case C-319/06 *Commission/Luxemburg* ECLI:EU:C:2008:350, [2008] ECR I-4323; Case C-271/08 *Occupational pensions* ECLI:EU:C:2010:426, [2010] ECR I-7091; Case C-426/11 *Alemo-Herron e.a.* ECLI:EU:C:2013:521; and Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

50 See generally Paul P Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (4th edn, Oxford University Press 2007), 380-381; See also Sionaidh Douglas-Scott, 'The European Union and

However, the actions of the Community before long extended beyond the purely economic realm and had a significant impact on broader (political and social) issues, and private economic and commercial interests. As private economic actors began to claim protection of their property rights and the freedom to pursue a trade or profession in certain Member States whose constitutions afforded such protection, the ECJ took its first steps in the field of fundamental rights protection.[51]

Although the ECJ was initially reluctant[52] to treat the rights invoked by the parties as part of the Community's legal order, its attitude soon changed. *Stauder*[53] is hailed as the first ECJ case in which the ECJ (albeit indirectly) recognised fundamental rights as a relevant part of the EEC's legal order. This new approach was confirmed and elaborated upon in *Internationale Handelsgesellschaft*.[54] While the ECJ explained that EEC law could only be reviewed in the light of its own legal order, and that there could therefore be no recourse to national fundamental rights standards, the ECJ considered it must be examined whether there existed analogous guarantees in EC law:

> In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community...[55]

In its judgment in *Nold (II)*,[56] the ECJ continued this line of argumentation, stating that the sources of fundamental rights that can be recognised as general principles of EU law were the constitutional traditions common to the Member States, as well as international human rights agreements.[57] In subsequent case

Human Rights After the Treaty of Lisbon.' (2011) 11 *Human Rights Law Review* 645, 647; Andrew Williams, 'Respecting Fundamental Rights in the New Union: A Review' in Catherine Barnard (ed), *The Fundamentals of EU law Revisited* (Oxford University Press 2007), 71: "In the beginning, there was silence".

51 Paul P Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (4th edn, Oxford University Press 2007), 381; See also G C Rodriguez Iglesias, 'The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities' (1994-1995) 1 *Columbia Journal of European Law* 169.

52 See for instance Case 1/58 *Stork v. High Authority* ECLI:EU:C:1959:4, [1959] ECR 17; Joined Cases 36, 37, 38/59 and 40/59 *Geitling v. High Authority* ECLI:EU:C:1960:36, [1960] ECR 423; and Case 40/64 *Sgarlata v. High Authority* ECLI:EU:C:1965:36, [1965] ECR 215, in which the Court denied the possibility of examining alleged infringements by EU acts of national constitutional law, and denied the existence of general principles of law such as fundamental rights.

53 Case 29/69 *Stauder v Stadt Ulm* ECLI:EU:C:1969:57, [1969] ECR 419.

54 Case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114, [1970] ECR 1125.

55 Case 11-70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114, [1970] ECR 1125, para 4.

56 Case 4-73 *Nold KG v Commission* ECLI:EU:C:1974:51, [1974] ECR 491.

57 Case 4-73 *Nold KG v Commission* ECLI:EU:C:1974:51, [1974] ECR 491, para 13.

law the ECJ confirmed this reasoning, adding the refinement that 'special significance' should be accorded to the ECHR and to ECtHR case law in that respect.[58] Furthermore, the Court made it clear that the EC could not accept measures, whether of national or EC origin, that were incompatible with the observance of human rights.[59]

The body of ECJ case law concerning fundamental rights was affirmed and integrated in the Treaty of Maastricht, introducing Article 6 which stated: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. This Treaty thus placed an emphasis on the ECHR and not on international treaties and conventions in general, which had already become the standard in the ECJ's case law. However, in *Opinion 2/94*, the Court also held that the Community did not have the competence to legislate in the domain of fundamental rights, which formed an obstacle to the Community's accession to the ECHR at the time.[60]

We therefore can conclude that, from the late 1960s onwards, the ECJ regularly interpreted or reviewed the validity of EC measures in the light of fundamental rights, and particularly the practice of the ECtHR, which received some recognition on Treaty level in the 1990s. However, until 2000, the EC did not have its own codified bill of rights.

The Charter of Fundamental Rights and Freedoms (hereafter the 'Charter') was proclaimed on 7 December 2000 at the Nice European Council, and subsequently reaffirmed and amended in 2007.[61] The Charter unites classic basic liberties, more modern fundamental rights (such as the right to protection of personal data, which we will discuss in more detail in Chapter 6), as well as economic and social rights,[62] thereby codifying and supplementing the

[58] Case 222/84 *Johnston* ECLI:EU:C:1986:206, [1986] ECR 1651; confirmed in case C-260/89 *ERT* ECLI:EU:C:1991:254, [1991] ECR I-2925.

[59] Case 5/88 *Wachauf* ECLI:EU:C:1989:321, [1989] ECR 2609, para 17.

[60] Opinion 2/94 *Accession by the Community to the ECHR* ECLI:EU:C:1996:140 [1996] ECR I-1759, para 27.

[61] For a commentary on the drafting process, see Gráinne de Búrca, 'The drafting of the European Union Charter of Fundamental Rights' (2015) 40 *European Law Review* 799.

[62] Given some Member States' unease about the inclusion of certain economic and social rights, the Charter makes a distinction between rights and principles. There has been disagreement between the exact status of principles, but it has been argued that principles were programmatic, but not justiciable. See for instance Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review*), 399-400. However, in *Pfizer,* the General Court reviewed a Council Regulation based on the precautionary principle (T-13/99 *Pfizer* ECLI:EU:T:2002:209, [2002] ECR II-3305). Furthermore, the ECJ's judgment in *Bauer* confirmed the horizontal direct effect of the right to annual paid leave as laid down in Article 31(2) Charter (Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871). The distinction between rights and principles has thus become increasingly blurred.

Court's case law on fundamental rights. However, until the coming into force of the Treaty of Lisbon in December 2009, the Charter did not have legal binding force, and the ECJ continued its protection of fundamental rights based on general principles of EU law, inspired by or drawn from the ECHR and/or national constitutional traditions. Such was also the Court's approach in *Schmidberger* and *Omega Spielhallen*, which were mentioned briefly in Section 4.2.2 above. In *Schmidberger,* the Court recognised for the first time that fundamental rights could be invoked in order to justify an interference with the four freedoms of the internal market. This approach was not only confirmed in *Omega Spielhallen*, but the Court also left a margin for the protection of particular national conceptions of fundamental rights, clarifying that not all rights need to have the same level of protection in all EU MS before they can be recognised as general principles of EU law.[63] We will examine the reasoning of the Court in *Schmidberger*[64] more closely in Section 4.4.2 below.

While the *Schmidberger* and *Omega Spielhallen* judgments were generally met with enthusiasm, this was not the case for all judgments of the Court in which both fundamental rights and fundamental freedoms were at stake. Notorious are the judgments in the *Viking Line*[65] and *Laval*[66] cases: pre-Lisbon judgments (2007) that have been considerably criticised. Both cases concerned collective action in the context of labour disputes, and the ECJ handed down judgments that prioritised the free movement rights of traders over the fundamental social rights that were constitutionally protected in Sweden (*Laval*) and Finland (*Viking Line*).[67] Notice how the Court developed a habit of calling for a 'fair balance' to be struck between the fundamental rights involved in a given case, and that includes free movement and economic rights, not only in the *Viking Line* and *Laval* cases, but also in, for instance, the judgments in *Lindqvist* and *Promusicae*,

4.3.2 The Lisbon Treaty and the Charter

As noted in Section 4.2.3, the Lisbon Treaty significantly amended the EU and EC Treaties, not only introducing the concept of the social market economy discussed above, but also taking important steps in terms

63 Case C-36/02 *Omega Spielhallen*, ECLI:EU:C:2004:614 [2004] ECR I-9609, para. 31, 34, 37-38.

64 Case C-112/00 *Schmidberger*, ECLI:EU:C:2003:333 [2003] ECR I-5659.

65 Case C-438/05 *Viking line*, ECLI:EU:C:2007:772 [2007] ECR I-10779, para 79.

66 Case C-341/05 *Laval*, ECLI:EU:C:2007:809 [2007] ECR I-11767.

67 See for thorough discussions of these cases Anne C L Davies 'One step forward, two steps back? *Laval* and *Viking* at the ECJ' (2008) 37 *Industrial Law Journal* 126; Jonas Malmberg and Tore Sigeman 'Industrial action and EU economic freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice' (2008) 45 *Common Market Law Review*, 1115; Tonia Novitz 'A human rights analysis of the Viking and Laval judgments' (2007-2008) 10 CYELS 541; Silvana Sciarra 'Viking and Laval: collective labour rights and market freedoms in the enlarged EU' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 563; Phil Syrpis and Tonia Novitz 'Economic and social rights in conflict: political and judicial approaches to their reconciliation' (2008) 33 *European Law Review* 411.

of the EU's fundamental rights regime. The Lisbon Treaty introduced a new Article 2 TEU, which states that '[t]he Union is *founded on* the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (emphasis added).

The new Article 6 TEU introduced by the Lisbon Treaty prescribes a three-pronged approach to fundamental rights protection in the EU, namely by declaring that the EU Charter of Fundamental Rights is to have the same legal value as the EU Treaties (paragraph 1), by ordering that the EU 'shall accede' to the ECHR[68] (paragraph 2), and by reaffirming the standard line of case law in which fundamental rights as guaranteed by the ECHR and by the constitutional traditions common to the Member States, are to be general principles of EU law (paragraph 3).

The Charter first made its appearance in AGs' Opinions while the Court initially continued to refer to case law of the ECtHR. However, over the years, with a slight time lag after the Charter gained primary law status at the entry into force of the Lisbon Treaty, the Court seems to be getting more 'Charter-centric', i.e. referring only to the Charter when adjudicating fundamental rights issues, without referring to pre-existing interpretations of similar rights in other international human rights instruments, such as the ECHR.[69] The lack of references to the ECHR or other relevant fundamental rights sources, and the – alleged – inconsistency or even arbitrariness in when it does so, has earned the ECJ a certain amount of criticism.[70]

The Charter does not have a universal scope of application: whereas it applies to all acts of the EU institutions and other bodies, offices and agencies, Article 51(1) of the Charter states that the Charter will only be applicable to Member

[68] For the purposes of this book, the project of the EU's accession to the ECHR is not so relevant, since in Opinion 2/13 the ECJ deemed that the draft accession agreement was not compatible with EU law's specific characteristics. The EU's accession is therefore a case of 'back to the drawing board'. Furthermore, the ambition of the EU to join the ECHR does not seem to have had an impact (so far) on the ECJ's reasoning concerning fundamental rights.

[69] Francesca Ferraro and Jesús Carmona, 'Fundamental Rights in the European Union: The Role of the Charter after the Lisbon Treaty', (European Parliamentary Research Service 2015, PE 554.168), 14; See also Marten Breuer, 'Impact of the Council of Europe on National Legal Systems' in Stefanie Schmahl and Marten Breuer (eds), *The Council of Europe: its Law and Policies* (Oxford University Press 2017), para 36.87.

[70] See for instance the critical views of Gráinne de Búrca, 'After the EU Charter of fundamental rights: the Court of Justice as a human rights adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168, 173-174. Elsewhere, I have suggested that the Court's Charter-centric approach in *Chavez* may be explained with reference to the "specific characteristics" and the "autonomy" of the EU legal order, in the light of which fundamental rights must be interpreted, as the Court has asserted in Opinion 2/13 *Accession of the Union to the ECHR* ECLI:EU:C:2014:2454, paras. 170-172. However, the Court has not clarified this (yet). See Hanneke van Eijken and Pauline S Phoa, 'The Scope of Article 20 TFEU Clarified in Chavez-Vilchez: Are the Fundamental Rights of Minor EU Citizens Coming of Age?' (2018) 43 *European Law Review* 949, 965.

States whenever they 'are implementing Union law'. The explanations accompanying the Charter, as well as the ECJ in its case law, such as the *Åkerberg Fransson* judgment, have made it clear that the Charter is binding upon Member States whenever they act in a situation that falls within the scope of application of EU law,[71] which is when Member States implement or otherwise apply EU law, or when Member States derogate from it,[72] for instance when, in a free movement case, a Member State relies on one of the Treaty or 'rule of reason' exceptions to justify a restriction of one of the four freedoms.[73] However, the reach of the Charter seems to be slowly expanding, as the ECJ recently developed a doctrine of Charter-consistent/compliant interpretation, which uses the Charter as an interpretative device without the case falling formally within the scope of application of the Charter, for example in the *Chavez-Vilchez* case.[74]

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[71] See the *Explanations relating to the Charter of Fundamental Rights*, OJ [2007] C 303/17. See also case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105.

[72] For the first situation, it is common to refer to the Court's approach in case 5/88 *Wachauf* ECLI:EU:C:1989:321, [1989] ECR 2609 and case C-292/97 *Karlsson e.a.* ECLI:EU:C:2000:202, [2000] ECR I-2737 as 'locus classicus', while for the second situation the comparison is made with the Court's approach in case C-260/89 *ERT* ECLI:EU:C:1991:254, [1991] ECR I-2925. See Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, particularly at 378 and 385. See also the *Explanations relating to the Charter of Fundamental Rights*, OJ [2007] C 303/17. For critical commentary on the interpretation of the scope of the Charter, see, among many others, Jukka Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter?' (2015) 21 *European Public Law* 285; Thomas von Danwitz and Katherina Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights' (2012) 35 *Fordham International Law Journal* 1396, 1406-1407; Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, 378; Bas van Bockel and Peter Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after *Åkerberg Fransson*' (2013) 38 *European Law Review* 866; Emily Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*' (2013) 50 *Common Market Law Review* 1411, 1430; Michael Dougan, 'Judicial review of Member State action under the general principles and the Charter: defining the "Scope of Union law"' (2015) 52 *Common Market Law Review* 1201.

[73] See for instance the Court's judgment in Case C-368/95 *Familiapress* ECLI:EU:C:1997:325, [1997] ECR I-3689, para. 24; and more recently in Case C-390/12 *Pfleger* ECLI:EU:C:2014:281.

[74] Case C-133/15 *Chavez-Vilchez* ECLI:EU:C:2017:354; Hanneke van Eijken and Pauline S Phoa, 'The Scope of Article 20 TFEU Clarified in Chavez-Vilchez: Are the Fundamental Rights of Minor EU Citizens Coming of Age?' (2018) 43 *European Law Review* 949. In that light, see also Case C-456/12, *O & B, S & G* ECLI:EU:C:2013:837, Opinion of AG Sharpston, paras 62-63; Mads Andenas, Tarjei Bekkedal and Luca Pantaleo, *The Reach of Free Movement* (Asser Press 2017), 245. Furthermore, see also Case C-414/16 *Vera Egenberger* ECLI:EU:C:2018:257 and Joined Cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871.

4.4 Schemes for adjudication of the internal market and fundamental rights

4.4.1 Schemes for legal reasoning

The foregoing sections provided relevant background information about the EU internal market and fundamental rights, but is all of this information helpful when trying to determine how to balance economic rights with fundamental rights? It is often asserted that there is no hierarchy between the fundamental rights and fundamental freedoms, and that they should be balanced on the basis of equality.[75] Let us look a bit more closely at the practice of the ECJ, and see if we can identify patterns, commonalities and differences in its schemes of reasoning we should be aware of in order to better understand the weighing of internal market and fundamental rights.

In contrast to the ECtHR, the ECJ is not a purely fundamental rights court; far from it, its mandate and jurisdiction are much broader, namely, to ensure that in the interpretation and application of the Treaties, 'the law' is observed. Not only the institutional design of the EU, but also various principles such as primacy and direct effect, mean that the judicial dialogue between national courts and the ECJ is largely direct, and that the remedies for addressing and redressing violations of rights (not only of fundamental rights) are more powerful and effective than those in the ECHR system.[76] As we have seen in Section 4.3 above, it is within the slipstream of the case law on the internal market that the EU's fundamental rights protection was developed over the years.

4.4.2 The classic EU free movement scheme

Based on a review of the ECJ's internal market case law throughout the years, we can distil a sort of adjudicative template or scheme that the Court more or less consistently applies in free movement cases, including those in which fundamental rights are at issue. The Court usually takes three separate steps: (i) is there a (prima facie) restriction of a free movement right? (ii) is there a legitimate justification for the restriction? (iii) can the restriction be considered proportionate with regard to its legitimate objectives?[77]

Such was also the Court's approach in the landmark judgment in *Schmidberger*.[78] In that case, an environmental NGO organised a demonstration at the Brenner pass motorway in Austria. Schmidberger was a transport company that could not use the motorway for four consecutive days (the day

[75] See for instance Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, 392.

[76] Síofra O'Leary, 'A Tale of Two Cities: Fundamental Rights Protection in Strasbourg and Luxembourg' (2018) 20 *Cambridge Yearbook of European Legal Studies* 3, at 11-13.

[77] See for instance the landmark case 120/78 *Cassis de Dijon* ECLI:EU:C:1979:42, [1979] ECR 649.

[78] Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659.

of the demonstration, a holiday, and during the weekend). The question was whether the Austrian government not prohibiting the demonstration was a breach of the free movement of goods. True to the 'scheme' that we identified above, the ECJ observed that there was, in principle, a restriction of free movement, but already observed that it could be justified.[79] It then referred to its case law in *Nold*, *Johnston* and *ERT*, and stated that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the four internal market freedoms.[80] The Court also observed that neither the free movement of goods, nor the fundamental rights relied on (in this case the freedom of expression and assembly), were absolute rights.[81] Accordingly, 'the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests'.[82] At this point, the Court considered that although the national authorities enjoy a 'wide margin of discretion in that regard', it was nevertheless 'necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights'.[83] The Court subsequently reviewed the question of proportionality, basically examining whether there were less restrictive ways to allow the demonstration. However, since the demonstration was limited in terms of location and duration, it was a real public interest demonstration with no objective to restrict free movement, and the national authorities took various measures to limit the disruption to road traffic, the ECJ concluded that the restriction on free movement in question had been proportionate.[84] The ECJ repeated and confirmed this schematic approach in subsequent cases such as *Familiapress*,[85] *Karner*,[86] and *Omega Spielhallen*.[87]

4.4.3 The Charter scheme

Although the Charter has acquired primary law status since the Lisbon Treaty, this does not mean that it is becoming an autonomous source for judicial review: both Article 6(1) TEU and Article 51(2) Charter are careful to point out that the Charter does not lead to the extension of EU competences.[88] This means that a case needs to have an EU law 'angle' in order for the litigants

79 Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659, para 64.

80 Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659, para 71-74.

81 Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659, para 78-80.

82 Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659, para 81.

83 Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659, para 82.

84 Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, [2003] ECR I-5659, para 84-93.

85 Case C-368/95 *Familiapress* ECLI:EU:C:1997:325, [1997] ECR I-3689.

86 Case C-71/02 *Karner* ECLI:EU:C:2004:181, [2004] ECR I-3025.

87 Case C-36/02 *Omega Spielhallen* ECLI:EU:C:2004:614, [2004] ECR I-9609.

88 See for a very nuanced review of this claim Sybe A de Vries, 'The Charter of Fundamental Rights and the EU's 'creeping' competences: does the Charter have a centrifugal effect for fundamental rights

to be able to invoke the Charter before the ECJ. As mentioned above in Section 4.3.2 if Member State actions are at issue, the Charter only applies when they 'implement' EU law, which means whenever they act within the scope of application of EU law, or when they derogate from it.

The fundamental rights review under the Charter follows the general limitation clause of Article 52(1) Charter. This provision of the Charter sets out the conditions with which every limitation of a Charter right (under Title II or following Titles, since Title I contain absolute rights like the right to life and the prohibition of torture) must comply. Although having a general limitation clause is a different method from that employed by the ECHR in which every provision has its own limitation clause, its structure is largely inspired by the ECHR and the case law of the ECtHR.[89]

According to the scheme of Article 52(1) Charter, the following steps should be followed:

- Does the measure fall within the scope of one of the Charter rights at all?
- Is there a prima facie interference?
- If yes:
- Is the essence of the fundamental right affected?
- If no:
- Is the interference justified by a legitimate purpose/objective of general interest?
- Is the measure appropriate to achieve the said objective?
- Is it limited to what is necessary to achieve the said objective?

As we will see in Chapter 6, the Court applied this scheme of judicial review quite rigorously in *Digital Rights Ireland*.

4.4.4 Subconclusion: the problem of the indeterminacy of actual reasoning

We thus find something like schemes of reasoning that the ECJ usually (or ideally) follows; or at least, the ECJ's reasoning seems to fit in a kind of schematic thinking that we teach our students. However, and in particular for our examination of ECJ reasoning, the bare bones of these schemes soon prove to be insufficient in order for us to move forward and deepen our understanding of the actual balancing of fundamental rights and economic interests. For instance, these schemes are insufficient in order to understand, if not predict, future decisions of the ECJ. As we shall see in the case studies undertaken in

in the EU?' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU law and Human Rights* (Edward Elgar Publishing 2017), 58-98.

89 See *Explanations relating to the Charter of Fundamental Rights*, OJ [2007] C 303/17; see also Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, 388; Filippo Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights: Does curia.eu Know iura.eu?' (2014) 14 *Human Rights Law Review* 231.

Chapter 5 and 6, legal practice, i.e. actual judgments of the ECJ, also shows a more robust reality than that which can be captured by schemes For instance, it may be misleading to assume that the ECtHR, the 'original' human rights court, always provides a better or fuller protection of fundamental rights than the ECJ, the alleged 'economic' court.[90] Furthermore, a full protection of fundamental rights may go further than this or that scheme of reasoning: it has been suggested that the deeper layers of word choice and narrative structure contribute to a real, holistic protection of 'the human' in human rights.[91]

4.5 Academic debate on the relationship between the EU internal market and fundamental rights: an overview

Examining the pre-understandings that we assume our paradigmatic jurist has before starting to interpret a concrete case about fundamental rights and economic interests, included a review of the general historical background of the EU's internal market and its protection of fundamental rights. Zooming in a bit further on the actual practice of the ECJ when it adjudicates such disputes has led us to discuss the schemes or steps that it often follows. The schemes of reasoning have proved somewhat helpful, but they have obvious limitations in terms of understanding the idiosyncrasies of the ECJ's case law, as well as in preparing a legal mind for undertaking the actual balancing of fundamental rights with economic interests.

How can we think about the relationship between economic interests and fundamental rights more deeply, then? Here we may assume that our jurist has a reasonably good level of knowledge of the academic debates about these topics, which will provide further lines of thought, if not assistance. There has been a rich academic debate about the protection of fundamental rights by the ECJ, the balancing between economic interests and fundamental rights, and the trajectory of the ECJ's development as a human rights court. What follows is a discussion of several of the voices in this broad academic debate, but it is by no means exhaustive or definitive.

De Vries raises the question as to what kind of conflict actually exists between fundamental rights and the economic freedoms: is this a conflict between two 'constitutional' principles that are both fundamental?[92] He views

[90] See for instance Susanne D Burri, 'Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR' (2013) 9(1) *Utrecht Law Review* 80, in which Burri shows that the ECJ and the EU legislature have developed a more elaborate concept of sex discrimination, thereby offering better protection than the ECHR.

[91] See for instance Charlotte O'Brien, 'I trade, therefore I am: Legal Personhood in the European Union' (2013) 50 *Common Market Law Review* 1643. See also James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990),75.

[92] Sybe A de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon: An Endeavour for more Harmony' in Sybe A de Vries, Xavier Groussot and Gunnar T Petursson (eds),

the introduction of the concept of the 'social market economy' by the Lisbon Treaty as a sign that, from 2009 onwards, EU law ought to balance economic integration with social considerations and public interests, and

> that the European economic integration process should at least not be perceived as a 'neo-liberal project'. Or, in other words, whereas the internal market originally seemed to be mainly concerned with the abolition of trade barriers, now a broader conception of the internal market can be found, conceptualized in more holistic terms, including public interests, such as consumer safety, public health, environmental protection and fundamental rights. The realization of an internal market and the liberalization of trade are not ends in themselves, but important tools to increase welfare and promote sustainable development.[93]

However, De Vries also considers that it is difficult, undesirable even, to establish an a priori hierarchy between fundamental rights and economic freedoms.[94] The ECJ therefore has to 'balance', and De Vries refers to Alexy's theory of balancing (focusing on the seriousness of the infringement and the importance of the fundamental right at issue), but also observing several ways in which the ECJ avoids such balancing,[95] and noting that the case law of the ECJ is unclear in terms of methodology, thereby showing the Court's struggle with this balancing act.[96] Elsewhere however, alongside Barnard and Weatherill, De Vries

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Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'Tightrope' Walker (Eleven International Publishing 2012), 28. See also for a similar discussion Francesco de Cecco, 'Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law' (2014) 15 *German Law Journal* 383; See also Daniel Augenstein and Bert van Roermund, '"Lisbon vs. Lisbon": Fundamental Rights and Fundamental Freedoms' (2013) 14 *German Law Journal* 1909.

93 Sybe A de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon: An Endeavour for more Harmony' in Sybe A de Vries, Xavier Groussot and Gunnar T Petursson (eds), *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'Tightrope' Walker* (Eleven International Publishing 2012), 31.

94 Sybe A de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon: An Endeavour for more Harmony' in Sybe A de Vries, Xavier Groussot and Gunnar T Petursson (eds), *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'Tightrope' Walker* (Eleven International Publishing 2012), 32.

95 Sybe A de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon: An Endeavour for more Harmony' in Sybe A de Vries, Xavier Groussot and Gunnar T Petursson (eds), *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'Tightrope' Walker* (Eleven International Publishing 2012), 35-36.

96 Sybe A de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon: An Endeavour for more Harmony' in Sybe A de Vries, Xavier Groussot and Gunnar T Petursson (eds), *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'Tightrope' Walker* (Eleven International Publishing 2012), 37.

acknowledged the Court's 'robust approach' to the internal market as a cause of concern for fundamental (social) rights.[97]

Nevertheless, Weatherill concludes from a review of the case law of the ECJ that it had been open to non-economic values such as fundamental rights, long before the more explicit fundamental rights aspirations of the Lisbon Treaty. According to him, any prioritisation of economic values was more a result of 'the diet of cases fed to the Court and the way in which arguments have been presented by litigants (most of all, but not exclusively, Member States) rather than any in-built bias preferring economic growth over the value of human rights.'[98]

Taking a view not on the substance of rights, but on the quality and structure of the ECJ's reasoning, De Burca has argued that, in light of the lack of experience and expertise in fundamental rights matters and for the sake of coherence of fundamental rights protection within Europe and globally, the ECJ should more regularly and consistently make recourse and reference to other human rights instruments and adjudicative bodies, such as the ECtHR. Furthermore, De Burca points out that transparency and the obligation to state reasons are pivotal to the legitimacy of the Court's case law in general, and perhaps even more so in cases pertaining to fundamental rights, suggesting that the Court's reasoning does not always meet these standards.[99] Similarly, Gerards does not seem to doubt the possibility of achieving a just outcome as long as the ECJ's reasoning is up to par.[100] Nic Shuibhne has repeatedly voiced similar concerns

97 Sybe A de Vries and Catherine Barnard, 'The 'Social Market Economy' in a (Heterogeneous) Social Europe: Does it Make a Difference?' (2019) 15(2) *Utrecht Law Review* 47, 61.

98 Stephen Weatherill, 'The Internal Market and EU fundamental rights' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU law and Human Rights* (Edward Elgar Publishing 2017), 365.

99 See Gráinne de Búrca 'After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168; See generally for the discussion of the ECJ as a human rights court: See for instance Jason Coppel and Aidan O'Neil, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 *Legal Studies* 227; Joseph H H Weiler and Nicolas Lockhart, '"Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence (part I and II)' (1995) 32 *Common Market Law Review* 51 and 579 respectively; James A Sweeney, 'A "Margin of Appreciation" in the Internal Market: Lessons from the European Court of Human Rights' (2007) 34 *Legal Issues of Economic Integration* 27, 30; Laurent Scheeck, 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks' (Garnet Working Paper 23/07, 2007); Sergio Carrera, Marie de Somer and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (CEPS, Justice and Home Affairs Liberty and Security in Europe Papers No. 49, 2012); Sybe A de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013).

100 Janneke Gerards, 'Judicial Argumentation in Fundamental Rights cases: the EU Courts' Challenge' in Ulla B Neergaard and Ruth Nielsen (eds), *European Legal Method: in a Multi-Level Legal Order* (DJØF Publishing 2012), 27-69.

about the consistency of the Court's case law on EU citizenship and fundamental rights, noting that the Court's own case law is not always a logical whole or even persuasive, and that changes in direction are not sufficiently explained or articulated.[101]

On the more critical side, Reynolds demonstrates that a significant structural asymmetry is built into the system of free movement law (at least in the specific review of national measures that affect the free movement provisions), which places fundamental rights at a 'clear structural disadvantage'. As the paradigm case for this observation, she analyses the judgment in *Schmidberger,* in which the ECJ developed its now more or less standard two stage breach-justification methodology: the application of EU law in such a way that the legal reasoning starts with the conclusion of a prima facie breach of a fundamental freedom by the fundamental right, in which case the latter has to 'defend' itself at the justification and proportionality stages with, as a consequence, greater evidentiary hurdles. According to Reynolds, this places fundamental rights on the procedural 'back foot'. Other cases in which this structure of reasoning is followed are *Omega Spielhallen*, *Dynamic Medien* and *Familiapress*.[102] Moreover, Reynolds observes that *Opinion 2/13* has made it clear that in the EU legal order fundamental rights are promoted and protected only 'within the framework of the structure and objectives of the Treaty', i.e. the establishment of the internal market.[103] The more recent cases of *Viking* and *Laval*,[104] *Commission v Luxembourg*[105] and *Rüffert*[106] allegedly show an even more distinct preference for the (neo-)liberal spirit of free movement over fundamental rights and social concerns.[107]

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[101] Niamh Nic Shuibhne, 'Editorial: Seven questions for seven paragraphs' (2011) 36 *European Law Review* 161, 162; Niamh Nic Shuibhne, 'Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, Judgment of the Court of Justice (Third Chamber) of 5 May 2011; Case C-256/11, Dereci and others v. Bundesministerium für Inneres, Judgment of the Court of Justice (Grand Chamber) of 15 November 2011' (2012) 49 *Common Market Law Review* 349, 378.

[102] Case C-368/95 *Familiapress* ECLI:EU:C:1997:325, [1997] ECR I-3689, Case C-36/02 *Omega Spielhallen* ECLI:EU:C:2004:614, [2004] ECR I-9609, Case C-244/06 *Dynamic Medien* ECLI:EU:C:2008:85 [2008] ECR I-505.

[103] Stephanie Reynolds, "Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights", Common Market Law Review 53 (2016), pp. 643-678. See for similar concerns: Douglas-Scott, Sionaidh. 2011. "The European Union and Human Rights After the Treaty of Lisbon." Human Rights Law Review 11 (4): 645-82.

[104] Case C-438/05 *Viking Line* ECLI:EU:C:2007:772, [2007] ECR I-10779 and Case C-341/05 *Laval un Partneri* ECLI:EU:C:2007:809, [2007] ECR I-11767.

[105] Case C-319/06 *Commission/Luxemburg* ECLI:EU:C:2008:350, [2008] ECR I-4323.

[106] Case C-346/06 *Rüffert* ECLI:EU:C:2008:189, [2008] ECR I-1989.

[107] Stephanie Reynolds, 'Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' (2016) 53 *Common Market Law Review* 643; See for similar concerns: Sionaidh Douglas-Scott, 'The European Union and Human Rights After the Treaty of Lisbon.' (2011) 11 *Human Rights Law Review* 645.

Over the years, the ECJ has rather regularly been accused of instrumentalising fundamental rights merely to extend its jurisdiction, protect the autonomy of the EU legal order and to accelerate the process of European economic integration, of which Coppel and O'Neil's study[108] is a rather famous example. Despite Weiler and Lockhart's[109] lengthy response, these accusations are regularly repeated, for instance by Williams, who posited his 'preservations theory', according to which fundamental rights protection was necessary for the ECJ in order to avoid significant legal challenges by national courts.[110] Another such criticism is voiced by Douglas-Scott, who concludes that part of the problem is that the EU and the Court does not have a 'clearly developed, substantive sense of human rights (or indeed of justice)' and that fundamental rights protection was created as 'an afterthought', as 'epiphenomenally', i.e. as a by-product of the EU's 'more central, market led functions.'[111]

Advancing on the scale of criticism and also of specificity, O'Brien noted not only a market-based normativity in EU law's structures, but also in its discourse, i.e. at the level of word choice, definitions and linguistic and logical relations.[112] Altogether more critical is Somek, discussing the *Viking* and *Laval* cases, who observed that in those judgments free movement rights 'evidently' had been considered more important than the right to collective wage determination.[113] He even goes so far as to state that 'Europe is about economic growth',[114] warning that 'market societies' have a certain reductive vision of humanity that grossly disadvantages certain people[115] and he asks whether a purely market-based mechanism of distribution can ever be just.[116] Kramer, similarly, observes that

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[108] Jason Coppel and Aidan O'Neil, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 *Legal Studies* 227.

[109] Joseph H H Weiler and Nicolas Lockhart, ''Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence (part I and II)' (1995) 32 *Common Market Law Review* 51 and 579 respectively.

[110] Andrew Williams, *The Ethos of Europe: values, law and justice in the EU* (Cambridge University Press 2010), 267.

[111] Sionaidh Douglas-Scott, 'The European Union and Human Rights After the Treaty of Lisbon.' (2011) 11 *Human Rights Law Review* 645, at 678-679.

[112] Charlotte O'Brien, 'I trade, therefore I am: Legal Personhood in the European Union' (2013) 50 *Common Market Law Review* 1643.

[113] Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal* 711, 712.

[114] Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal* 711, 711.

[115] Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal* 711, 726.

[116] Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal* 711, 716.

EU law and the interpretation by the ECJ is increasingly based on 'a neoliberal anthropology of the human being.'[117]

Subconclusion: compatibility and mutual permeability

The academic publications discussed above can be divided into two 'camps'. One half, to which De Vries and Weatherill belong, argues that there is no fundamental incompatibility between internal market rights and fundamental rights, and that it is up to the Court to balance them. Gerards, De Burca and Nic Shuibhne can also be categorised in this camp, as they do not seem to doubt the compatibility of these rights, but add a different perspective by commenting on the quality of the reasoning of the Court.

At this point we should look back at our description of the development of the legal frameworks for the internal market and for fundamental rights protection, and consider their mutual openness, or at least their parallel qualifications. By this I mean the following.

Article 26 TFEU provides that the internal market is ensured 'in accordance with the provisions of the Treaty'. Particularly in light of the changes introduced by the Lisbon Treaty, i.e. Article 2 TEU's proclamation that the EU is founded on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights', the notion of the social market economy introduced by Article 3(3) TEU, as well as the primary law status of the Charter, this turn of phrase of Article 26 TFEU may be interpreted as meaning that the internal market should be interpreted in light of fundamental (social) rights. In other words, these changes in primary law designate fundamental rights as an important interpretive 'topos' for the internal market.

However, the EU fundamental rights regime seems to have a similar qualification. Already in its judgment in *Internationale Handelsgesellschaft* the ECJ insisted that 'the protection of [fundamental] rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'.[118] This connection between fundamental rights and the objectives of the EU was echoed in, inter alia, *Melloni*: a higher national standard of fundamental rights protection cannot be accepted that adversely affects the effectiveness, unity and primacy of EU law.[119] Moreover, the emphasis in *Opinion 2/13*, in which the ECJ rejected the draft agreement for the EU's accession to the ECHR, on the 'specific characteristics' and the 'autonomy' of the EU legal order, in the light of which fundamental rights must be interpreted,[120] is also telling of an EU-specific

[117] Dion Kramer, 'From Worker to Self-Entrepreneur: the Transformation of Homo Economicus and the Freedom of Movement in the European Union' (2017) 23 *European law journal* 172, 173.

[118] Case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114, [1970] ECR 1125, para. 4.

[119] Case C-399/11 *Melloni* ECLI:EU:C:2013:107, para 63; See also Case C-341/05 *Laval un Partneri* ECLI:EU:C:2007:809, [2007] ECR I-11767 and Case C-438/05 *Viking Line* ECLI:EU:C:2007:772, [2007] ECR I-10779, and Case C-447/09 *Prigge*, EU:C:2012:399, paras 46-47.

[120] See Opinion 2/13 *Accession of the Union to the ECHR* ECLI:EU:C:2014:2454, paras. 170-172.

character of, and rationale for, fundamental rights protection. More particularly, in paragraph 172 of *Opinion 2/13*, the Court stated as follows:

> The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the raison d'être of the EU itself.

In much the same way as Article 26 TFEU together with Article 2 and 3(3) TEU seem to introduce an interpretive 'topos' for the internal market, one could read these judgments as 'foregrounding' or prioritising the interpretive 'topos' of the internal market whenever fundamental rights are at issue. Anagnostaras raised the question whether this means that the provisions of the Charter must be interpreted in the light of the objectives pursued by the EU legislature and that all conflicts between them must be resolved in such a way as to facilitate the attainment of these aims'.[121]

The result is – at least on the level of the rhetoric of the Treaties and that of the ECJ – a systemic openness to each other, but also, as noted by Nic Shuibhne and Weatherill a problem of competing priorities, leaving it up to the ECJ to choose in each case which interpretative topos it will apply.[122] The problem is compounded when, as both of these authors also note, the Court uses the language of 'fair balance' (noted above in, for instance, *Promusicae*) in the same way both before and after the entry into force of the Lisbon Treaty, making it doubtful whether these Treaty amendments, particularly those of Articles 2 and 3(3) TEU, have actually led to the substantive differences in the Court's approach at all.[123] Moreover, as noted above, the language of 'balancing' may obscure the fact that at some point a decision is made for one right over the other, and also which factors have actually determined that choice. There are several ways that the Court may approach – and avoid – the balancing of rights, and the

[121] Georgios Anagnostaras, 'Balancing conflicting fundamental rights: the Sky Osterreich paradigm' (2014) 39 *European Law Review*, 122.

[122] Niamh Nic Shuibhne, 'Fundamental rights and the framework of internal market adjudication: Is the charter making a difference?', in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2017), 215-240. See also Stephen Weatherill 'From economic rights to fundamental rights' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds.) *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing, 2012) 11, at 13.

[123] Stephen Weatherill, 'Use and abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract"' (2014) 10 *European Review of Contract Law*, 167 at 179. See for instance the judgment in Case C-12/11 *McDonagh v Ryanair*, EU:C:2013:43, or the greatly criticized judgment in case C-426/11 *Alemo-Herron* EU:C:2013:521, at para 25 and 29.

academic debate unfortunately does not offer clear or coherent instructions or parameters that help to choose among the possibilities. The criticisms of these authors remain on the level of requiring the Court to be more consistent or clear in terms of structuring and references, but, as we have also seen in Chapter 3, Section 3.5, there is no agreement on what 'clear' or 'consistent' means.

By contrast, the criticism expressed by Coppel and O'Neil, Scott, O'Brien, Reynolds, Somek and Kramer forms another 'camp' in the debate. Not only does the criticism relate to a more close-up level of discourse and narrative, these are rather serious accusations of an unconscious but built-in bias, or even of intentional privileging of economic interests over fundamental rights that is supposedly present in EU law's concepts, logic and even the semantic choices of both judge and legislature. Unlike the publications in the first camp, these publications all express, whether implicitly or explicitly, a fundamental doubt about the compatibility of the internal market and fundamental rights protection in the EU legal order.As De Vries and Van Waarden observe, in the particular case of the balancing of economic interests with fundamental rights, the compromise made in any given society between the interests of the collectivity and those of the individual, 'reveals something of a worldview', and the choices made regarding concepts such as citizenship, democracy and the role of the judiciary reveal an 'expression of a vision of humanity'.[124] Moreover, as we learned in Chapter 2, Section 2.4, the way in which an author, such as the Court, speaks about people, such as litigants, not only reveals its view of humanity, but it also reveals a sense of 'self'. Therefore, accurately observing the narratives about humanity, i.e. 'the other', also helps us to accurately characterise the way in which the Court sees and performs its own role. All of this touches upon Cover's 'nomos' of the law mentioned previously in Section 4.1, i.e. the governing normative worldview and narratives that are ever present in our laws. So let us dive a little deeper into this discussion, and see what such a worldview and vision of humanity might look like in terms of the narrative level of the law, i.e. the complex interplay of facts, semantics, sequencing, and relational structures such as causal connections and inferences, and if there is indeed something of a market narrative, that can – presumably – be countered by a fundamental rights narrative.

[124] Sybe A De Vries and Frans van Waarden. 'Rivalling and clashing citizenship rights within the EU: problems with the multi-dimensionality of rights' in Sandra Seubert and others (eds), *Moving Beyond Barriers: Prospects for EU Citizenship* (Edward Elgar Publishing 2018), 48; See also Max Fabian Starke, 'Fundamental Rights before the Court of Justice of the European Union: A Social, Market-Functional or Pluralistic Paradigm?' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017), 94; referring to, among others, Jürgen Habermas, 'Paradigms of Law' (1996) 17 *Cardozo Law Review*, 771.

4.6 Revisiting narrative theory

As we learned in Chapter 2, Section 2.4.3, the configuration of legal texts may reveal certain narratives, for instance around the theme of 'the other', by which we mean the way in which a text speaks about the litigants and the community that they form part of (or are excluded from). There are many different ways of thinking about the world and about humanity, depending on, inter alia, the philosophical, political and/or religious or spiritual beliefs to which you adhere. Your worldview may be different in subtle and less subtle ways depending on whether you are a liberal, civic-republican, social-democrat, communist or (neo-)fascist. One also needs to consider more recent (post-) modern perspectives on political philosophy, such as those offered by, for instance, ecology, or feminist and queer theories.[125] Our vision of humanity and worldview thus shape the narratives we consciously or (more often) unconsciously adhere to, in other words, how we think about our legal institutions and about society in general. As previously mentioned in Chapter 1, Section 1.5.3, Chapter 2, Section 2.4.3, and Chapter 3, Section 3.4.6, by using the pronoun 'we' I mean to invite the reader into 'imaginary participation', i.e. thinking of ourself as if we were a jurist working at the ECJ, not merely examining the Court's legal reasoning from an external, detached point of view, but rather from an internal point of view of responsibility for a process of co-creation.

A question that has so far been implicit in this study, is whether there is a distinct narrative of the internal market and a distinct one for fundamental rights, whether these narratives are inherently incompatible or not, and whether, and how, the ECJ can succeed in reconciling these narratives. This issue also forms the background of the literature discussed above: the more optimistic authors seem to believe that the EU internal market and fundamental rights are part of the same narrative, or that they at least have compatible narratives, while the more critical authors seem to believe that there are distinct narratives of 'the market' that compete with, and are possibly irreconcilable with, a fundamental rights narrative.

In concrete ways, our vision of humanity influences how we, and therefore, the Court, think and speak about, for instance, what people are motivated by (e.g. if humans are inherently bad, violent and self-interested, or inherently good, benevolent and social creatures) and what people can do (e.g. if humans are inherently capable, strong and not needing protection through government interference, or vulnerable and in need of protection). It affects our beliefs about the appropriate system of government, about notions like community, solidarity, and responsibility. Furthermore, our view of these things determines

[125] See for instance the very rich and thought-provoking volume Nuno Ferreira and Dora Kostakopoulou (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge University Press 2016). See also Drucilla Cornell, "Fanon today", In Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights*, Cambridge: Cambridge University Press 2014, 121.

how we think about the relationship between freedom and equality, which in turn, for instance, influences how we think about social justice: do we believe it is 'freedom plus equality', in the sense that the State should actively pursue and promote equality by redistributive social policy, or do we believe that 'freedom is equality', in the sense that the State should uphold the principle of non-interference?[126] Our view on social justice also determines whether social assistance is seen as a human right aimed at social justice, or as a result of civic irresponsibility, for which the person needing social assistance is to be blamed, and therefore the assistance needs to be curtailed as much as possible. Such narratives all affect the Court's legal reasoning in significant ways.

In an attempt to make it even more concrete, notice how the normative choices that we consciously or unconsciously make on the issues above, influence our particular *legal* thinking in important ways, for instance:

- The importance of facts, and which ones are selected and/or emphasized as relevant and how they are presented in terms of order and word choice.
- The conception of causal relationships and inferences made on that basis.
- The choice for a certain benchmark in the interpretation of a certain norm, placing those who do not meet the criteria of this norm in a disadvantaged position as the exception.
- The level of deference that one thinks the judiciary should pay to the legislature's choices.
- The degree of what we will call 'constitutionalism' in legal reasoning: the tendency to rely on primary law and fundamental rights in order to guide interpretation.
- The weighing of rights: which rights are considered to be more important and, for the application of the principle of proportionality, what is deemed to be an accepted justification ground, what is deemed to be 'proportionate', i.e. the right measure or distance relative to each interest.

The following sections explore the ways in which we could conceive of two such narratives, and what their effects would be on our legal language, and particularly on the vision of humanity that a legal text may (unconsciously) espouse. We do so in their exaggerated, archetypical forms in order to get the sharpest contrast, while keeping in mind the potential for mutual permeability, explained above in Section 4.5, that the legal framework actually shows.

[126] Sybe A de Vries and Frans van Waarden, 'Rivalling and clashing citizenship rights within the EU: problems with the multi-dimensionality of rights' in Sandra Seubert and others (eds), *Moving Beyond Barriers: Prospects for EU Citizenship* (Edward Elgar Publishing 2018), 46-48.

4.7 A narrative of 'the market'

If we were to identify something of a discourse or narrative of 'the market', or a language of (capitalist) economics,[127] beyond or at a deeper level than the pure schemes of the EU legal rules on free movement, what would that look like? Economic theory not only underpins regulatory choices, but in the particular context of the EU, it justifies the entire system of governance that was created. Classic free trade theory means that an important, if not dominant, emphasis lies on the notion of 'efficiency'.[128]

According to several commentators, this kind of free trade or 'market' narrative emphasises human possibility and the human will: we can be what we want to be, and we can create our world according to our desires.[129] In neoclassical microeconomic theory, human beings are assumed to be Cartesian, competent, rational, and entrepreneurial actors or agents, who are (solely) motivated by self-interest.[130] This view is sometimes referred to as the idea of the 'homo economicus'.[131] As Somek notes, market societies expect everyone to be 'agile

[127] See James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), 47-75.

[128] See for the seminal Law and Economics publication Ronald H Coase, *The Firm, The Market and the Law*, (University of Chicago Press 1988). See also Jens-Uwe Franck and Kai Purnhagen, 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis', in: Klaus Mathis (ed), *Law and Economics in Europe: Foundations and Applications* (Springer 2014), 331, referring to a survey conducted in 2007 among EU directors of better regulation, see Claudio Radaelli and Fabrizio de Francesco, *Regulatory Quality in Europe: Concepts, Measures, and Policy Processes* (Manchester University Press 2007).

[129] According to White, this is a Hobbesian view of humanity, see James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), 47.

[130] See James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), 51; this idea also goes back to Adam Smith's economic theory, according to which efficient economies run themselves, with the least amount of government intervention. The purpose of laws must be to liberate individuals to pursue their own particular material interests (liberty = efficiency). In Smith's utilitarian vision of human nature, people are self-interested, and they do things to improve their lives. Self-interest is the driver that Smith calls 'the invisible hand'. See Adam Smith, *The Wealth of Nations* (1776), and comments by Ian Ward, *A Critical Introduction to European Law* (3rd edn, Cambridge University Press 2009), 114. See also Jens-Uwe Franck and Kai Purnhagen, 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis', in Klaus Mathis (ed), *Law and Economics in Europe: Foundations and Applications* (Springer 2014), 332-333 and Klaus Mathis, *Efficiency Instead of Justice?* (Springer 2009) 7-30.

[131] The first formulation of the rationale behind the concept of a 'homo economicus' is attributed to John Stuart Mill, *Essays on Some Unsettled Questions of Political Economy* (Longmans, Green, Reader and Dyer 1874) Essay 5, paras. 38 and 48. Dion Kramer, 'From Worker to Self-Entrepreneur: the Transformation of Homo Economicus and the Freedom of Movement in the European Union', (2017) 23 *European Law Journal*, 172. See also Mariusz J Golecki, 'Homo Economicus Versus Homo Iuridicus. Two views on the

and adaptable' – overlooking or disadvantaging those who are slow, lack self-mastery or are 'generally of a melancholic disposition'.[132] More concretely, the effect of this view of humanity is that it judges a person's value (and deservingness of rights) in terms of their economic capabilities, involvement and/or potential development. As noted by O'Brien, in this view only certain activities count, namely only regular, paid work, not unremunerated care work for family members or what O'Brien calls 'reproductive labour', thereby creating and sustaining a gender (and often age) bias.[133]

Furthermore, the market is believed to be 'democratic': openly (and thus fairly) accessible to the previously mentioned rational agents, who each bring their own value, and their potential to maximise their value. Accordingly, the market supposedly thrives on, and supports, individual choice and action. Society, in this view, is the sum of all market participants. White identifies two problems with this market narrative: (1) it is reductive of all social life to a process of exchange, overlooking the other ways we live together, and taking for granted the existing distributions, i.e. inequalities; (2) by taking autonomy and liberty as its central political values, it assumes that all exchanges are equally voluntary and consensual, and expressive of an individual's autonomy, while reality proves that that is not always the case.[134]

As a consequence of the view of humanity within this narrative, the notion of personal, individual responsibility becomes quite severe, even punitive: 'if people happen to find themselves in dire straits, they are themselves to blame. They could have taken precautions or otherwise adapted to circumstances before they were acting'.[135] Accordingly, any assistance that they receive, for instance in the form of social benefits, is not granted because of an obligation owed by society in light of an inherent right of every person, but out of sheer charity of the other market participants.[136]

Coase Theorem and the Integrity of Discourse Within the Law and Economics Scholarship', in: Klaus Mathis (ed), *Law and Economics in Europe: Foundations and Applications* (Springer 2014), 69-91.

[132] Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal* 711, 726.

[133] Charlotte O'Brien, 'I trade, therefore I am: Legal Personhood in the European Union' (2013) 50 *Common Market Law Review* 1643.

[134] See for a classic "law and literature" discussion of the notion of consent in light of the works of Franz Kafka, the academic exchange between Robin West and Richard Posner: Robin West, 'Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner' (1985) 99 *Harvard Law Review* 384; See also Richard A Posner, *Law and Literature* (3rd edn, Harvard University Press 2009), 230-247.

[135] Alexander Somek, *Individualism: An essay on the authority of the European Union* (Oxford University Press 2008), 180-182. See also Dion Kramer, 'From Worker to Self-Entrepreneur: the Transformation of Homo Economicus and the Freedom of Movement in the European Union' (2017) 23 *European Law Journal* 172.

[136] Alexander Somek, *Individualism: An essay on the authority of the European Union* (Oxford University Press 2008), 180-182; See also Charlotte O'Brien, 'I trade, therefore I am: Legal Personhood in the European Union' (2013) 50 *Common Market Law Review* 1643, 1647.

Although this market-based view of humanity may have – for certain categories of people – emancipatory or stimulating effects, it has the tendency or risk to increasingly instrumentalise and commodify human life. What are the alternatives to this kind of narrative? White has suggested that

> a true recognition of the equality of human beings would result not in the market economy, which is really a system of dominance and acquisition, but in an economy that achieved a far more equal sharing of the wealth, and did so by a severe curtailing of the desire to consume and to expend. This would be an economics of education, freeing the self, and the community, from the false belief that what the human being wants or needs can be found in the Gross National Product. Meaning might instead be located in activities of law and art. But these are exactly the things – respect, love, art, education – about which economics of the standard kind cannot talk.[137]

However, how would we achieve this, and does the fundamental rights protection in the EU provide a different, more humane and less economic kind of narrative?

4.8 A narrative of human rights

It would be so simple to have a clear human rights discourse or narrative to compare and contrast with the more or less clear market narrative that we identified in the previous section. For instance, the opposition or dichotomy between these two narratives could then be phrased as follows:

> Economists are concerned with the maximization of social welfare, measured by indicators such as gross domestic product; human rights play, at best, an instrumental role. Human rights scholars are concerned with respect for human dignity and the moral restrictions and obligations which follow from this, irrespective of the consequences.[138]

However, this is an oversimplified representation of the situation, which overlooks mutual efforts to include the other's perspective, as well as taking for granted the complexity (and risks) of human rights protection. Indeed, human rights discourse may not fulfil the promise of a holistic protection of

[137] James B White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990), 72-74, referring to a type of economics proposed by Schumacher, which has a larger focus on subsidiarity, well-being and sustainability: Ernst F. Schumacher, *Small is Beautiful: Economics as if People Mattered* (Harper&Row 1975).

[138] Edward Anderson, 'Economics and human rights' in Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing Limited 2017), 94.

humanity in many ways. As observed by McInerney-Lankford, 'human rights legal research appears at times to assume the validity, coherence, legitimacy and objectivity of the normative baselines underpinning human rights law', and is therefore often 'insufficiently critical of the norms, their political content and their value biases (whether implicit or explicit).' Human rights researchers and academics often 'fail to articulate the operating assumptions or organizing principles underpinning them'. The uncritical use of the human rights narrative could lead to the use of human rights as '"moral trumps" that ought to be accepted on faith', and even to the deployment of human rights 'to serve market-purposes or to legitimize existing inequalities.'[139]

Although the term 'human rights discourse' is thrown around quite liberally in academic literature, once we start investigating what authors mean by this notion, things start to get very complex indeed.[140]At a minimum, human rights discourse starts with the actual recognition that there are such things as human rights that have legal value and that are worthy of protection, and that may compete with other legal rights. Such recognition may be not only in legal texts but also in academic, political and journalistic publications. Although human rights seem to have become ubiquitous in recent decades, there was a long time when they were not recognised as such at all. Furthermore, a human rights discourse or narrative may refer to the tendency to frame all kinds of legal, political and societal claims or problems as human rights issues.[141]

There are, furthermore, different versions or functions of a human rights narrative. A first important function is the classic narrative in which an individual requires protection, by means of human rights, against an oppressive state. Note how this narrative also encompasses another narrative, in which human rights ideally not only protect against oppression, but are enabling and empowering in the sense of the development of a person's human potential and freedom, allowing him or her to participate fully in the (socio-political) community of which he or she is a part.[142] This empowerment narrative leads us to a paradox: the state is both the source of an individual's oppression, but also of his or her protection,[143] as it is by means of state institutions such as the law

[139] Siobhán McInerney-Lankford, 'Legal methodologies and human rights research: challenges and opportunities' in Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing Limited 2017), 42-46.

[140] Daniel Augenstein, 'Disagreement—Commonality—Autonomy: EU Fundamental Rights in the Internal Market' (2013) 15 *Cambridge Yearbook of European Legal Studies* 1, 3-5, referring to the difference in views between Dworkin and Waldron.

[141] See Justine Lacroix and Jean-Yves Pranchere, *Human Rights on Trial: a genealogy of the critique of human rights* (Gabrielle Maas tr, Cambridge University Press 2018), 13-21 for a historical overview of the revival of the human rights discourse in the 20th century.

[142] Joseph R Slaughter, 'Enabling Fictions and Novel Subjects: the Bildungsroman and International Human Rights Law' (2006) 121 *PMLA* 1405, 1409-1410.

[143] Domna C Stanton, 'Foreword: ANDs, INs, and BUTs – Humanities in Human Rights' (2005) 121 *PMLA* 1518, 1520.

and court proceedings that an individual can implement and realise his or her human rights claim(s).

The second important function of a human rights narrative, apart from the protection of the individual, is its role in 'state construction'. The 18th century French and US declarations on human rights concerned the rights of a whole people, rather than individual rights, and served as a political rhetoric to found, legitimise and protect a newly established polity.[144] Likewise, it has been observed that the development of a human rights framework within the EU (by the ECJ), has been at least as much about protecting and legitimising the European legal order's self-proclaimed primacy from contestation by national constitutional courts, as it was about the inherent value of protecting an individual's rights.[145]

After our very brief examination of the function of human rights, let us dive into the obvious question of who the 'human' in human rights seems to be. As observed by various commentators, the hegemonic vision of humanity or human subjectivity in contemporary (Western) human rights discourse seems to be the Cartesian or Enlightenment view of the human as individual. This view assumes that human subjectivity is universal, stable and knowable and, to a large extent, pre-social. Moreover, as has been pointed out by, for instance, Slaughter and Addis, this vision of humanity has a rather distinct narrative form: it presents human life as the narrative of the heroic individual who overcomes obstacles presented by either the state or by others in society through 'sheer force of dignified will', aided by the human rights that he or she enjoys due to his or her inherent dignity.[146]

Without claiming to make an exhaustive analysis, a review of three important human rights instruments shows the prevalence of this view. For instance, despite efforts to make the UN Declaration as neutral as possible,[147] this dominant vision of humanity certainly seems to be at work there, emphasising the human subject's rationality.

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[144] Robin Blackburn, 'Reclaiming Human Rights' (2011) 69 *New Left Review* 126.

[145] See for instance Sionaidh Douglas-Scott, 'A Tale of Two Courts' (2006) 43 *Common Market Law Review* 629, 652-654; See also Stijn Smismans, 'Fundamental rights as a Political Myth of the EU' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU law and Human Rights* (Edward Elgar Publishing 2017), 19; See also Daniel Augenstein, 'Disagreement—Commonality—Autonomy: EU Fundamental Rights in the Internal Market' (2013) 15 *Cambridge Yearbook of European Legal Studies* 1, 10; referring to G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595.

[146] Joseph Slaughter, 'A Question of Narration: The Voice in International Human Rights Law' (1997) 19 *Human Rights Quarterly* 406, 410-411; referring to Adeno Addis, 'Individualism, Communitarianism, and the Rights of Ethnic Minorities' (1991) 66 *Notre Dame Law Review* 1219, 1237.

[147] For a discussion on the drafting history of the UN Declaration, see Johannes Mansink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Philadelphia Press 1999), 284-290.

> *Article 1*
> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Moreover, the EU Charter of Fundamental Rights' Preamble emphasises 'the individual' as the 'heart of [the EU's] activities'. However, just like the commentators on the 'market narrative' (as discussed in Section 4.7 above) observed, here too we need to acknowledge that reality shows us that human subjectivity and existence is much more complex, varied, unstable and, moreover, more relational and social than the limited Cartesian view.[148] Accordingly, using this view as the narrative 'fiction' guiding human rights discourse, claims and interpretations, harbours the risk of overlooking and excluding certain categories of people and their ways of living, as well as the interests of the community as a whole. As pointed out by Douglas-Scott, human rights may not produce real justice after all – they may possibly also be used as a tool for conservative, oppressive powers, but 'dressed up' as something beneficial and empowering. Accordingly, human rights may be 'instrumentalised to further European integration',[149] without serving real justice.

Another tension or paradox that is inherent in human rights protection, is its claim for and dependence on universalism: human rights ought to be protected because they represent traits, qualities or values that all humans across the globe allegedly share because of their common humanity – and the importance of respecting and protecting 'the local', the particular, and the 'culturally relative'.[150] Here we could cite Zizek's criticism:

> Paradoxically, I am deprived of human rights at the very moment at which I am reduced to a human being 'in general', and thus become the ideal bearer of those

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[148] See generally for a recent overview of criticism of the human rights discourse Justine Lacroix and Jean-Yves Pranchere, 'Introduction: From the Rights of Man to Human Rights?' in Justine Lacroix and Jean-Yves Pranchere (eds), *Human Rights on Trial: a genealogy of the critique of human rights* (Gabrielle Maas tr, Cambridge University Press 2018).

[149] Sionaidh Douglas-Scott, 'Human rights as a basis for justice in the European Union' (2017) 8 *Transnational Legal Theory* 59, 73-74; See also the concerns expressed by Hans W Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The images of the consumer in EU law: legislation, free movement and competition law* (Hart Publishing 2016), 41.

[150] Domna C Stanton, 'Foreword: ANDs, INs, and BUTs – Humanities in Human Rights' (2005) 121 *PMLA* 1518, 1519-1520; See also Alison L Young, 'EU fundamental rights and judicial reasoning: towards a theory of human rights adjudication for the European Union' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU law and Human Rights* (Edward Elgar Publishing 2017), 140-141; See also Mark Dawson, 'Regenerating Europe through Human Rights? Proceduralism in European Human Rights Law' (2013) 14 *German Law Journal* 651, 652-653.

> 'universal human rights' which belong to me independently of my profession, sex, citizenship, religion, ethnic identity, etc.[151]

Accordingly, the risk of universalism is that such claims could turn into imperialistic ways of speaking for, or in place of, silenced others. The challenge is therefore 'to articulate ways and means of speaking "with" others, as agents in their own right, while at the same time trying to get beyond the limits of the local to make "generalizable" statements and claims that are effective and non-imperial'.[152] But how do we do that, particularly within the given language and structures of the law?

4.9 Conclusion

Speaking about internal market law and fundamental rights protection is more complex and richer than a mere scheme for the application of this or that provision. Moreover, our examination of the development of these legal domains and the respective legal frameworks that are currently in force, has revealed that both the concept of the internal market, already before the introduction of the 'social market economy', but particularly after it, as well as the notion of fundamental rights protection have a mutual openness or permeability.

Furthermore, we have observed that discourses of 'the market' and of human rights may prove to be much closer together in terms of the hegemonic narratives of human subjectivity that seem to be at play in EU law, since they are both in important ways shaped by the Enlightenment view of humanity as rational, self-interested individuals. As observed above, the choices made in a legal system and in a polity in general, such as the choice or the balance between the individual and the community, reveal a certain *nomos*, a normative paradigm or narrative that harbours a certain vision of humanity and, more generally, a certain worldview. These are the lenses through which we see the world and each other, the ordering principles that establish right from wrong, and that dictate social as well as legal norms and expectations. As such, they work the other way around, too: these views, consciously and unconsciously, affect how the Court balances economic interests with fundamental rights, and also how we evaluate these decisions.

Without making concrete, substantive recommendations for one or the other vision of humanity or worldview, I hope that the mere pointing out of the different normative options in thinking about human subjectivity in legal discourse, an awareness of the fact that these are all choices, not unchangeable

[151] Slavoj Zizek, 'Against Human Rights' (2005) 34 *New Left Review* 115, 127.

[152] Domna C Stanton, 'Foreword: ANDs, INs, and BUTs – Humanities in Human Rights' (2005) 121 *PMLA* 1518, 1520; See also Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 29.

natural facts, helps us to ground or guide our subsequent close reading of some examples of ECJ judgments in the following chapters, with a heightened sensitivity for all the ways in which these normative choices may be at play in the language and structures used. Moreover, in the way in which the ECJ speaks about (or excludes) people, it also carves out a role, a 'self', for itself in this social universe, which also be an important aspect of our examination of the Court's legal reasoning. It is exactly this kind of reading, i.e. at the narrative level made up by a complex interplay of facts, sequencing and relational structures such as causal connections and inferences, that the hermeneutic close reading to which our combined reading of White's and Ricoeur's work invites us.

PART III

Configuration

CHAPTER 5

Case Study on Economically Inactive EU Citizens' Access to Social Benefits

5.1 A close reading of EU citizenship case law[1]

EU citizenship is one of the areas in which the economic and the fundamental meet. Furthermore, conceptualising a polity's citizenry is pre-eminently a way of imagining a self: it is an important element in the 'story' of the EU as a political community. It therefore has a strong symbolic value. It is therefore the most obvious place to start asking questions about narratives of self and other in EU law.[2]

Although the original EEC Treaty did not contain a self-standing provision on citizenship, as we will see in Section 5.2, the roots of this legal status can be traced back to the earliest case law of the ECJ. Apart from the legislation and case law on market integration that will be discussed in the following paragraphs, the ECJ made a dramatic first step in the activation of citizens' rights in the famous *Van Gend and Loos* case.[3] In this case the ECJ declared that certain provisions of the EEC Treaty produce direct effects: they bestow rights and duties on individuals, who can, in turn, invoke these provisions before their national courts. More particularly, the ECJ stated that the objective of the EEC Treaty, namely the establishment of a common market, is 'of direct concern to interested parties in the Community', which, according to the ECJ, implies that the EEC Treaty is 'more than an agreement which merely creates mutual obligations between the contracting states.'[4] The ECJ also referred to the preamble of the EEC Treaty, which mentioned the 'peoples' of the Member States, and to the fact that the EEC Treaty sets up specific institutions with sovereign rights. Finally, the ECJ emphasized the democratic aspect of the cooperation between European citizens through the European Parliament and the Economic and Social Committee. Accordingly, the ECJ concludes that

> 'the Community constitutes a new legal order of international law for the benefit of which the states have limit their sovereign rights, (...) and the subjects of which comprise not only Member States but also their nationals. (...) Independently of

[1] This chapter is revised and supplemented, but nevertheless based on an article that was previously published as: Pauline Phoa, ''EU Citizens' Access to Social Benefits: Reality or Fiction? Outlining a Law and Literature Approach to EU citizenship' in Frans Pennings and Martin Seeleib-Kaiser (eds), *EU Citizenship and Social Rights: Entitlements and Impediments to Accessing Welfare* (Edward Elgar Publishing 2018). The use of this material for the present book has been approved by the publisher.

[2] See for instance Percy B Lehning, 'European Citizenship: Towards a European Identity?' (2001) 20 *Law and Philosophy* 239, 241.

[3] Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1, [1963] ECR 3.

[4] The reference to the 'direct concern to interested parties' creates so-called narrative desire: there is an untold story playing in the background. I think we can safely assume that this untold story is about the First and Second World War and the chaos Europe found itself in their wake in the 1950s. The EEC was set up to create stability in the region after these devastating events. The reference of 'direct concern' seems vague, but I think in 1963, the World Wars and their aftermath were still fresh in the minds of the judges of the ECJ.

> the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.'

The ECJ added that 'the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and the Member States.' The ECJ thereby, drastically changed the way in which European law was held to permeate the national legal orders of its Member States and affected the lives of their citizens. Through the *Van Gend&Loos* judgment, the ECJ showed sensitivity for the civil and political rights of the citizens of the EEC Member States. It made the relationship between the EEC, the Member States and their national triangular: the Member States nationals do not only have a direct relationship with their home state, but also with the EEC, instead of just an indirect, derivative one.[5]

In the subsequent years, the Court continued in this vein by expansively interpreting the free movement rights of workers and self-employed persons in light of the effectiveness of market integration in Europe. Since 1992, the legal heritage developed in light of the internal market freedoms has been codified and expanded into the formal status of EU citizenship which was introduced in the Maastricht Treaty, further encouraging intra-EU migration. However, over the years, Member States have increasingly feared that their social welfare systems would be destabilised by this EU migration. This has sparked a heated debate among Member States and legal scholars about migrated EU citizens' access to social rights and the exclusionary nature or effects of domestic social welfare systems,[6] and it has been asserted that the Court's approach to EU citizenship has changed in light of this debate.[7]

While the Court's interpretation of the EU citizenship provisions has for a long time been expansive and emancipatory, with the *Grzelczyk*[8] case as a

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5 Espen D.H. Olsen, 'The origins of European citizenship in the first two decades of European integration', *Journal of European Public Policy* 15:1, p. 49.

6 See for instance the developments noted in 'Editorial Comments: The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare' (2014) 51 *Common Market Law Review* 729.

7 Urška Šadl and Suvi Elina Sankari, 'Why Did the Citizenship Jurisprudence Change?' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and Limits of Free Movement and Solidarity in the EU* (Hart 2017), 91, 109; Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889; Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom' (2017) 54 *Common Market Law Review* 209; Eleanor Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through Its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017), 204.

8 Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, [2001] ECR I-6193.

landmark, a shift seems to have taken place in 2014 with the *Dano*[9] case, leading to a more restrictive line of decisions. This new approach to EU citizens' social rights has left many EU scholars to wonder: where do we go from here? What is left of EU citizenship, what is it to become in the changing political landscape of 21st century Europe?[10] In order to respond to that question, we will here use the reading strategy consisting of three steps that we developed in Chapter 2 to examine the Court's case law. More particularly, we will be paying attention to the resources for meaningful speech offered by the legislative framework and prior case law in the stage of *prefiguration*, close reading the text and trying to notice all the ways in which the ECJ as author offers the reader an experience of each judgment in the stage of *configuration*, and, finally, reflecting on the new ways in which the judgments repeat or remake the resources for meaningful speech about EU citizenship, again offering resources for future judgments in the stage of *refiguration*, drawing, where necessary or appropriate, on what we learned about the ECJ as an institutional author in Chapter 3 and about the domain of the EU internal market and fundamental rights in Chapter 4.

More particularly, to provide a context for the interpretation of these cases, and to explain the choice for these specific texts, I will firstly provide a brief background of the development of EU citizenship (Section 5.2). I will then present my observations from reading the *Grzelczyk* and *Dano* judgments through the lens developed in Chapter 2. To facilitate the understanding of this close reading, I start by giving a brief summary of both cases (Sections 5.3.1 and 5.3.5, respectively). However, I highly recommend the reader to keep a copy of these two judgments to hand, as I will guide you through a close reading of these texts and refer to specific paragraph numbers, without always quoting the paragraphs extensively. The subsequent close reading will be loosely structured along the themes of self and other: a vision of humanity and a worldview more generally, focusing first on the introduction of the protagonists and the social world in which they live, in the statement of the facts (Sections 5.3.2 and 5.3.6, respectively) and on the legal reasoning employed by the ECJ in these judgments (Sections 5.3.3 and 5.3.7, respectively). Finally, Section 5.4 compares the reasoning of both judgments, and Section 5.5 reflects on the refiguration of the *Dano* judgment in subsequent cases.

As the wealth of scholarly writing about EU citizenship shows, there is never full clarity about the meaning of the provisions on EU citizenship in primary and secondary law, or, even more importantly, about the meaning of the Court's

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9 Case C-333/13 *Dano* ECLI:EU:C:2014:2358.

10 See for instance Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889; See also Catherine Jacqueson, 'When benefit tourism enters the Court-room: The consequences of the Dano case' (blog for bEUcitizen, 26 January 2015) accessed ....; See further: Catherine Jacqueson, 'Back to business: the Court in Alimanovic' (blog for bEUcitizen, 7 July 2016) both available at https://www.uu.nl/en/research/beucitizen-european-citizenship-research/blogs lastly accessed 22 December 2020.

decisions in EU citizenship cases.[11] I do not wish to claim that the reading represented here of the *Grzelczyk* and *Dano* judgments is the only correct reading. As explained in Chapter 2, I submit that there is never one true meaning of the texts that I can claim to have discovered.[12] Nevertheless, by sharing my thought process with you, I aim to contribute to a discussion of the importance of these judgments beyond my subjective interpretation of them. As White puts it: '*The best reading thus includes a retelling, one reader's version, which can be checked by other readers against their own*'.[13]

5.2 Prefiguration: the development of EU citizens' social rights

Before we can begin to think about the future of EU citizenship, we must first understand the current state of the law as our starting point, the 'here' in our question 'where do we go from here?'. From a legal point of view, we cannot just reinvent EU citizenship from scratch. Our work – even when we explore new futures for this concept – is bounded by the legal context that is already in place.[14] We have to take into account the existing provisions in EU primary law on EU citizenship (such as Articles 20-23 TFEU), secondary legislation such as the Citizens Directive 2004/38 (hereafter CD), and the Court's case law. This pre-existing legal framework, i.e. what has been said about EU citizenship before, provides material for what can be said about EU citizenship in the future. This means that we have to read and interpret, before we can write.

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[11] Such as Hanneke van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015); Niamh Nic Shuibhne, 'The Resilience of Market Citizenship' (2010) 47 *Common Market Law Review* 1597; Eleanor Spaventa, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *Common Market Law Review* 13; Francis G Jacobs, 'Citizenship of the European Union: A Legal Analysis' (2007) 13 *European Law Journal* 591; Dora Koustakopoulou, 'EU Citizenship: Writing the Future' (2007) 13 *European Law Journal* 623; Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press 2007); Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 *Common Market Law Review* 1245; Catherine Jacqueson, 'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship' (2002) 27 *European Law Review* 260; Síofra O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer 1996); Carlos Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29 *Common Market Law Review* 1137.

[12] Lawrence K Schmidt, *Understanding Hermeneutics* (Routledge 2014), 5.

[13] James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 287.

[14] Cf Hans-Georg Gadamer on "prejudices" in: Hans-Georg Gadamer, *Truth and method* (Joel Weinsheimer and Donald G Marshall trs, Continuum 1989), 273.

5.2.1 1957- 1990s – free movement of workers and persons

From the start of the European integration project, the free movement of persons was an important element of the internal market. However, the free movement rights were initially only granted to workers or self-employed people, and to people in their capacity as consumers or service-providers or recipients. The right to free movement of workers follows the free movement logic of the 'factors of production', i.e. labour, goods, services and capital, that were essential to stimulate economic growth on the European continent after the devastation of the Second World War.[15]

However, more or less from the beginning, the national authorities (and, through the preliminary reference procedure, the ECJ) were confronted with a larger group of people, beyond the definitions of 'worker', that claimed not just the right to move and reside, but also other rights. The ECJ was asked, for instance, whether students, job-seekers, retirees, and family members of workers also enjoyed rights to move and reside under Article 45 TFEU.[16] And did workers (and this nucleus of other people) enjoy, besides a right to move and reside in another Member State, a right to social benefits such as social housing, student allowances for their children, and other social benefits? Over the years, the ECJ construed the internal market freedoms rather broadly, allowing a large number of people to enjoy protection and equal treatment for an extensive range of rights.[17] In the late 1950s, the EEC adopted the first regulation to coordinate social security benefits of migrated workers,[18] since losing one's right to social protection as a consequence of using one's free movement rights was considered to present an obstacle to the free movement of workers. The scope of the competence in the domain of social policy has been extended gradually,

[15] See also Chapter 4.

[16] See for instance case 48/75 *Royer* ECLI:EU:C:1976:57, [1976] ECR 497; case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284, [1986] ECR 2121; case 196/87 *Steymann* ECLI:EU:C:1988:475, [1988] ECR 6159; case C-188/00 *Kurz* ECLI:EU:C:2002:694, [2002] ECR I-10691; case C-415/93 *Bosman* ECLI:EU:C:1995:463, [1995] ECR I-4921; See generally: Francis G Jacobs, 'Citizenship of the European Union: A Legal Analysis' (2007) 13 *European Law Journal* 591.

[17] See for example case 2/74 *Reyners v Belgian State* ECLI:EU:C:1974:68, [1974] ECR 631; Joined cases 117/76 and 16/77 *Ruckdeschel* ECLI:EU:C:1977:160, [1977] ECR 1753, para 7; For indirect discrimination, see case 152/73 *Sotgiu* ECLI:EU:C:1974:13, [1974] ECR 153; case C-350/96 *Clean Car* ECLI:EU:C:1998:205, [1998] ECR I-2521; case C-379/87 *Groener* ECLI:EU:C:1989:599, [1989] ECR 3967; In some cases different treatment may be objectively justified: see for instance ECJ case C-224/00 *Commission v Italy* ECLI:EU:C:2002:185, [2002] ECR I-2965, paras. 20-24; See also Koen Lenaerts and Piet van Nuffel, *Constitutional law of the European Union* (Robert Bray ed, Sweet & Maxwell 2005), 123-124; Paul J G Kapteyn and Pieter VerLoren van Themaat, *Het recht van de Europese Unie en van de Europese Gemeenschappen* (6th edn, Kluwer 2003), 133; and Takis Tridimas, *The General Principles of Community Law* (2nd edn, Oxford University Press 2006), 61, 119-120 and 132.

[18] Regulation 3 OJ 1958/30; Regulation 3 was succeeded by Regulation 1408/71, OJ L 1971/149 (1972); and Regulation 883/2004, OJ L 2004/166 respectively.

and the ECJ has contributed in significant ways to this development. However, by the late 1980s, the concept of the free movement of workers seemed to have been stretched to a much larger number of people and affected a larger category of rights than the drafters of the original EEC Treaty had perhaps anticipated. While the EU legislature had adopted several instruments of secondary legislation, such as Regulation 1612/68,[19] these instruments and the primary rights that the EEC Treaty contained did not offer an adequate protection of the rights of the growing number of people who had used their free movement rights and were actually, on a more or less permanent basis, living and working, loving, procreating, and dying, in Member States other than their own. Therefore, during the late 1980s and early 1990s there was a renewed attention for the social dimension of the internal market, leading to the adoption of the (non-binding) Community Charter of Basic Social Rights for Workers (Social Charter) and a related 'action programme' at the 1989 Strasbourg summit.[20] Furthermore, the SEA had introduced provisions for the harmonisation of health and safety conditions at work, for negotiating collective agreements on European level, and for a Community policy for economic and social cohesion.

5.2.2 1992 – early 2000s: putting flesh on the bones of EU citizenship

Although there had been various earlier endeavours to create European citizenship,[21] it was on a concrete proposal of the Spanish delegation at the Intergovernmental Conferences in 1990-1991,[22] that the Maastricht Treaty of 1992 introduced the concept of EU citizenship in the EC Treaty by stating, in what is now Article 20 TFEU: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union'. The Amsterdam Treaty later added: 'Citizenship of the Union shall complement and not replace national citizenship'. The Lisbon Treaty slightly amended this addition, substituting 'complement' for 'be additional to'. Several subsequent Articles confer specific rights, such as the right to move and reside

[19] See also Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity OJ L 180/28; and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students OJ L 317/59.

[20] Mary Daly, 'The dynamics of European Union social policy', in: Patricia Kennett and Noemi Lendvai-Bainton (eds.) *Handbook of European Social Policy* (Edward Elgar Publishing 2017), 97-99.

[21] See for instance the 'Tindemans report' after the 1974 Paris summit: Report by Leo Tindemans, Prime Minister of Belgium, to the European Council. Bulletin of the European Communities, Supplement 1/76. Available at http://aei.pitt.edu/942/ lastly accessed 22 December 2020.

[22] See also the discussion by Hanneke van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015), 9 referring to 'The Road to European Citizenship', the Spanish Memorandum for the Intergovernmental Conference on Political Union, European Citizenship, 21 February 1991.

freely within the territory of the Member States (Article 21 TFEU), and various political rights (Articles 22-24 TFEU).

Meanwhile, the Amsterdam Treaty had codified the steps taken on social policy so far in what are now, inter alia, Articles 151-161 TFEU. With the adoption of Regulation 883/2004, the scope of social security coordination was extended from workers and self-employed persons, to economically inactive EU citizens, such as jobseekers, students, pensioners, disabled persons and family members.[23] The Lisbon Treaty meant further progress and consolidation, with the introduction of the notion of social market economy and the emphasis on the EU's social objectives in Article 3 TEU. Moreover, the Charter codified several social and socio-economic rights and principles. For instance, Article 15 Charter states that every citizen of the EU has 'the freedom to seek employment, to work, to exercise the right to establishment and to provide services in any Member State'. Several other social rights are laid down in Articles 26-35 Charter. Article 34 Charter states on social benefits: 'Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.' And also: 'the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.'[24] However, the EU's social dimension remains somewhat piecemeal due to the Member States' continuing competences in this field.[25]

The introduction of the concept of European citizenship was a key part of the political symbolism and rhetoric of the transition from the European Economic Community to the European Community and finally to the European Union.[26] The legal change brought about by these provisions is first of all that they elevate the rights of entry and residence of certain groups of citizens from their basis in secondary legislation, such as the previously mentioned regulations and directives, to a Treaty footing. Another important change brought about by the introduction of the provisions on EU citizenship in the Maastricht Treaty, is that the rights emanating from European citizenship concern not only the economically active Member State nationals who have exercised their rights of free movement, which is a relatively small percentage of Europe's population, but also nationals who are not economically active, and those who were not, strictly speaking, protected under the secondary legislation mentioned previously.[27]

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[23] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 2004/166.

[24] Cecilia Bruzelius and Martin Seeleib-Kaiser, 'EU Citizenship and Social Rights', in: Patricia Kennett and Noemi Lendvai-Bainton (eds.), *Handbook of European Social Policy* (Edward Elgar Publishing 2017), 156.

[25] Frans Pennings, 'EU Citizenship: Access to Social Benefits in Other EU Member States' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations*, Issue 3, 333.

[26] Paul P Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (4th edn, Oxford University Press 2007), 847.

[27] Paul P Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (4th edn, Oxford University Press 2007), 855.

Much of the logic, legal concepts and approaches that were developed with regard to the free movement of workers and the self-employed, was continued in the legal approach to EU citizenship. So much so, that in academic publications the question was repeatedly raised as to whether EU citizenship had an added value compared with the rights protected under the classic internal provisions.[28] Were the rights to move and reside that Articles 20 and 21 TFEU bestowed upon EU citizens, self-standing rights, or were they another form of 'market citizenship' that was strongly linked to the internal market?[29] It may come as no surprise to learn that the ECJ played a crucial role in 'fleshing out' EU citizenship, in cases such as *Wijssenbeek* and *Martinez Sala*,[30] in which it decided that economically inactive EU citizens are entitled to have equal access to social benefits if they are lawfully residing within a Member State.

The *Martinez Sala* case was received as a revolutionary judgment, but legal commentators expressed their concern as well. Tomuschat criticises the ECJ's judgment for introducing a 'radical' or 'blanket' concept of equality, which would jeopardise the social security systems of the Member States.[31] Fries and Shaw have called *Martinez Sala*'s key contribution to EU law the 'equal treatment guarantee' it gave to migrated EU citizens, despite the lack of competence of the EU to raise revenue for the welfare state or to distribute social assistance. They predicted that this development would either lead to a change in the way in which solidarity is conceptualised, normalising intra-EU migrants and their claims to social assistance, or it would lead to a 'radical rethink' of the scope and level of national welfare regimes, possibly leading to a 'race to the bottom'.[32] Finally, O'Leary noted that *Martinez Sala* seemed to 'explode the linkages' with performing an economic activity that EU law usually required in order to grant equal treatment rights.[33] She pointed out, furthermore, that the ECJ failed to engage with the question concerning on what basis (EU or national law) Mrs Martinez Sala's residence in Germany was actually lawful.[34] In subsequent

[28] See for instance Michelle Everson, 'The legacy of the market citizen' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995).

[29] See also the critical discussions by Catherine Jacqueson, 'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship' (2002) 27 *European Law Review* 260; and by Niamh Nic Shuibhne, 'The Resilience of Market Citizenship' (2010) 47 *Common Market Law Review* 1597.

[30] Case C-85/96 *Martinez Sala* ECLI:EU:C:1998:217 [1998] ECR I-2691; and case C-378/97 *Wijssenbeek* ECLI:EU:C:1999:439 [1999] ECR I-6207.

[31] Christian Tomuschat, 'Case C-85/96, María Martínez Sala v. Freistaat Bayern, Judgment of 12 May 1998, Full Court. [1998] ECR I-2691' (2000) 37 *Common Market Law Review* 449, 456-457.

[32] Sybilla Fries and Jo Shaw, 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 *European Public Law* 533, 558.

[33] Siofra O'Leary, 'Putting flesh on the bones of European Union citizenship' (1999) 24 *European Law Review* 68, 77-78.

[34] Siofra O'Leary, 'Putting flesh on the bones of European Union citizenship' (1999) 24 *European Law Review* 68, 78.

literature, the *Martinez Sala* judgment was held to mean that the basis of lawful residence was irrelevant: once lawfully resident in another Member State, an EU citizen could rely on the principle of equal treatment provided by EU law.[35]

The Court's approach to EU citizens' rights of residence and equal treatment was further developed in the *Grzelczyk* case.[36] The *Grzelczyk* judgment was the first in which the ECJ stated that

> Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[37]

This formula became a standard feature, a 'building block' in the ECJ's EU citizenship jurisprudence. In *Grzelczyk*, the ECJ interpreted the right to equal treatment broadly in light of the prohibition of discrimination, enshrined in Article 18 TFEU, and the citizenship provisions of Articles 20 and 21 TFEU.

The judgment in *Grzelczyk* marked a turning point in the ECJ's approach to EU citizens' rights, also outside or beyond the economic – internal market – context,[38] as Grzelczyk was not economically active when he applied for the social benefit. The ECJ confirmed its approach in *Grzelczyk* in several subsequent judgments on EU citizenship rights,[39] and it subsequently developed a consistent scheme of legal review in which national restrictions on EU citizens' rights had to be (i) expressly provided for, and the ECJ (and national courts) reviewed these measures against (ii) directly effective, (iii) primary rights (i.e. the provisions on EU citizenship and equal treatment in the TFEU), and the ECJ required (iv) an individual assessment of the circumstances of each case, (v) respecting general principles of EU law, most notably the principle of proportionality.[40] In most of these cases, the ECJ used EU citizenship to either broaden the scope of the non-discrimination principle, or as an independent source of

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35 See for instance Hanneke van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015), 60/para. 3.4.1.5.

36 Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, [2001] ECR I-6193.

37 Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, [2001] ECR I-6193, para 31.

38 See for instance Editorial comments, 'Two-speed European Citizenship? Can the Lisbon Treaty help close the gap?' (2008) 45 *Common Market Law Review* 1; Samantha Besson and André Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box' (2007) 13 *European Law Journal* 573, 574.

39 See, for instance, case C-413/99 *Baumbast* ECLI:EU:C:2002:493, [2002] ECR I-7091; Case C-456/02 *Trojani* ECLI:EU:C:2004:488, [2004] ECR I-7573; Case C–138/02 *Collins* ECLI:EU:C:2004:172, [2004] ECR I-2703; and case C-209/03 *Bidar* ECLI:EU:C:2005:169, [2005] ECR I-2119.

40 See for the identification of these five elements in the Court's foundational case law on EU citizenship: Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889, 894.

rights.[41] Furthermore, in cases such as *D'Hoop*,[42] *Bidar*,[43] *Morgan*[44] and *Förster*,[45] the ECJ developed a line of reasoning according to which an EU citizen's access to social benefits, such as unemployment benefits or student allowances, was dependent on an assessment of a 'genuine link with' or a 'certain degree of integration in' the host Member State. These factors were taken into account as part of the individual proportionality assessment.

Thus, in the first decade of its formal existence, it seemed to be all good news for EU citizenship. With the proclamation in 2000 of the Charter of Fundamental Rights, citizens' rights were even framed as fundamental rights,[46] although the Charter only became formally binding in 2009. Various commentators concluded that it seemed that European citizenship was slowly becoming a direct and autonomous source of rights outside the economic context.[47]

5.2.3 2004-2014: adoption of the Citizens' Directive and continuation of the ECJ's approach

In 2004, the EU adopted Directive 2004/38/EC (the 'Citizens' Directive', CD), which largely codified the interpretation that the ECJ had given so far to EU citizens' rights under the Treaty provisions (predominantly Art. 21 TFEU). For instance, recital 3 of the Preamble to the CD cites the already mentioned '*Grzelczyk* formula'. However, the CD also set certain boundaries in that the right to equal treatment of economically inactive EU citizens was subject to a scale: the longer the duration of the residence, the stronger the equality rights enjoyed by the migrated EU citizen. This was, however, in line with the ECJ's previously mentioned case law on the 'genuine degree of integration', such as *Bidar*.[48]

Nevertheless, after the adoption and entry into force of the CD, the ECJ continued the approach that it had developed since *Grzelczyk*,[49] and the CD

[41] See Francis G Jacobs, 'Citizenship of the European Union: A Legal Analysis' (2007) 13 *European Law Journal* 591, 593.

[42] Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, [2002] ECR I-6191.

[43] Case C-209/03 *Bidar* ECLI:EU:C:2005:169, [2005] ECR I-2119.

[44] Joined cases C-11/06 and C-12/06 *Morgan and Bucher* ECLI:EU:C:2007:626, [2007] ECR I-9161.

[45] Case C-158/07 *Förster* ECLI:EU:C:2008:630, [2008] ECR I-8507.

[46] Title V: Article 39-46 Charter.

[47] See for instance Editorial comments, 'Two-speed European Citizenship? Can the Lisbon Treaty help close the gap?' (2008) 45 *Common Market Law Review* 1; Samantha Besson and André Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box' (2007) 13 *European Law Journal* 573, 574.

[48] Case C-209/03 *Bidar* ECLI:EU:C:2005:169, [2005] ECR I-2119.

[49] Case C-520/04 *Turpeinen* ECLI:EU:C:2006:703, [2006] ECR I-10685, para 18; Case C-76/05 *Schwarz* ECLI:EU:C:2007:492, [2007] ECR I-6849, para 86; Case C-103/08 *Gottwald* ECLI:EU:C:2009:597, [2009] ECR I-9117, para 23; Case C-503/09 *Stewart* ECLI:EU:C:2011:500, [2011] ECR I-6497; Case C-46/12 *N*. ECLI:EU:C:2013:97, para. 27.

therefore did not seem to be a 'game-changer' in the legal framework on EU citizenship.[50] Furthermore, the ECJ added an argument in its standard 'building blocks' for EU citizenship judgments, namely to refer to recital 3 of the CD in order to identify the particular objective of the Directive: to facilitate and strengthen free movement.[51]

In 2013 in *Brey*[52] – a case about a retired German couple claiming a pension supplement in Austria where they had recently migrated – the ECJ acknowledged that the right to free movement and residence for economically inactive EU citizens was not unconditional.[53] Member States may require, for a period of residence longer than three months, that the EU citizen (and family members) has comprehensive sickness insurance and sufficient resources so that he/she does not become a burden on the social assistance system of the host Member State.[54] The condition of having sufficient resources is, according to the ECJ in *Brey*, 'based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances'.[55] However, derogations from the general rule of free movement and residence need to be interpreted narrowly and 'in compliance with the limits imposed by EU law and the principle of proportionality'.[56] Accordingly, national authorities should make an individual assessment of whether the grant of the social benefit in question places an unreasonable burden on the social assistance system as a whole and, as part of that assessment, take into consideration a whole range of factors such as 'whether the person concerned is experiencing temporary difficulties', 'the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him'.[57] An automatic denial of the social benefit based on a presumption of insufficient resources was not acceptable. *Brey* was followed by *Dano*, which we will discuss in much more detail in the next section.

As the previous paragraphs show, EU citizenship has had a long history of development of the free movement of people in the context of the internal market, and EU citizenship case law has experienced remarkable 'turning points': the addition of EU citizenship in the Maastricht Treaty, the proclaiming by the ECJ of the *Grzelczyk* formula, the adoption of substantial secondary

[50] Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889, 903.

[51] See for instance Case C-127/08 *Metock* ECLI:EU:C:2008:449, [2008] ECR I-6241, para. 59 and 82; Case C-162/09 *Lassal* ECLI:EU:C:2010:592, [2010] ECR I-9217, para 30; Case C-434/09 *McCarthy* ECLI:EU:C:2011:277, [2011] ECR I-3375; and case C-140/12 *Brey* ECLI:EU:C:2013:565, para. 71.

[52] Case C-140/12 *Brey* ECLI:EU:C:2013:565.

[53] Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 46.

[54] Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 47.

[55] Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 55.

[56] Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 70.

[57] Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 69 and 72.

legislation in the form of the CD, its recognition as a fundamental right in the Charter of Fundamental Rights, and much case law in which the ECJ solidified a more or less schematic approach to EU citizens' rights.[58]

To summarise, in 2001 the ECJ's *Grzelczyk* judgment marked a turning point in the Court's narrative on EU citizenship. The specific use of language in its statement that 'EU citizenship is destined to be the fundamental status of the nationals of the Member States…' seemed to convey the ECJ's ambitions for EU citizenship. Over the course of a decade, these ambitions seemed to be slowly but steadily matched in legislation and policy, and also by the ECJ itself in each new case on EU citizenship. However, as we will see, the Court's decision in the *Dano* case marks a new turning point, this time in another direction. Instead of accompanying the statement of '…destined to be the fundamental status…' with legal reasoning and an outcome that supported the expansion of EU citizens' rights, the ECJ seemed to choose a more restrictive path. More recently, in *Alimanovic*,[59] *Garcia-Nieto*,[60] and *Commission v UK*[61] the ECJ has continued its new, more restrictive line of reasoning in these cases concerning the access of EU citizens to social benefits in their host Member States, even abandoning the *Grzelczyk* formula of hailing EU citizenship as 'destined to be the fundamental status of the nationals of the Member States'. These developments make the *Grzelczyk* and the *Dano* cases as the start and, perhaps, the end of a legal narrative about EU citizenship, interesting to analyse and compare from the hermeneutical perspective which we defined in Chapter 2.

5.3 Configuration: reading *Grzelczyk* and *Dano*

5.3.1 *Grzelczyk* – summary

Rudy Grzelczyk was a French national who began university studies in physical education in 1995 in Belgium. During his first three years in Belgium, he supported himself financially by taking up minor jobs and by obtaining credit facilities. In his fourth and final year, he applied for the Belgian 'minimex', a minimum subsistence allowance. The Public Social Assistance Centre (Centres Publics d'Action Sociale) (hereafter CPAS) initially granted the allowance, but after a refusal, by the competent federal Minister, of reimbursement of the sum paid to Mr Grzelczyk, it withdrew the allowance, based on the

[58] See article Wollenschläger, who is optimistic about the move from market citizenship towards a fuller, more inclusive Union citizenship: Ferdinand Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration', (2011) 17 *European Law Journal*, 1-34.

[59] Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597.

[60] Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114.

[61] Case C-308/14 *Commission v. UK* ECLI:EU:C:2016:436.

French nationality of Mr Grzelczyk and the fact that he was not considered to be a 'worker', but was enrolled as a student.

The ECJ, taking a rather different approach from the one suggested by AG Alber,[62] broadly interpreted the right to equal treatment enjoyed by students by linking the prohibition of discrimination, enshrined in Article 18 TFEU, to the citizenship provisions of Article 20 TFEU and following Articles, without referring to the free movement of workers. For the first time, the ECJ referred to EU citizenship as 'destined to be the fundamental status of the nationals of the Member States'. The Court furthermore stated that a certain degree of financial solidarity could be expected of the Member States. It concluded therefore, that when a Member State national is lawfully resident in another Member State, there can be no discrimination as to the access to a social advantage.

5.3.2 *Grzelczyk* – facts

The first paragraph (paragraph 10) of the statement of facts presents the following information about Rudy Grzelczyk to the reader: he is male, French, and he pursues a university education. The second sentence of paragraph 10 mentions that, during the first three years of his studies, he took up various jobs and credit facilities to pay for his maintenance, accommodation and studies. This is apparently essential information about 'the person' Grzelczyk.

In point 11, the Court refers to the findings of the CPAS that

> Mr Grzelczyk had worked hard to finance his studies, but that his final academic year, involving the writing of a dissertation and the completion of a qualifying period of practical training, would be more demanding than the previous years.

Consider the role which this background information plays in the whole of the judgment, and the tone with which it is written: is it neutral, or does it create a feeling of sympathy for a hard-working student, thus contributing to a positive framing of the facts of this case? Furthermore, note that paragraph 11 informs us that the CPAS initially granted Mr Grzelczyk the minimex, so we learn that this Belgian institution was not even a real opponent of Rudy Grzelczyk.

As I read it, the apparent positive framing of Mr Grzelczyk's position is reinforced by paragraph 14, in which the Court notes that, during the legal proceedings before the Belgian Labour Tribunal, that court granted Mr Grzelczyk a flat-rate monthly allowance by way of an interim measure because it recognised 'the urgency of Mr Grzelczyk's situation'.

Under the separate heading 'Preliminary remarks' (paragraphs 15-18), the Court notes in paragraph 15 that during the proceedings considerable attention has been paid to the relevance of the fact that Mr Grzelczyk has taken on various jobs during the first three years of his studies. Even though the Court announces that it will only answer the questions as they have been asked by the

[62] Case C-184/99 *Grzelczyk* ECLI:EU:C:2000:519 [2000], Opinion of AG Alber.

national court (i.e. pertaining to the last year of his studies, during which he did not work), and will leave the factual assessment as to whether Mr Grzelczyk actually qualifies as a worker to the national court (paragraph 18), it places an emphasis, repeatedly, on the fact that Mr Grzelczyk has worked and done his best to support himself financially.[63] In these paragraphs, the ECJ deals with a practical problem: should we write about all the things that have been discussed in detail during the proceedings, or should we leave out certain points of debate if they play no role in the actual solution of the case? And if we decide to mention a point of debate, as the ECJ does here in paragraphs15-18, as a 'preliminary remark', how do we go about writing about this issue? Is it a normatively innocent thing to do, adding such preliminary remarks before starting the actual judgment?

5.3.3 *Grzelczyk* – legal reasoning

When we look at the judgment proper, we notice that the ECJ starts by discussing Mr Grzelczyk's case in the context of Regulation 1612/68 on the free movement of workers and an earlier judgment on the Belgian minimex, namely the *Hoeckx* case (paragraphs 27-29). That case concerned an earlier version of the Belgian law on the minimex, which had already been the subject of dispute because it required a minimum period of residence in Belgium. The amended law at issue in the *Grzelczyk* case did not have this residence requirement, but it limited entitlement to the minimex to those people who fell within the scope of Regulation 1612/68, i.e. who qualified as 'workers'. The *Hoeckx* case and Regulation 1612/68 represent a storyline that was thus far familiar to the Court: the free movement of workers had been part of the four fundamental freedoms since the establishment of the EEC in 1957. However, Mr Grzelczyk did not fall within the scope of the concept 'worker' from a legal point of view, which means that the language employed thus far, of free movement of workers, would not suffice to meaningfully answer the preliminary questions. The Court had to find a way to reconstitute its way of speaking about 'the human' in EU law. It proceeded as follows.

In paragraph 29 the ECJ observes that a Belgian person who found himself in the same position as Mr Grzelczyk, would receive the financial benefit that Mr Grzelczyk was denied. The Court concludes that the case concerns discrimination on the ground of nationality, the prohibition of which is central to the idea of the EU's internal market as we have seen in Chapter 4, thereby raising the stakes in this judgment.

Subsequently, in paragraph 30, by referring to Article 6 EC (now Article 18 TFEU), i.e. the general prohibition of discrimination based on nationality, and by adding that this provision 'must be read in conjunction with the provisions

[63] It is at this point relevant to know that AG Alber devoted a significant part of his Opinion to an assessment of whether Mr Grzelczyk qualified as a worker, and he concluded that in principle, he would. Case C-184/99 *Grzelczyk* ECLI:EU:C:2000:519 [2000], Opinion of AG Alber, paras 65-75.

[...] concerning citizenship of the Union', the Court moves from the discussion of secondary law, i.e. Regulation 1612/68, to the level of primary – Treaty – law.

The Court then goes on, in paragraph 31, to make its now famous statement:

> Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.

Note how the stakes that have been raised in paragraphs 29 and 30 are now brought to a climax with this formula, which was entirely novel, i.e. its terms were not provided for by the legal provision at all. In fact, it was quite the contrary, as Article 20 TFEU stated that EU citizenship will 'complement' (or later: 'be additional to') national citizenship, and not replace it. The Treaty text thus does not speak of a 'destiny' of EU citizenship to be a 'fundamental status'. We see the ECJ at work in creating a new way of speaking, a new kind of 'language' for EU citizenship, and it claims authority for its novel formula.[64] Something of the Court's own 'voice' can be heard in this passage, the ECJ uses the creative space that this judgment permitted. Imagine yourself in the position of drafting a judgment at the Court: what is the tone of the *Grzelczyk* formula? It is a solemn proclamation, and as such it is a kind of break in the style and tone of the judgment so far.

After this statement, the Court refers in paragraph 32 to the *Martinez Sala* case. The reference to this precedent embeds the *Grzelczyk* case – and its newly constituted language of EU citizenship as a fundamental status – in a pre-existing line of case law, according to which a lawfully resident EU citizen can rely on the general provision on equal treatment of Article 6 EC in all situations which fall within the scope *ratione materiae* of EU law. In paragraph 33, the Court adds that those situations include 'the exercise of fundamental freedoms guaranteed by the Treaty', i.e. the four freedoms and the citizen's right to move and reside in other Member States. Note how the use in this paragraph of the word 'fundamental' for the four economic freedoms emphasises the importance of the free movement provisions, and seems to semantically tie the 'fundamental status/ EU citizenship' formula of paragraph 31 to the longer established free movement provisions.

In paragraphs 34, 35 and 39, the Court employs a remarkable line of legal reasoning: referring to older case law, the changes in the EC Treaty, and the content of Directive 93/96. In paragraph 35, the ECJ considers that there is 'nothing in the amended text...to suggest' that students lose their EU citizenship rights. The ECJ continues by arguing that, although Directive 93/96 does not establish a right to social assistance in the Member State of destination, there are 'no provisions...that preclude [students] from receiving social security

[64] See for an elaborate examination of the evolution of the Grzelczyk-formula Thomas Burri, *The Greatest Possible Freedom- Interpretive formulas and their spin in the free movement case law* (Nomos 2015), 524-550.

benefits.' Note how the Court seems to be consciously looking for interpretative space in these two paragraphs: there is nothing to exclude students in the specific legislation, so it must be possible for them to have a right to social benefits based on the more general Treaty provisions on EU citizenship. This expansive legal reasoning for the EU citizen's claim is in stark contrast with traditional legal reasoning which is usually more conservative and looks for legal obligations, not discretion.

Consider also the line of argumentation that the ECJ builds in paragraphs 37, 38 and 40-45. In paragraph 37, the Court recalls that Article 8a(1) EC (now Article 21(1) TFEU) allows certain limitations and conditions to be set on the right to move and reside freely within the territory of the Member States. In that light, Directive 93/96, which governed the right of residence for students at the time of the *Grzelczyk* judgment, permits Member States to require that the people at issue have sufficient resources, in order to avoid becoming an unreasonable burden on the social assistance system of the host Member State during their stay. However, note in paragraph 44 how the Court argues that the use of the word 'unreasonable' means that EU law accepts a certain degree of financial solidarity between Member States for their nationals, particularly when their financial difficulties are temporary. Furthermore, the Court adds, in paragraph 45, that a student's financial position 'may change with the passage of time', and that the truthfulness of a student's declaration should be assessed only as of the time when it was made. In putting the matter in this way, the Court complements its expansive interpretation of Mr Grzelczyk's rights identified above, with a narrow interpretation of the possibilities for Member States to restrict both free movement and equal treatment of economically inactive EU citizens.

5.3.4 Subconclusion

What experience does the *Grzelczyk* judgment offer its readers, what do we observe is at play in the ECJ's novel '*Grzelczyk* formula' and the whole of the legal reasoning? Let us pause for a moment and take stock of the attitudes towards the law and the resources for meaningful speech offered by *Grzelczyk*.

First of all, the Court's account of, and interaction with, the facts of the *Grzelczyk* case is characterised by a certain movement and framing that is noticeably, undeniably positive. The Court's attitude towards the law is one of opportunities and possibilities, and one could argue that its expansive reasoning about Mr Grzelczyk's claim for equal treatment as regards access to social benefits, as well as its narrow reading of derogations or restrictions on this right to equal treatment, is a performance of the fundamentality of EU citizenship. Could we say that therefore the whole of the reasoning is narratively and rhetorically coherent?

There is something more which we need to consider about the *Grzelczyk* formula of paragraph 31: what is the nature of a statement, a proclamation like

this? It invites new ways of imagining the EU's polity, with an active citizenry at its heart. Perhaps it continues the Court's vision in *Van Gend & Loos*, which, as observed by former AG Francis Jacobs, already contained 'embryonic forms of Union citizenship'.[65] However, when one speaks in such a way, it is in absolutes, claiming universality and certainty. However ambitious and admirable this may be, it is at once inspiring and deeply problematic, given the multiplicity of interests, values, cultures and personal circumstances in the EU. Such a formulation can offer a set of ideals, a vision of law against which government action can be tested, but they will remain, at the same time, radically imperfect.[66]

As we have seen, the *Grzelczyk* judgment offered a positive account of the EU citizen's factual circumstances and it compared the EU citizen to a national of the host Member State thereby acknowledging the basic comparability of both. Furthermore, the Court delivered an expansive interpretation of citizens' rights by relying on a 'lex superior' argument based on the Treaty provision on EU citizenship and equal treatment, leading to the *Grzelczyk* formula. Moreover, the Court complemented this line of reasoning with a narrow interpretation of restrictions on EU citizens' rights, and by expecting a certain degree of solidarity among Member States. As noted in Section 5.2.2, this movement in reasoning was codified in a 'scheme' of reasoning in subsequent cases. There had been no real reason to doubt the viability and validity of this tradition of reasoning about EU citizenship, until the *Dano* case.

The central problem that the ECJ faced in the *Dano* case was how to relate 2014, when there was a discussion at play in the larger political context at the time of the proceedings,[67] to the pre-existing materials offered by the 'narrative' in EU law about EU citizenship that were, in such an important way, shaped by the *Grzelczyk* judgment, with their claims to authority. If it proves to be necessary to change course, how does one do that, and how does one claim authority for the new course chosen?[68] In addition, how are we to judge, by what stan-

[65] See Francis G Jacobs, 'Citizenship of the European Union: A Legal Analysis' (2007) 13 *European Law Journal* 591, 592-593; In Van Gend & Loos the ECJ considered that: 'the Community constitutes a new legal order of international law for the benefit of which the states have limit their sovereign rights, (...) and the subjects of which comprise not only Member States but also their nationals. (...) Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.' See also Ole Due, 'The Law- Making Role of the European Court of Justice Considered in Particular from the Perspective of Individuals and Undertakings' (1994) 63 *Nordic Journal of International Law* 123.

[66] See James B White, *Acts of Hope* (The University of Chicago Press 1994), 188.

[67] See, for instance, Michael Blauberger and Susanne K Schmidt, 'Welfare migration? Free movement of EU citizens and access to social benefits' (2014) 1(3) *Research and Politics*, 1-7.

[68] Carter and Moritz are among the very few academics that have asserted that the Dano judgment is actually not such a revolutionary judgment, but that it is rather the logical evolution of the Court's approach to EU citizen's right to equal treatment after the adoption and entry into force of the CD and the legislative choice made therein. See Daniel Carter and Jesse Moritz, 'The "Dano Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3 *European Papers* 1179. However,

dards, whether the ECJ is successful in this 'refiguration' of the EU citizenship legal narrative? Let us turn now to the *Dano* case, and examine how the Court takes up this challenge.

5.3.5 *Dano* – summary

Elisabeta Dano and her son Florin were both Romanian nationals, who entered Germany in 2010, and lived with Ms Dano's sister in the city of Leipzig, where she was issued with a residence certificate of unlimited duration. Ms Dano had no diplomas, nor professional training or work experience and her command of German was very limited. She received child benefit and an advance on maintenance payments, but she also applied for the grant of benefits under the German Social Code. These benefits were refused because they were not intended for foreign nationals who were not workers or self-employed and who did not enjoy the right to free movement under the German law on the free movement of EU citizens, for the first three months of their residence in Germany.

Although the ECJ repeated its *Grzelczyk* statement that EU citizenship 'is destined to be the fundamental status of nationals of the Member States…' at the beginning of its answer to the preliminary questions, it actually answered the questions by reference to the specific Directives 2004/38 and 883/2004, as 'more specific expressions' of the prohibition of discrimination on grounds of nationality of Article 18 TFEU. The Court concluded that Ms Dano and her son did not have sufficient resources and could therefore not claim a right of residence under the CD, nor the corresponding right to equal treatment. The Court ruled that, in such circumstances, EU law allowed Member States to exclude people that find themselves in the same situation as Ms Dano from entitlement to certain benefits. Furthermore, the Court decided that Elisabeta and Florin Dano could not rely on the Charter of Fundamental Rights, since Member States are not implementing EU law when determining the conditions for the right to such benefits.

5.3.6 *Dano* – facts

Paragraphs 35-45 contain the facts of the case, which is where we will start. In paragraph 35 of the statement of facts in the *Dano* case, the Court introduces Elisabeta Dano and her son Florin by referring to their ages and origins: Elisabeta Dano was born in 1989, her son Florin was born in Germany in 2009. They were both Romanian nationals. This invites the

as noted by Niamh Nic Shuibhne, if it is true that a change in approach is warranted (and she does acknowledge the imperfections of the CD), then from the perspective of quality of law and legal reasoning, the Court should at least address its own previous case law and explain why a change is needed. See Niamh Nic Shuibhne, 'What I tell you three times is true: Lawful Residence and Equal Treatment after Dano' (2016) 23 *Maastricht Journal of European and Comparative Law* 908, 923 and 936.

question as to why their ages are relevant. Knowing their ages, if anything, permits the reader to calculate that Ms Dano had her son at a relatively young age.

In the second sentence of paragraph 35, the Court gives us more information that is apparently relevant about 'the person' Dano, namely about her move to Germany, by referring to the fact that, according to the findings of the national court, Ms Dano last entered Germany on 10 November 2010. However, as the Court continues in paragraph 36, the city of Leipzig issued Ms Dano a residence certificate with unlimited duration for EU nationals, on 19 July 2011, with 27 June 2011 as the date of entry into Germany. The reader is left wondering how the latter date relates to the previous date of 10 November 2010. What was the status of Ms Dano's residence between 10 November 2010 and 27 June 2011? Furthermore, the Court adds in paragraph 35 that the city of Leipzig issued Ms Dano a duplicate residence certificate in 2013. Why is this information relevant? Is it a confirmation of her right of residence in 2013, which would make the outcome of the Court's decision (that she did not have a right of residence) wrong in the light of the *Martinez Sala* judgment? What is the effect of mentioning this fact, when it is not relevant in the subsequent legal reasoning of the ECJ? What does it seem to say about 'the person' Dano, about her character? To certain readers, it may signal that Ms Dano is careless, because she apparently needed a duplicate and one reason for needing a duplicate is that you have lost the original.

In paragraph 37, it is stated that Ms Dano and her son have been living with her sister since their arrival in Leipzig, and that she 'provides for them materially'. The Court includes these facts in its summary, but they do not seem to have been of any relevance in the actual judgment. What is the effect of mentioning these facts? On the one hand, it would be a reason not to consider Elisabeta and Florin to be a burden on German society, since her sister is taking care of her. On the other hand, these facts may also be seen as framing the case in such a way that it appears as though Ms Dano uses her sister's charity in the same way that she is trying to use the German system of social benefits.

Paragraph 38 enumerates the benefits that Ms Dano already receives. In this paragraph, the Court also remarks that the identity of Florin's father is unknown. Again, one could ask, what the relevance is of this remark. The identity or nationality of Florin's father has apparently not been used as an argument to claim the benefit in Germany. As a matter of fact, in the ECJ's legal reasoning, the rights of Florin as an EU citizen are not taken into account at all, unlike the rights of the children in, for instance, the *Zambrano* case.[69] One cannot help but notice that one of the possible effects of the comment about the unknown father is that it stereotypes a Romanian, uneducated young woman whose (sexual) behaviour is irresponsible. At this point it is interesting to note that AG Wathelet did not mention the identity of Florin's father at all. Moreover,

[69] Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, [2011] ECR I-1177; In this case, a right of residence in the EU for a third country national parent was deemed to be derived from the EU citizenship rights of his two children who were EU citizens.

in a footnote to paragraph 34 of his Opinion, AG Wathelet points out that the referring court had stated that Ms Dano had been convicted of crimes, but he adds that he left these facts out of the statement of the facts because he deemed them irrelevant for answering the preliminary questions.[70]

In paragraph 39, the last paragraph in the statement of facts which provides information about Elisabeta Dano, the Court sums up Ms Dano's education and language skills, which are very limited: she attended school for three years in Romania, but she has no leaving certificate, no higher education, nor professional training. She understands spoken German, and speaks it on a simple level, but she cannot write German and has limited reading skills. To date, the Court remarks, she has not worked in Germany or Romania, and '[a]lthough her ability to work is not in dispute, there is nothing to indicate that she has looked for a job'. Again, the critical reader may wonder what the effect of this information is. Is Ms Dano's unemployment a choice or, even worse, is she lazy?

Later on in the judgment, in the Court's findings, another paragraph stands out as narratively relevant for the social universe of this text, namely paragraph 78, in which the ECJ states that EU law allows Member States to refuse social benefits to persons who 'exercise their right to freedom of movement solely in order to obtain another Member State's social assistance…'. Although the ECJ does not explicitly say that this is so in the case of Elisabeta Dano and her son, it must be added to the observations about the way she, as the protagonist of this story, is described. Must we read between the lines, and infer that this is exactly what Ms Dano has done, i.e. moved from Romania to Germany with the sole intention of obtaining social benefits? However, how does that assumption fit with the other facts of the case, namely that Ms Dano joined her sister who was already living in Leipzig? Was that not another, or perhaps the main reason for moving to Germany? And how about the timeline of this case: we learned from paragraph 35 that Ms Dano entered Germany in November 2010. In paragraph 40 we read that her application for the social benefit at issue was denied by a decision of 28 September 2011, which does not seem to allow for the conclusion that she applied for the benefit immediately upon arriving in Germany. Moreover, in paragraph 41 we learn that she applied afresh for the benefit on 25 January 2012, which was refused by a decision of 23 February 2012. If an EU citizen used her free movement rights solely to apply for benefits elsewhere, would she not have applied sooner than these dates? We will return to this passage in the section below.

5.3.7 *Dano* – legal reasoning

Questions 2 and 3

For the examination of the Court's legal reasoning, the following sections focus on the Court's answers to questions 2, 3 and 4, since they contain the most relevant reasoning for the development of the Court's approach to EU citizenship.

[70] Case C-333/13 *Dano* ECLI:EU:C:2014:341, Opinion of AG Wathelet, para 34.

In the *Dano* judgment, the ECJ starts its findings by referring to the principle of non-discrimination, the provisions on EU citizenship (Articles 18, 20 and 21 TFEU), and its own previous case law on EU citizenship, in paragraphs 57-59. We can see the habit of using 'building blocks' of standard passages that we identified in Chapter 3.

In paragraph 58, it repeats its landmark statement from *Grzelczyk*:

> As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope ratione materiae of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard.

We thus see that the authors of the *Dano* judgment were readers, so to speak, of the *Grzelczyk* judgment and the subsequent case law, as evidenced by their usage of this phrase as legal precedent. What kind of experience do these building blocks, and the *Grzelczyk* formula in particular, create for the reader of the text? I think they create expectations for how the reasoning can and will continue: the legacy of the expansive interpretation of EU citizens' rights. They also introduce a tension with the rather normative tone and selection of the facts that we examined in Section 5.3.6.

In the subsequent paragraphs, the ECJ in a way resolves this tension by moving from this broad, general footing in EU primary law (TFEU) to the lower level of specific secondary legislation, i.e. the CD (paragraphs 60-62), which, according to the ECJ, gives 'specific expression' to the principle of non-discrimination. In paragraph 60, the ECJ supplies emphasis by referring to the 'limits and conditions' twice, and to the measures adopted to give effect to the EU citizenship provisions. This leads the Court to conclude in paragraphs 61-62 that its task is to interpret Article 24 of the CD and Article 4 of Regulation 883/2004. By doing so, the ECJ breaks with the 'lex superior' approach it has taken in *Grzelczyk* and the subsequent cases, and makes the CD the specific 'super-norm'[71] for the resolution of this case.

The next movement in the *Dano* judgment is formed by paragraphs 63-80, and in those paragraphs (and particularly paragraphs 74-80) the ECJ articulates the way in which it sees the possibilities to restrict or derogate from the equal treatment rights of EU citizens offered by the CD. For instance, note how in paragraph 69 the ECJ argues that

> so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the

[71] Niamh Nic Shuibhne, 'What I tell you three times is true: Lawful Residence and Equal Treatment after Dano' (2016) 23 *Maastricht Journal of European and Comparative Law* 908.

> host Member State *only if* his residence in the territory of the host Member State complies with the conditions of Directive 2004/38. (emphasis supplied)

This deviates from the approach taken in *Martinez Sala* that accepted any lawful residence as the basis for equal treatment. Furthermore, the ECJ considers in paragraph 74 that it follows from recital 10 of the Directive's Preamble that equal treatment of people without a right of residence under the CD would create an unreasonable burden on the social assistance system of the host Member State. The ECJ points out that the Directive makes a clear distinction between people who are working and those who are not (paragraph 75), and that the Directive 'seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence' (paragraph 76). This line of argument is also a deviation from the Court's previous approach, in which it had always emphasised the facilitation of free movement as the central aim of the CD.

Perhaps the most revealing statement is made by the ECJ in paragraph 77:

> As the AG has observed in points 93 and 96 of his Opinion, any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member States with regard to social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in Article 7 of the Directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.

What does the ECJ really say here? It pays explicit deference to the EU legislature, redirecting our focus to where the criticism is perhaps most due: the legislature. There is a sense of the awareness of the limitations, the boundedness and imperfections of the legal narrative about EU citizenship in the way in which the ECJ imagines this counter-argument and responds to it pre-emptively. However, this still does not explain the extent of framing of the facts, and the actual engagement with the facts by making assumptions about the intentions of Ms Dano – despite their being legally irrelevant. It does not explain the sudden elevation of the CD to a 'super-norm' that exhausts the protection afforded by the TFEU. Furthermore, in light of the more generous, expansive interpretation which the Court has given the EU citizenship provisions, as well as the CD, in the past, the sudden strict deference to the 'inevitable consequence' of the legislative choices is inconsistent (if not disingenuous).[72]

The new direction in which the ECJ is going with EU citizenship rights in this judgment is reinforced in paragraph 78, where the ECJ considers that 'a Member State must therefore have the possibility, [...] of refusing to grant social

[72] The Court's approach follows the one proposed by AG Wathelet, who also did not explain this measure of deference either.

benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance' (paragraph 78). As noted above, we can think of this sentence as doing two things. First of all, it is another, explicit, addition to a line of argumentation in which Member States' possibilities for restricting EU citizens' rights are interpreted broadly. Secondly, as noted in Section 5.3.6, this passage contributes to the negative framing of the case, implying that, in fact, Ms Dano has exercised her right to free movement solely to abuse Germany's social welfare system. Furthermore, this passage raises several questions. Is it for the ECJ to make this factual appreciation in a preliminary reference procedure? And have the intentions with which an EU citizen has made use of her rights ever been relevant? They were not relevant in the *De Cuyper* case[73] or in the *Chen* case,[74] where there were also suspicions of intentional abuse of rights. In the *K.A.* case, the ECJ found that the reason for (behaviour leading up to) a travel ban was 'immaterial', and that limitations to the rights under Article 20 TFEU were to be interpreted strictly.[75] So why were intentions relevant in *Dano*? Furthermore, how are national authorities to assess with what intention an EU citizen has migrated, and who has the burden of proof? In paragraph 79, the Court elaborates further on Member States' possibilities for refusing social benefits, by adding the *a contrario* argument that to deny this possibility would mean that migrated EU citizens would automatically have sufficient resources.

In Ms Dano's case, the ECJ concludes in paragraph 81 that she does not have sufficient resources without having recourse to the German social benefits, and that she therefore 'cannot claim a right of residence' in Germany under the CD, and that she cannot invoke the principle of non-discrimination of Article 24(1) CD. This passage in the reasoning again engages with the facts of the case, but is it for the ECJ to do that in a preliminary reference procedure? Usually, the ECJ holds that it is for the national court to apply its interpretation of EU law to the facts of the case. Why would the Court engage with the facts in this case and not in other cases? Furthermore, how can we be sure that the national court has taken all relevant facts into account? In any case, it leads the ECJ to conclude that

> Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain 'special non-contributory cash benefits' [...], although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.

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73 Case C-406/04 *De Cuyper* ECLI:EU:C:2006:491, [2006] ECR I-6947.

74 Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639 [2004] ECR I-9925.

75 Case C-82/16 *K.A. and others* ECLI:EU:C:2018:308, para. 77-97.

Question 4

The last argumentation unit in the judgment is the Court's response to preliminary question 4 relating to Articles 1, 20 and 51 Charter, i.e. the right to human dignity, the right to equality, and the scope of application of the Charter. The ECJ holds that the Charter only applies when Member States are 'implementing EU law' and the ECJ seems to use 'implementing' in a strict sense (paragraphs 85-92). This stands in sharp contrast with other ECJ case law on the scope of application of the Charter, and particularly with the *Åkerberg Fransson* case which the ECJ cites as precedent in paragraph 88, since in that case the ECJ actually interpreted Article 51(1) of the Charter as meaning that the Charter applies to Member State action that falls 'within the scope of European Union law'.[76] Such is the case when Member States implement, apply[77] or derogate from[78] EU law. How are we to understand the reference to *Åkerberg Fransson* in paragraph 88? At best, this is a selective use of precedent, claiming for authority while, in fact, not being consistent with the judgment in that case.[79]

[76] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105, paragraph 19-20; See the Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17; See also Sybe A de Vries, 'Protecting Fundamental (Social) Rights through the Lens of the EU internal market: the Quest for a More 'Holistic Approach'.' (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 203, 207-208; See Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, 378 and 385. For critical commentary on the interpretation of the scope of the Charter, see, among many others, Jukka Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter?' (2015) 21 *European Public Law* 285; Thomas von Danwitz and Katherina Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights' (2012) 35 *Fordham International Law Journal* 1396, 1406-1407; Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, 378; Bas van Bockel and Peter Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after *Åkerberg Fransson*' (2013) 38 *European Law Review* 866; Emily Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*' (2013) 50 *Common Market Law Review* 1411, 1430; Michael Dougan, 'Judicial review of Member State action under the general principles and the Charter: defining the "Scope of Union law"' (2015) 52 *Common Market Law Review* 1201.

[77] Case 5/88 *Wachauf* ECLI:EU:C:1989:321, [1989] ECR 2609.

[78] Case C-260/89 ERT EU:C:1991:254, [1991] ECR I-2925; C-368/95 *Familiapress* EU:C:1997:325 [1997] ECR I-3689; C-390/12 *Pfleger* EU:C:2014:281 [2014].

[79] See also Hanneke van Eijken and Pauline Phoa, 'The Scope of Article 20 TFEU Clarified in Chavez-Vilchez: Are the Fundamental Rights of Minor EU Citizens Coming of Age?' (2018) *43 European Law* Review 949. See also for criticism, Michael Dougan, 'Judicial review of Member State action under the general principles and the Charter: defining the "Scope of Union law"' (2015) 52 *Common Market Law Review* 1201, 1225; Furthermore, see also Niamh Nic Shuibhne, 'Consensus as Challenge and Retraction of Rights: Can Lessons Be Drawn from – and for – EU Citizenship Law?' in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019), 435, noting the cases NA and Petruhhin as examples of EU citizenship cases in which the Charter does play a role, indirectly criticizing the Court for inconsistency in its application of the Charter.

In paragraph 89, the ECJ refers to the *Brey*[80] case in which it considered that Article 70 of Regulation 883/2004 does not lay down the conditions creating the right to 'special non-contributory cash benefits', and in paragraph 90 it swiftly concludes that neither the CD 'or other secondary legislation' determine such conditions, and that Member States thus have the competence to determine them. When they do so, the Court argues in paragraph 91, they are not 'implementing EU law'. How convincing do we find this reasoning, not only in light of the precedent of *Åkerberg Fransson*, but also in light of the Court's own response to preliminary questions 2 and 3 earlier? Did not Ms Dano's case fall within the material scope of Article 21 TFEU, even though 'limits and conditions' could, and did, apply? Furthermore, in the Court's own strict reading of Articles 24 and 7(1)b of the CD, it is EU law that determines whether Ms Dano is entitled to equal treatment with regard to the grant of social benefits.[81] Moreover, even if it were true that it is up to the Member States to determine the conditions for access to social benefits, the ECJ has also repeatedly held that Member States must comply with EU law when they exercise their competences, in particular with the provisions on the right to free movement of EU citizens and the right to equal treatment.[82] It is thus EU law that determines the outer limits of a Member State's room for manoeuvre on this point.

We can therefore conclude that the ECJ thus decided the *Dano* case on a very detailed and strict interpretation of the CD as well as the Charter. It is another step in the exclusionary movement that is already at work in the earlier passages of the *Dano* judgment. In that sense, it is internally consistent with the rest of the judgment, but not so consistent 'externally', i.e. with important precedent and, as we will see in Section 5.5, with other cases about EU citizenship that were decided during the same period of time.

5.4 From configuring to refiguring the EU citizenship legal narrative: comparing *Grzelczyk* and *Dano*

5.4.1 Comparison of the introduction of the protagonists

The two statements of the facts can be appreciated in their normative context, and particularly so when we briefly fast-forward to the reasoning

[80] Case C-140/12 *Brey* ECLI:EU:C:2013:565.

[81] Cf. Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities offered by the ECJ in Dano?' (2015) 52 *Common Market Law Review* 363, 387.

[82] See e.g. Case C-228/07 *Petersen* ECLI:EU:C:2008:494, [2008] ECR I-6989, para 42; Case C-208/07 *von Chamier-Glisczinski* ECLI:EU:C:2009:455, [2008] ECR I-6095, para 63; Case C-345/09 *van Delft* ECLI:EU:C:2010:610, [2010] ECR I-9879, para 84; Case C-503/09 *Stewart* ECLI:EU:C:2011:500, [2011] ECR I-6497, para 77; and Case C-75/11 *Commission* v. *Austria* ECLI:EU:C:2012:605, para 47. Case C-135/99 *Elsen* EU:C:2000:647, para 33; Case C-507/06 *Klöppel* ECLI:EU:C:2008:110, [2008] ECR I-943, para 16; and Case C-208/07 *von Chamier-Glisczinski* ECLI:EU:C:2009:455, [2008] ECR I-6095, para 63.

of the ECJ (which I will discuss and compare in more detail in the following Section 5.4.2). In both judgments, the ECJ provides the reader with information about the residency status of the persons at issue, and about their education and occupation. Mr Grzelczyk moved from France to Belgium in order to pursue a university education and the fact that Mr Grzelczyk was a student and that he had had various jobs to support himself financially is emphasised over and over again. If we appreciate these narrative pieces of the *Grzelczyk* judgment for what they tell us about what James Boyd White would call the 'social universe' of this judgment, it appears – perhaps unsurprisingly – that this universe is – initially at least – governed by a certain norm, i.e. the classic EU notion of the 'worker'. This is quite understandable, given the legal reality of the pre-existing framework of the free movement of workers at that time. From a narrative point of view, the complication is then formed by the presence and legal claim in the Member State of destination by Rudy Grzelczyk, who does not conform to the traditional norm of 'worker'. However, I would suggest that the EU's social universe is also governed by the norm of the 'deserving citizen', a norm for which Rudy Grzelczyk does not appear to present a real complication. The ECJ apparently found it important to emphasise that Rudy Grzelczyk had worked in the past, and would work again, and so he seems to embody the 'good' or 'deserving' citizen: he is highly educated, and holds the promise of becoming economically active in the future.[83] As noted in Section 5.3.2, by mentioning that Mr Grzelczyk's worker status received considerable attention in the discussion before the Court in the 'Preliminary remarks' in paragraphs 15-18, gives a positive spin to the description of the facts. Furthermore, as noted above, the Court is decidedly obliging in observing that a student's financial position may change over time for reasons beyond his control, and that the truthfulness of his declaration about his resources must be assessed as at the time it was made (paragraph 45).

By contrast, the narrative analysis of the statement of facts of the *Dano* judgment suggests that the economically inactive, uneducated Elisabeta Dano is not only not a 'worker', but she is also a deviation from the norm set by 'good citizen' Rudy Grzelczyk. The general picture that the Court paints of Elisabeta Dano is quite unfavourable: unlike Rudy Grzelczyk, she is not educated, she does not really speak, read or write the language of the Member State of destination, has had a child at a young age (of an unknown father), has not worked before, and – according to the national court and repeated by the ECJ all too readily – she appears to have come to Germany with the sole intention of applying for benefits. The Court makes no reference to her sister or to the importance of family life, ignoring the fact that her son was born in Germany and that he is

[83] Loïc Azoulai, 'The (Mis)Construction of the European Individual: Two Essays on Union Citizenship Law' (2014) 14 *EUI Department of Law Research Paper*; See also Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889, 927.

dependent on her, nor acknowledging any other (personal) reason that could have driven her to leave her country of origin.[84]

A bit of research on Google brings up one newspaper article from the *Daily Mail* which contains some more details about Ms Dano (and a very unflattering photo).[85] Although this publication applauds the outcome of the judgment, entirely adopting the rhetoric of 'benefit tourism', it does provide some interesting background information. We learn that she moved to Germany in order to live with her sister, who has five children, and that until recently she took care of the children while her sister was out at work. Does that change the matter? Why has this fact not been mentioned by the Court? Is childcare economically invaluable? And, as we have already asked in Section 5.3.6, why do we learn her age and that of her son? It enables us to calculate that she was barely twenty years old when she gave birth. The Court does not consistently mention the year of birth or the ages of the litigants in its judgments, so why now? Why do we learn that the identity of the father is unknown, if that fact is not legally relevant? Why do we learn about her poor education and language skills, if the ECJ does not engage with those facts in order to assess, for instance, if she has a 'real link' or 'genuine level of integration' with the host Member States, as it has done in other cases on EU citizenship? Why are these things mentioned, but not that she has been taking care of her sister's children? Perhaps Ms Dano was an entirely unsympathetic character and indeed all of those things that she was accused of between the lines, namely lazy, not intending to find a job but instead only relying on social benefits to fund her life, an out-and-out 'benefit tourist'.[86] Any of this is possible. The question I want to raise is this: how much of that matters? Does it matter if someone is a good, sympathetic, hard-working person or not?[87] And, more importantly, are you even

[84] Loïc Azoulai, 'The (Mis)Construction of the European Individual: Two Essays on Union Citizenship Law' (2014) 14 *EUI Department of Law Research Paper,* 13-15 (on the 'bad citizen').

[85] Paul Bentley, 'The Roma gipsy who sparked a crackdown on benefit tourism: Elisabeta Dano, 25, tracked down to German city after finding herself at centre of landmark welfare case' *The Daily Mail* (Leipzig, 14 November 2014) <https://www.dailymail.co.uk/news/article-2835442/The-Roma-gipsy-sparked-crackdown-benefit-tourism-Elisabeta-Dano-25-tracked-German-city-finding-centre-landmark-welfare-case.html> accessed 24 June 2020.

[86] As pointed out by Gareth Davies in a publication that takes a rather different view of this judgment that mine: Gareth Davies, 'Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication' (2018) 25 *Journal of European Public Policy* 1442.

[87] As noted by Verschueren, the motives for using free movement rights had – until Dano – never been taken into account by the ECJ. Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities offered by the ECJ in Dano?' (2015) 52 *Common Market Law Review* 363, 374; See Case 53/81 *Levin* ECLI:EU:C:1982:105, [1982] ECR 1035, para 23; Case C-109/10 *Akrich* EU:C:2003:491, para 55; See also the Opinions of several AGs that such motives should never play a role: Case C-147/03 *Commission v Austria* EU:C:2005:40, Opinion of AG Jacobs, para 19; Case C-209/03 *Bidar* EU:C:2004:715, Opinion of AG Geelhoed, para 19; and Case C-73/08 *Bressol* EU:C:2009:396, Opinion of AG Sharpston, para 95; For a completely different view, see Gareth Davies,

aware of what kind of vision of humanity you are portraying or validating by writing and arguing in this way?

The accounts of the facts in these cases have serious effects of 'framing' the decisions that followed. There seems to be a strong narrative of the 'good' or 'deserving' versus the 'bad' or 'undeserving' citizen at play here, as well as a latent gender bias.[88] Furthermore, as we will explore in more detail in Chapter 7, there is a particular conception of responsibility at work in these judgments: it is your duty to do all that you can to avoid needing social benefits, but if you do need them, that is your personal failing. This is the narrative of the citizen as 'self-entrepreneur' that we explored in Chapter 4. In the following section, we will explore how the narration of the facts of the two cases relates to, and interacts with, the reasoning of the Court.

5.4.2 Comparison of the legal reasoning

Building blocks from Grzelczyk, but undermined in Dano

Read as narrative, we see that in the *Grzelczyk* judgment the law was made to accommodate the complication presented by Rudy Grzelczyk's presence in his host Member State and his claim to equal treatment. Resolving the legal question in his favour was, however, not so far removed from the more traditional case law on the free movement of workers, since the fact that Mr Grzelczyk had worked and would work again in the future was emphasised on several occasions. Not only in the statement of facts, but also throughout the judgment, Mr Grzelczyk was presented as a sympathetic, 'good' citizen, with a promising future as an economically active citizen who would contribute to society. The leap from the language of 'worker' to the language of 'citizen' was in Mr Grzelczyk's particular case perhaps not such a large one. However, the leap was made, and the Court established a new language, a new vocabulary to talk about European citizenship as 'destined to be the fundamental status…'. As described in Section 5.2.3, after the *Grzelczyk* judgment this new vocabulary became solidified in subsequent case law and legislation. The Court developed

'Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication' (2018) 25 *Journal of European Public Policy* 1442.

88 Cf for instance Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *Common Market Law Review* 937; Gustav Peebles, '"A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law' (1997) 22 *Law and Social Inquiry*, 581; Dimitry Kochenov, 'The Citizenship of Personal Circumstances in Europe' in Daniel Thym (ed), *Questioning EU Citizenship* (Hart Publishing 2018); Eleanor Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through Its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017), 204 et seq; Charlotte O'Brien, 'Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017), 509 et seq; See Dimitry Kochenov, 'EU Citizenship: Some Systemic Constitutional Implications' (2018) 3 *European Papers* 1061, 1065-1066.

an approach consisting of the review of measures that restricted the free movement of EU citizens against, notably, primary rights (the Treaty provisions on EU citizenship) and against the general principles of EU law (equal treatment and proportionality). Furthermore, in this approach the Court repeatedly emphasised that the objective of the CD was to facilitate and strengthen free movement, and the Court left the Member States very little room for restrictive measures.

Thirteen years had passed between the date of the *Grzelczyk* judgment and that of the *Dano* judgment, and the language of EU citizenship as 'destined to be the fundamental status' was well established. As we learned in Chapter 2 and Chapter 4, the consistent line of case law preceding the *Dano* judgment provided the 'resources of meaningful speech', and they formed the 'prefiguration', setting certain expectations of how a case would be decided and what kind of reasoning would be presented. We see the presence of the 'building blocks' of standard reasoning in the opening paragraphs of various preceding judgments. Accordingly, in *Dano* we see that the normative starting point of the Court's reasoning was indeed determined by the *Grzelczyk* precedent: the repetition of the general statement 'Union citizenship is destined to be the fundamental status...etc.' in paragraph 58 of the Court's findings explicitly brings the *Grzelczyk* case into the *Dano* case as a normative point of reference, as was the standard approach.[89] However, in the narrative and legal reasoning of the *Dano* case, the meaningfulness of the *Grzelczyk* formula is undermined.

In *Grzelczyk*, the ECJ heralded EU citizenship as being 'fundamental'. What does it mean that EU citizenship is a 'fundamental status'? 'Fundamental' usually relates to a basic, foundational, primary quality, something that is inherent, ingrained in a person's humanity.[90] However, the different type of movement that we noticed in the reasoning of the ECJ in the *Grzelczyk* and the *Dano* cases, i.e. from equal treatment of EU citizens as a primary law principle in *Grzelczyk*, towards a narrow right to equal treatment within the sole context of the CD in *Dano*, casts serious doubts on the 'fundamentality' of EU citizenship.[91] How can EU citizenship be a fundamental status when it is clear from the framing of the *Grzelczyk* and *Dano* cases that you have to earn most rights/benefits by being a 'good', productive citizen? This seems to be not a fundamental, but rather a thin, conditional status that is still tied to the notion of market-citizenship.[92] This observation seems to be confirmed by the glaring absence of

[89] Peter Brooks, 'Literature as Law's Other' (2010) 22 *Yale Journal of Law & the Humanities* 349, 360; See also Julia Kristeva's notion of intertextuality as a theory of a text as a network of sign systems related to other sign systems or practices in a culture, see Irene R Makaryk (ed), *Encyclopedia of Contemporary Literary Theory: Approaches, Scholars, Terms* (University of Toronto Press 1993), 568-569.

[90] See for instance <http://www.merriam-webster.com/dictionary/fundamental>.

[91] Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889, 908-909.

[92] See Niamh Nic Shuibhne, 'The Resilience of Market Citizenship' (2010) 47 *Common Market Law Review* 1597, 1613; and more recently Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing

this sentence in the Court's most recent judgments of *Alimanovic*, *Garcia Nieto*, and *Commission v. UK*, as we will see in Section 5.5.

No comparison to host Member State's national

The *Dano* case is in a way the mirror image of the reasoning of the ECJ in *Grzelczyk*. First of all, the ECJ does not mention the comparability of Elisabeta Dano to any other jobless German national, where it had compared Rudy Grzelczyk's position to that of a Belgian national in the *Grzelczyk* judgment. Apart from the legal use of such a comparison (and such a comparison is an accepted practice in the case law of the ECJ), i.e. in order to determine whether there was a situation of discrimination based on nationality, the comparability of Mr Grzelczyk to a Belgian national drew 'the person' Grzelczyk narratively (and empathically) closer to the reader, whereas the absence of such a comparison seems to widen the distance between 'the person' Dano and the reader.

Equal treatment has been a crucial concept in the Court's reasoning in the *Grzelczyk* judgment, and it took on a different – but equally crucial – meaning in the *Dano* judgment. In both cases the tension lay in the fear of having an (unreasonable) burden on the social assistance system, caused by (intra-EU) migration. How much solidarity can be expected between Member States? The ECJ seems to be ambiguous and inconsistent in the application of the principle of equal treatment. How equal are EU citizens? Why is Mr Grzelczyk compared to a Belgian national, but Ms Dano is not compared to a German national? The Court's silence in *Dano* speaks of a fundamental incomparability of Ms Dano as a person to the nationals of the host Member State, beyond the technicalities of the right to equal treatment contained in the CD.

Truthfulness of Grzelczyk, 'sole intention' assumed in Dano

Another narrative difference between the *Grzelczyk* and the *Dano* judgments lies in the way in which the Court's reasoning in *Grzelczyk* about the truthfulness of a student's declaration about his resources (paragraph 45) speaks of trust in the EU citizen, whereas the emphasis on the possible intentional abuse of the free movement rights by a person such as Ms Dano (paragraphs 76 and 78) speaks of a fundamental distrust of (economically inactive) EU citizens. Furthermore, consider how these passages subtly engage in an appreciation of the facts and circumstances of a case, thereby demonstrating a certain kind of vision of the relationship between the ECJ and the national courts.

In *Grzelczyk* the ECJ instructs national authorities and courts to appreciate a student's statement about his or her resources as at the time it was made, *ex tunc*, since 'a student's financial position may change with the passage of time

Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889, 926. See also Bridget Anderson, Isabel Shutes and Sarah Walker, *Report on the rights and obligations of citizens and non-citizens in selected countries*, bEUcitizen Report D10.1, p. 7, available at: https://www.uu.nl/sites/default/files/rights-and-obligations-of-citizens-and-non-citizens-in-selected-countries.pdf last accessed 22 December 2020.

for reasons beyond his control'. Such an instruction to make an *ex tunc* assessment is in principle within the jurisdiction of the ECJ, and it tells us something about the role of the themes of control and responsibility that we will explore in more depth in Chapter 7.

In *Dano*, note how paragraph 66 already builds up towards paragraphs 76 and 78. In paragraph 66 the Court notes that 'it is apparent from the documents before the Court that Ms Dano (...) is not seeking employment and that she did not enter Germany in order to work'. In more general terms, the Court in paragraph 76 asserts that 'Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence' and, in paragraph 78, that 'a Member State must therefore have the possibility [...] of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence'. The sequence of these passages functions not merely as an interpretation of the legal provision, but also to imply something about the facts and circumstances of Ms Dano's situation. By doing so, as noted above in the discussion of the facts of the *Dano* judgment, the ECJ may be crossing the boundary between its own jurisdiction in preliminary reference procedures, which is to interpret EU law, and the national court's prerogative to apply the Court's interpretation of EU law to the facts of the case at hand. The element of *pathos*, i.e. the rhetorical appeal to the reader's values and emotions, and even a double element, since Ms Dano is not only not a worker nor economically active, but she is even allegedly intentionally using Germany's welfare system to fund her life, makes the different (and inconsistent) approach more acceptable. Conversely, could we conclude that a strong bad citizen versus a good citizen narrative is so tempting for the Court itself that it causes it to overstep its jurisdictional boundaries?

Lex specialis versus lex superior

Although the ECJ repeats the vocabulary it used in *Grzelczyk* ('Union citizenship is destined to be the fundamental status of the nationals of the Member States'), its legal reasoning is actually the exact opposite of that which was applied in the *Grzelczyk* case. Instead of drawing on the higher norm of primary law (the Treaty provisions on EU citizenship) as a 'lex superior' to review the legality of secondary legislation and of restrictive measures taken by Member States, now specific secondary legislation ('lex specialis') in the form of the CD seems to trump primary law in not just the regulation of the exercise of free movement rights, but also in the determination of their very existence.[93] The Court does not explain why it changes direction, and does not, beyond the citing of the standard paragraphs, substantively address its own previous case law. This is in stark contrast with the Court's approach in *Grzelczyk*, in which the ECJ carefully addresses its own previous case law in the discussion of the

[93] For this observation see also Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889, 909 and 926.

Hoeckx (paragraphs 27-28) and *Brown* (paragraphs 34-35) cases, and we can see it explaining why these precedents do not apply here and why a new approach is necessary. As observed by Muir and Nic Shuibhne, discussed in Section 3.6 above, this aspect of the legal reasoning of the Court in *Grzelczyk* can be characterised as displaying a 'constitutionalising' approach, whereas in *Dano*, the reasoning revealed a tendency of 'deconstitutionalisation'.[94]

Finding and using interpretative space

Furthermore, where the Court had ruled in the *Grzelczyk* judgment that there is nothing to preclude students from receiving benefits (paragraph 39), thereby actively seeking room for judicial discretion, it stated in *Dano* that any unequal treatment is the direct result of the legislation at issue (paragraph 77), that it must be possible to exclude economically inactive EU citizens from receiving benefits (paragraph 78), and that the Charter did not apply. Note how in *Grzelczyk* the Court found interpretative space and used it expansively (inclusion of Rudy Grzelczyk in terms of access to social benefits), whereas in *Dano* it equally enjoyed such interpretative space, but used it narrowly, leading to the exclusion of Elisabeta and Florin Dano from equal access to social benefits, and to the denial of the applicability of the Charter.

The narrow or liberal interpretation of restrictions to free movement

Moreover, the ECJ usually (and implicitly in the *Grzelczyk* case) rules that although restrictions on the fundamental freedoms and on non-discrimination are allowed they must be interpreted narrowly.[95] This was reflected in the interpretation of the question of sufficient resources in the *Grzelczyk* case: the Court clarified that a host Member State may require a migrated EU citizen to have sufficient resources, but it also states that a certain degree of financial solidarity between Member States must be accepted. This means that not all burdens on the social assistance system can be avoided, only 'unreasonable' ones.

By contrast, in the *Dano* case, the ECJ leaves more room for the Member States to refuse equal treatment regarding social benefits, without mentioning the 'certain degree of financial solidarity' that the Court emphasised in the *Grzelczyk* case. Even more so, the Court emphasised that preventing EU citizens from becoming an unreasonable burden on the social assistance system of the host Member State was an objective of the Directive, where it would normally state that the objective was the strengthening and facilitation of the free movement rights. As noted by Thym, this is an 'argumentative U-turn', and since

94 See on the process of constitutionalisation and de-constitutionalisation: Elise Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit' (2018) 3 *European Papers* 1353, 136-1362 and 1365-1366.

95 See for instance joined cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* EU:C:2004:262, [2004] ECR I-5257, para 65; case 36/75 *Rutili* EU:C:1975:137, [1975] ECR 1219, para 27.

the Court did not address its classic citizenship judgments in which it normally held that limitations on EU citizens' rights must be interpreted narrowly, the 'doctrinal imponderabilities' of the legal reasoning employed in *Dano* are concealed.[96] Furthermore, it is extremely interesting (and worrying) that the *Dano* case does not mention the words 'solidarity' or 'proportionality' at all, which were once central terms of meaning and value in the ECJ's emancipatory, protective line of EU citizenship case law.[97] The use of the term 'solidarity' speaks of an inclusiveness that once characterised the Court's approach to EU citizenship. Furthermore, the requirement of a proportionality assessment, i.e. a review of the individual circumstances of the EU citizen at issue, reflected a humanising dimension of this legal narrative. By contrast, the Court's omission of these concepts – its silence – in the *Dano* judgment and in the subsequent cases reveals a changed, de-humanising legal narrative.

5.5 Concluding observations

To summarise, a movement, or a narrative, of inclusion and exclusion can be found in the way in which the protagonists in these cases are described and in the Court's reasoning. The positive framing of Grzelczyk as the 'good citizen', who is comparable to a Belgian national, is reflected in the movement of the ECJ towards him: an expansive, broad interpretation of EU citizenship rights as 'fundamental status'. The law was transformed in order to accommodate the initial complication introduced by Rudy Grzelczyk's presence and claims in the host Member State. Conversely, the negative framing of Elisabeta Dano as the uneducated outsider who is a threat to the social assistance system of Germany, finds another layer of emphasis in the absence of any comparison to a German national, in the ECJ's narrow interpretation of the CD, and thus in the undermining of the 'EU citizenship as fundamental status' narrative. So, not only did Elisabeta Dano not fit the norm – thereby presenting a narrative complication – the law was transformed in an entirely different way from the *Grzelczyk* judgment: the Court narrowed the EU citizenship framework to exclude not only her claim to equal treatment, but also her lawful presence in the host Member State, and even the protection of the Charter.

The *Grzelczyk* and the *Dano* cases may therefore be seen to represent the start and, perhaps, the end of a particular legal narrative – one about inclusivity and empowerment – about EU citizenship. However, there is another possible way of looking at this line of case law. Perhaps the strong good citizen narrative in *Grzelczyk* always already had an equally strong bad citizen narrative as its natural counterpart, which was only really actualised in the *Dano* case. *Dano* may therefore merely be the mirror image of *Grzelczyk* 'come true', so perhaps

[96] Daniel Thym, 'The Elusive Limits of Solidarity' (2015) 52 *Common Market Law Review*, 24-25.

[97] Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889, 913.

what seems to be a new, opposite narrative, was present in the reasoning of the ECJ all along. As noted by Somek, Kramer, Reynolds and O'Brien, discussed in Chapter 4, this is a narrative of the market citizenship, homo economicus or the neo-liberal self-entrepreneur: you are responsible for making something of yourself, for being economically active. According to such a vision of humanity, if you need social assistance, then that is because of your weaknesses, shortcomings or bad choices.

In *Grzelczyk*, the statement 'EU citizenship is destined to be the fundamental status...etc' seemed appropriate. This sentence has been taken up as precedent, and it has often been repeated in subsequent cases. As we acknowledged in Chapter 3, the use of precedent is a part of legal professionalism: referring to precedent in order to tie the new case to a line of earlier case law is just what we do, often, and it increases legal certainty and legitimacy. However, a statement like this contains many layers of meaning, and it raises a broad spectrum of questions, if not expectations. What does it mean if the ECJ repeats such a statement as precedent in *Dano*, but the actual framing and outcome of the case proves that EU citizenship rights are not fundamental, but rather conditional? What sense does this statement make in this case? What does it mean if a precedent is suddenly, without explanation, dropped, as the ECJ did in cases after the *Dano* judgment? Also, the omission of a comparison to a German national, the lack of any reference to solidarity or the principle of proportionality, and the denial of application of the Charter, reinforce the sense that Ms Dano's access to social benefits was governed by a different type of reasoning, by a different legal narrative from the *Grzelczyk* case. The reader of the *Dano* judgment is left with an uneasy feeling created by a mismatch in vocabulary and subsequent legal reasoning and outcome. The fact that the vocabulary did not change at the same time that the reasoning changed, gives an imbalanced feel to this judgment.

Nic Shuibhne, in her discussion of this recent line of cases in EU citizenship, has also formulated criticism of the quality of the ECJ's reasoning, finding fault with the Court for not addressing its own previous case law 'that consistently pushed the individual assessment approach notwithstanding its practical weaknesses. Something changed after Brey; but that change has not been explained'.[98] Such a lack of an explanation, combined with a substantive change in direction, leads to systemic incoherence. Furthermore, she also points out a problem with the ECJ's approach covering over – instead of openly and thoughtfully addressing – the issue of the increased complexity of free movement, and the problematic 'indulgence' of the ECJ to accept assumptions instead of proof (for instance, for the cumulative effect of claims for social benefits).[99]

The *Dano* judgment was followed by *Alimanovic*,[100] which confirmed and continued the narrower approach of economically inactive EU citizens' access to

[98] Niamh Nic Shuibhne, 'What I tell you three times is true: Lawful Residence and Equal Treatment after Dano' (2016) 23 *Maastricht Journal of European and Comparative Law* 908, 923.

[99] Niamh Nic Shuibhne, 'What I tell you three times is true: Lawful Residence and Equal Treatment after Dano' (2016) 23 *Maastricht Journal of European and Comparative Law* 908, 933.

[100] Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597.

social benefit. Ms Alimanovic and her three children were Swedish nationals, who had also moved to Germany. Ms Alimanovic and her eldest daughter had worked there in various temporary jobs for slightly less than a year. For the subsequent period of unemployment, Ms Alimanovic applied for German social assistance benefits. The assessment by the ECJ was again based on a very narrow interpretation of the CD, and this time even abandoned the *Grzelczyk* formula or any reference to the TFEU, thereby somewhat resolving the tension that we noticed within the *Dano* judgment. Furthermore, where in *Brey* the ECJ had insisted on a comprehensive and individual proportionality assessment, and in *Dano* had still considered that the financial situation of the EU citizen had to be examined specifically, in the *Alimanovic* judgment it took a dramatically different approach. The ECJ considered that no individual assessment is necessary, since the CD has a graded system built into it as regards the retention of worker status, which in itself takes into consideration various factors such as duration of the exercise of an economic activity. According to the Court, this system enables EU citizens to know what their rights and obligations are.[101] Furthermore, where it required an overall appraisal of what burden the grant of a specific benefit to one EU citizen would place on the social assistance system in *Brey*, now the ECJ presumed the accumulation of these burdens, which would be bound to lead to an unreasonable burden. The cases of *Garcia-Nieto* and *Commission v UK* confirmed the line adopted in *Alimanovic*, with no *Grzelczyk* formula, no mention of Articles 21 or 18 TFEU, a narrow application of the requirements for residence laid down in the CD, no individual proportionality assessment, and the presumed accumulation of social benefits claims leading to an unreasonable burden, and no role for fundamental rights protection under the Charter.[102] Thus, we see how the resources offered by *Grzelczyk* were remade in the *Dano* judgment, and how the *Dano* judgment, in turn, offered resources for a narrative that was continued by the ECJ in the subsequent cases in which an EU citizen's claim for social benefits was at stake.

[101] Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 59-61.

[102] We see a further confirmation of the Dano-line in case C-308/14 *Commission v. UK* ECLI:EU:C:2016:436, in which the ECJ applied the narrow approach of the CD to Regulation 883/2004. See for critical analysis in Niamh Nic Shuibhne, 'What I tell you three times is true: Lawful Residence and Equal Treatment after Dano' (2016) 23 *Maastricht Journal of European and Comparative Law* 908; Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom' (2017) 54 *Common Market Law Review* 209.

Case Study on Personal Data Protection and Privacy

6.1 Close reading the Court's case law on data protection

When the Data Protection Directive[1] (DPD) was adopted in 1995, with a deadline for transposition into national law by 1998, innovations in communication technologies, particularly in the digital world, were so rapid that they presented an immediate test of the durability of this legislation. Meanwhile, negotiations for the DPD's successor (the General Data Protection Regulation, GDPR) were rather lengthy, and it was not until 2016 that the GDPR was adopted, and it only entered into force in 2018. The Court's interpretation of the DPD and the general rights to privacy and protection of personal data under Articles 7 and 8 of the Charter have therefore been formative for the data protection regime in the EU.

The field of (digital) information and communication technologies is one of the arenas in which economic interests – namely those involved in the free flow and use of personal data – and fundamental rights, in particular the right to privacy and data protection, but also the freedom of expression and to receive and impart information, must be balanced. More particularly, nowadays digital communication technology has such an important role in our daily lives and in society in general that our private 'digital' lives are increasingly commodified. All kinds of data about our behaviour on the Internet, our travels (air passenger data, various public transport schemes and cards), our health and fitness (digital patient records, health apps and fitness trackers), and our social life are accessible to governments as well as large corporations, and the analysis of and trade in this data is big business. At the same time, the creation of 'filter bubbles' and the dissemination of 'fake news' on various online and offline channels has been revealed as influencing public opinion in very important ways, even affecting electoral outcomes. In this Chapter we will undertake a close reading of two examples of the ECJ's case law, in order to identify themes, patterns and/or inconsistencies in its legal reasoning and narration. More particularly, we are going to take a closer look at two Grand Chamber judgments that have been considered to be 'landmark cases' in the area of privacy and data protection and that have influenced the update of the legislative regime by way of the GDPR.

The structure of this Chapter is as follows. We will first discuss the general development of the legal framework of data protection in the EU in Section 6.2, by way of an exploration of the pre-understandings and context of the judgments. We will examine the narrative and rhetorical features of the texts

[1] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31. The first proposal for the DPD was made in 1990; See for a very detailed overview of the various documents, recommendations and communications, Gloria González Fuster, 'The Beginning of EU Data Protection' in Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer 2014), 112; See also Federico Ferretti, 'Data protection and the legitimate interests of data controllers: much ado about nothing or the winter of rights?' (2014) 52 *Common Market Law Review* 843, 852.

in more detail in Section 6.3. More particularly, the questions about what kind of 'self' the ECJ creates in its tone, style and approach, what kind of 'world' the Court describes in which the personal data is gathered and processed, and what, if any, the relationship is with any close or distant 'other', structure our examination of the 'configuration' of these judgments. After the description of our reading experience in each respective case, we will compare the *Digital Rights Ireland* and *Google Spain* judgments in Section 6.4, and we examine their 'legacy' in the subsequent case law in Section 6.5. Finally, we will attempt to draw some conclusions in Section 6.6.

The structure used in this chapter differs slightly from the case study on EU citizenship, as the configuration of these judgments is interesting for different reasons. However, as we will see in Chapter 7, it will nevertheless prove possible to compare the case studies, or at least discuss what we have learned from one reading in light of the other, and vice versa. As noted in Chapter 5, Section 5.1, my aim here is not to provide a full legal annotation of the judgments, which you can find elsewhere, but to discuss some of the ways in which a judgment works. In doing so I will focus on the structure and logic of the arguments, as well as on more textual and literary elements, highlighting certain passages and suggesting connections that I think are significant. Furthermore, I assume a familiarity with each case that we discuss, and I will describe or reproduce phrases or passages that I have found relevant. Nevertheless, the reader may find it useful, crucial even, to read the entire judgment for him or herself, and check my observations and suggestions against his or her own experience.

6.2 Prefiguration: legislative framework and case law

6.2.1 Legal framework – historical development

Since the 1970s there have been debates about the need for an EU policy and for EU legislation relating to data protection. Two distinct motivations drove these efforts and developments: on the one hand, a real concern for the rights of individuals in relation to rapidly developing new communications technologies,[2] and on the other hand, a concern for the competitive capacity of the EU market in information and communication technologies, which would be harmed by diverging national regimes.[3]

As noted in Chapter 4, for a long time the protection of fundamental rights in the EU legal order was achieved through recognition of these rights as

[2] Undoubtedly influenced by the relatively recent experiences with totalitarian regimes' violations of the right to privacy in various Member States during and after WWII. See also Federico Ferretti, 'Data protection and the legitimate interests of data controllers: much ado about nothing or the winter of rights?' (2014) 52 *Common Market Law Review* 843, 851.

[3] As noted by Gloria González Fuster, 'The Beginning of EU Data Protection' in Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer 2014), 111.

general principles of EU law, based upon the constitutional traditions common to the Member States, and on the ECHR. Although the ECJ had, in *Stauder*,[4] more or less accepted that a right to privacy (in relation to, or resulting from, the right to respect for human dignity) existed as a ground for review in the form of a general principle of EU law, it had not taken the opportunity to spell out what this right entailed exactly in the EU legal order. Regulating the area of data protection and privacy in light of new and existing communication technologies therefore presented various challenges, and only a marginal legal framework pre-existed on the international level. Article 12 of the Universal Declaration on Human Rights[5] (1948) and Article 8 ECHR[6] (1950) established a right to respect for a person's private and family life, as well as his or her home and correspondence, but did not explicitly address personal data. In the classic scheme of human rights instruments, Article 8(2) ECHR provides that an interference with this right by a public authority is only lawful if it is

> in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

A long process of political and policy debates preceded the adoption of the DPD, which was adopted on the basis of Article 100a EC Treaty (now Article 114 TFEU), the legal basis for internal market harmonisation legislation. This is not surprising since the EC Treaty did not contain a specific legal basis for data protection legislation at that time. The DPD set up a system that was aimed at facilitating the free flow of data, and also very clearly aimed at protecting individuals' fundamental rights.[7] The system of the DPD sets out requirements for data quality (Article 6) and criteria that make data processing legitimate (Article 7). In principle, all use and 'movement' of personal data is lawful if those requirements are complied with. In that light, it places obligations on controllers of data processing and creates various rights that empower individuals to protect their rights effectively. Furthermore, the DPD requires each Member States to

4 Case 29-69 *Stauder v Stadt Ulm* ECLI:EU:C:1969:57, [1969] ECR 419.

5 Art. 12 Universal Declaration on Human Rights: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

6 Art. 8 ECHR, the right to respect for private and family life: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

7 Lynskey therefore calls Directive 95/46/EC a 'hybrid': Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015), 8.

set up a national supervisory authority (nsa) to supervise the functioning of the data protection rules in the Member States.

When the DPD was adopted, only a very small percentage of the EU population used the Internet, and Google had not been launched.[8] However, in the years after its adoption, the use of new information and communication technologies exploded, particularly with the rise of the Internet, mobile devices, and social media networks: Facebook launched in 2004, and had 6 million users by December 2005; Apple introduced the first iPhone in 2007, making smartphones mainstream, and the processing of personal data became extremely valuable.[9] Furthermore, with the terrorist attacks in New York on 9/11 (11 September 2001), and further attacks worldwide and in European cities like Madrid (2004), London (2005), Paris (2015) and Brussels (2016), authorities adopted far-reaching surveillance measures aimed at (digital) communication technologies, as the Internet and mobile (smart) phones played an increasingly important role in the coordination of attacks and communication between terrorist cells, in the dissemination of radical ideas and recruitment of potential attackers, and in the financing of terrorist activities. In response to all of these developments, the EU adopted several other measures to regulate the growing market of information and communication technologies after the adoption of the DPD, such as the E-commerce directive, and the Data Retention Directive (DRD), which, as we will see, was the subject of the *Digital Rights Ireland* case.[10]

Meanwhile, at the Nice summit of 2000 the EU had adopted the EU Charter of Fundamental Rights, which included both the right to privacy and a separate provision on the right to data protection:

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8 Viviane Reding, 'Outdoing Huxley: Forging a high level of data protection for Europe in the Brave New Digital World' (Speech at Digital Enlightenment Forum, 18 June 2012) <https://www.identityblog.com/wp-content/images/2012/06/Viviane_Reding_Digital_Enlightenment_Forum.pdf> accessed 5 October 2018, 4.

9 For a simple but relatively broad overview, see the Wikipedia entry: 'History of the Internet' (*Wikipedia*) <https://en.wikipedia.org/wiki/History_of_the_Internet> accessed 23 April 2019.

10 Data Retention Directive: Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54; the E-commerce Directive: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1; and Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1, on the particular legal basis (Art. 286 EC) introduced in the EC Treaty by the Amsterdam Treaty reform in 1997. See also Marie-Pierre Granger and Kristina Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: telling off the EU legislature and teaching a lesson in privacy and data protection' (2014) 39 *European Law Review* 835, 838.

Article 7 Charter

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.[11]

Article 8 Charter

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Since the Charter did not become legally binding until the entry into force of the Lisbon Treaty in 2009, the ECJ continued for a long time to rely on the ECHR and the ECtHR's case law on the right to privacy. Moreover, the Charter and its explanatory memorandum left the right to data protection 'to be determined', in the sense that these documents did not make clear what the relationship and/or the difference was between privacy and data protection, and what the scope of the right to data protection was.[12]

6.2.2 The ECHR and the ECtHR on privacy and data protection

Article 8 ECHR was initially conceived – against the backdrop of the atrocities committed by the totalitarian regimes during and after the Second World War – as a classic 'negative' liberty: the right to privacy meant the right to be left alone, protecting individuals against (state) interference in personal matters, their homes and bodies, correspondence and property. However, over the years, the ECtHR developed Article 8 ECHR into a broader set of rights, akin to what are sometimes called 'personality rights', which encompass positive rights tied to human dignity, i.e. the right to develop an identity and a personality. This interpretation of Article 8 ECHR also implies control over a person's public image, personal information and intellectual property. Throughout the case law of the ECtHR we can thus see a considerable extension of the material scope of Article 8 ECHR. Although a right to data protection is not expressly included in that provision, the ECtHR has brought it within its scope

[11] Art. 8 ECHR uses 'correspondence' – this has been updated in the Charter to 'communications' in response to the developments in communication technologies – see explanations to Charter.

[12] Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015), 132.

in its 'living instrument' doctrine of interpretation.[13] The ECtHR does seem to require an additional, specific element affecting private life in order for personal data to be included in the protection of Article 8 ECHR.[14] The approach of the ECtHR in reviewing claims based upon Article 8 ECHR has also developed and changed over the years. Under the ECtHR's classic approach, the following scheme of review would apply.

1) Does the applicant's situation fall within the material scope of application of the right to privacy?
2) Is the national measure or other act a restriction of this right?
3) Is this limitation prescribed for by law and foreseeable?
4) Does it serve a legitimate interest?
5) Is the limitation as such necessary in a democratic society, that is, does it serve a pressing social need?

For this last assessment, the ECtHR traditionally allows the Contracting Parties a margin of appreciation.[15] The ECtHR usually holds that the greater the scope of the infringements, the higher the level of safeguards and the more refined the limits that are required under Article 8 ECHR.[16] However, as noted by Van der Sloot, within this scheme the ECtHR introduced an approach based on balancing, i.e. weighing the severity of the restriction for the individual against the importance of the public interest that the restriction aims to achieve or protect. The downside of balancing is that it assumes that all rights and interests are relative, measurable and, in principle, of equal weight, whereas, as Van der Sloot argues, a 'purer' fundamental rights approach is based on a hierarchy of principles.[17]

Compared with the EU legal framework, the ECHR is different in at least three important formal respects. First, the list of grounds for which the right to privacy may be limited is listed exhaustively in Article 8 ECHR (national security, public safety, the economic well-being of the country, the prevention of

[13] See Bert van der Sloot, 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of 'Big Data'' (2015) 31 *Utrecht Journal of International and European Law* 25; See also Juliane Kokott and Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the ECJ and the ECtHR' (2013) 3 *International Data Privacy Law* 222.

[14] See Juliane Kokott and Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the ECJ and the ECtHR' (2013) 3 *International Data Privacy Law* 222, 224.

[15] Bert van der Sloot, 'The Practical and Theoretical Problems with 'Balancing': Delfi, Coty and the Redundancy of the Human Rights Framework' (2016) 23 *Maastricht Journal of European and Comparative Law* 439, 455.

[16] See Juliane Kokott and Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the ECJ and the ECtHR' (2013) 3 *International Data Privacy Law* 222, 224.

[17] Bert van der Sloot, 'The Practical and Theoretical Problems with 'Balancing': Delfi, Coty and the Redundancy of the Human Rights Framework' (2016) 23 *Maastricht Journal of European and Comparative Law* 439, 442, 445, and 457.

disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others), whereas the EU Charter is more open-ended, allowing objectives of general interest recognised by the EU and the need to protect the rights and freedoms of others (Art. 52(1) Charter).[18] Secondly, the DPD imposes obligations on private parties as well as on public authorities, while the ECHR traditionally only binds 'vertically', i.e. on the Contracting Parties. Finally, the EU system specifically requires oversight by independent data protection authorities, which the ECHR system does not.

6.2.3 ECJ case law on privacy and data protection

In light of the foregoing, it is perhaps unsurprising that after the adoption and the entry into force of the various legislative instruments, most importantly the DPD, the ECJ contributed not only to the fleshing out and refinement of the EU's data protection regime through various preliminary reference procedures, but also to its flexibility and durability given the rapid developments in this field.

For instance, in *Fisher*[19] the Court considers that in light of the effectiveness of an EU agricultural subsidy scheme, applicants must be able to obtain the information they need in order to apply for the aid scheme.[20] National authorities must therefore balance the interests of the party who has provided the data with the interests of the party who needs that data and that must be done in a way that ensures the protection of fundamental rights.[21] In that regard, the Court considered that the DPD provides suitable criteria to make that assessment, even though it had (at the time of the judgment in *Fisher*) not yet entered into force.[22] In particular, the Court referred to Article 7(f) of the DPD, which holds that disclosure of data is legitimate if it is in the legitimate interests of a third party, unless such interests are overridden by the fundamental rights of the data subject.[23] However, the Court left that assessment to the national court.

In *Rundfunk*[24]Austrian legislation required certain bodies and public undertakings to declare information concerning the names and annual income of their employees, where that income exceeded a certain threshold, and subsequently to publish that information. In its judgment, the Court established a firm connection between the interpretation of the DPD and the protection under Article 8 ECHR and the requirements developed in the ECtHR's case law on

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[18] See also Juliane Kokott and Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the ECJ and the ECtHR' (2013) 3 *International Data Privacy Law* 222, 224.

[19] Case C-369/98 *Fisher* ECLI:EU:C:2000:79, [2000] ECR I-6751.

[20] Case C-369/98 *Fisher* ECLI:EU:C:2000:79, [2000] ECR I-6751, para 28-29.

[21] Case C-369/98 *Fisher* ECLI:EU:C:2000:79, [2000] ECR I-6751, para 31-32.

[22] Case C-369/98 *Fisher* ECLI:EU:C:2000:79, [2000] ECR I-6751, para 33-34.

[23] Case C-369/98 *Fisher* ECLI:EU:C:2000:79, [2000] ECR I-6751, para 35.

[24] Joined cases C-465/00, C-138/01 and C-139/01 *Rundfunk* ECLI:EU:C:2003:294, [2003] ECR I-4989.

Article 8 ECHR.[25] In particular, as a preliminary point, the Court clarified that the Directive is applicable even to situations without a free movement element, so also extending to (purely internal) situations such as that in the case at hand.[26] The Court noted that there are specific provisions in the Directive that make data disclosure legitimate for the purpose of compliance with legal obligations, such as a monitoring, inspection or regulatory function.[27] However, the Court also emphasised that the provisions of the Directive must be interpreted in the light of fundamental rights, particularly the right to privacy,[28] ensured by Article 8 ECHR which, however, also accepts certain limitations or restrictions.[29] The Court proceeded with providing the national court with guidelines for its assessment of whether an interference with the right to privacy exists, and if so, whether that interference can be justified, and if the measure chosen is proportionate to the aim pursued.

In the *Lindqvist*[30] case Mrs Lindqvist was charged with a criminal offence under Swedish law for publishing on her website certain personal data of people working with her as volunteers for a local church. This was done as a way to connect parishioners who were preparing for their confirmation. However, she had not informed her colleagues, nor asked their consent. Mrs Lindqvist had removed the Internet pages as soon as she learned that some of her colleagues objected to them, but she also argued that the processing of personal data had occurred in an informal, non-commercial (even charitable and religious) setting, and should be exempted from the DPD. In its judgment, the Court considered that in each individual case a balance must be struck (by the national court) between the right to protection of personal data and other fundamental rights and interests, such as the freedom of expression under Article 10 ECHR.[31] The Court considered that the DPD (and national implementing measures) provide the mechanisms and criteria for this balancing, which should be undertaken in each individual case, and in which fundamental rights have a particular importance.[32] The Court considered it a matter for the national court to determine a fair balance between the data protection rules and Mrs Lindqvist's freedom of expression in the context of her religious volunteer work. In that review, the

[25] See in particular joined cases C-465/00, C-138/01 and C-139/01 *Rundfunk* ECLI:EU:C:2003:294, [2003] ECR I-4989, para 71-87.

[26] Joined cases C-465/00, C-138/01 and C-139/01 *Rundfunk* ECLI:EU:C:2003:294, [2003] ECR I-4989, para 39-47.

[27] Joined cases C-465/00, C-138/01 and C-139/01 *Rundfunk* ECLI:EU:C:2003:294, [2003] ECR I-4989, para 65-67.

[28] Joined cases C-465/00, C-138/01 and C-139/01 *Rundfunk* ECLI:EU:C:2003:294, [2003] ECR I-4989, para 68-70.

[29] Joined cases C-465/00, C-138/01 and C-139/01 *Rundfunk* ECLI:EU:C:2003:294, [2003] ECR I-4989, para 71.

[30] Case C-101/01 *Lindqvist* ECLI:EU:C:2003:596, [2003] ECR I-12971.

[31] Case C-101/01 *Lindqvist* ECLI:EU:C:2003:596, [2003] ECR I-12971, para 80-90.

[32] Case C-101/01 *Lindqvist* ECLI:EU:C:2003:596, [2003] ECR I-12971, para 86.

Court stressed, regard must also be had to the principle of proportionality.[33] This line of reasoning was continued in *Promusicae*[34] and *Rijkeboer*,[35] in which the Court emphasised the importance of striking a fair balance between the data subject's effective protection of his right to privacy, and other rights involved, such as the right to (intellectual) property and the right to an effective judicial protection. In *Promusicae*, the Court also recognised for the first time the actual right to data protection as separate from the right to privacy.[36]

Meanwhile, the validity of the DRD had been challenged in the case *Ireland v. European Parliament and Council*.[37] Ireland claimed that the choice of Article 95 EC (now Art. 114 TFEU) as the legal basis for the DRD was fundamentally wrong, since the main aim of the DRD was to facilitate the investigation, detection and prosecution of crime, including terrorism, and not the improvement of the functioning of the internal market. However, the ECJ dismissed the action, emphasising that the action was solely based on the choice of legal basis and not on the substantive validity in light of fundamental rights.[38] The Court also considered that data retention obligations had considerable economic impact on the market in electronic communication services and, furthermore, that the measures introduced by the DRD were 'essentially limited to the activities of service providers and do not govern access to data or the use thereof by the police or judicial authorities of the Member States'.[39] The ECJ therefore concluded that the DRD 'relates predominantly to the functioning of the internal market' and that the choice for Article 95 EC was valid.

In the case *Volker & Schecke*,[40] the ECJ relied, for the first time in a case concerning data protection and privacy, primarily on the Charter instead of the ECHR, with the ECHR and the ECtHR's case law nevertheless continuing as an important source of inspiration. Furthermore, in its assessment of whether a violation of the right to data protection and/or privacy occurred in the case at hand, the Court followed the scheme of Article 52(1) Charter for its fundamental rights review (already discussed in Chapter 4): is there an interference, and if so, is it provided by law, is it pursuing a legitimate aim ('objective of the general interest recognised by the EU'), and is it necessary and proportionate?[41]

33 Case C-101/01 *Lindqvist* ECLI:EU:C:2003:596, [2003] ECR I-12971, para 87-89.

34 Case C-275/06 *Promusicae* ECLI:EU:C:2008:54, [2008] ECR I-271.

35 Case C-553/07 *Rijkeboer* ECLI:EU:C:2009:293, [2009] ECR I-3889.

36 Case C-275/06 *Promusicae* ECLI:EU:C:2008:54, [2008] ECR I-271, para 63.

37 Case C-301/06, *Ireland v Parliament and Council* ECLI:EU:C:2009:68, [2009] ECR I-593.

38 Case C-301/06, *Ireland v Parliament and Council* ECLI:EU:C:2009:68, [2009] ECR I-593, para 57.

39 Case C-301/06, *Ireland v Parliament and Council* ECLI:EU:C:2009:68, [2009] ECR I-593, para 80-83.

40 Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063; See also Michal Bobek, 'Joined Cases C-92 & 93/09, Volker und Markus Schecke GbR and Hartmut Eifert, Judgment of the Court of Justice (Grand Chamber) of 9 November 2010' (2011) 48 *Common Market Law Review* 2005.

41 Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063, para 49-50.

However, the Court also emphasised the correspondence between Article 8 ECHR and Articles 7 and 8 Charter.[42] In its review of the validity of the particular requirements of the agricultural aid scheme laid down in secondary legislation, the Court considered that the aim of increasing transparency in EU spending of public funds was a legitimate aim, but that this interest must be balanced against the interference with the right to respect for private life and the right to protection of personal data of the recipients of EU aid. Derogations or interferences in relation to personal data are justified only in so far as they are strictly necessary.[43] In this regard, the Court considered that it did not appear that the EU legislature sought to strike such a fair balance with regard to the personal data of natural persons by, for instance, considering less intrusive means.[44] As we will see in the following section, the Court's approach in *Volker & Schecke* foreshadowed the rigorous structure and quite strict standard of review of privacy and data protection in *Digital Rights Ireland*.

6.2.4 Subconclusion on prefiguration

As we have seen, the backdrop of the *Digital Rights Ireland* and *Google Spain* cases is formed by an interplay between both primary and secondary EU legislation, and the ECtHR's interpretation of Article 8 ECHR has been a formative influence on the ECJ's approach to the right to private life and to the protection of personal data under the DPD and Articles 7 and 8 Charter. As noted by Van der Sloot, the ECtHR's approach to Article 8 ECHR has been one of 'balancing', which is a tendency that was prominent in the ECJ's case law as well, as evidenced by, for instance, *Lindqvist* and *Volker & Schecke*.

6.3 Configuration: reading *Digital Rights Ireland* and *Google Spain*

6.3.1 Summary *Digital Rights Ireland*

Digital Rights Ireland[45] is a judgment in two joined preliminary references from the Irish High Court and from the Austrian

[42] Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063, para 51-52.

[43] Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063, para 77.

[44] Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063, para 80-83.

[45] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238; For a general discussion see Orla Lynskey, 'The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland' (2014) 51 *Common Market Law Review* 1789; as well as Marie-Pierre Granger and Kristina Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: telling off the EU legislator and teaching a lesson in privacy and data

Verfassungsgerichtshof, that both questioned the compatibility of the DRD with EU law. The EU adopted the DRD in 2006, and it required the collection and retention of telecommunication traffic data for the purposes of prevention, detection and investigation of 'serious crime', and is therefore an exception to the principle of confidentiality of electronic communications as set out in the E-privacy Directive 2002/58.

Digital Rights Ireland is a volunteer-based activist organisation aimed at 'defending civil, human and legal rights in a digital age'.[46] It had brought an action before the Irish High Court, challenging the retention of data from a mobile phone which it asserted that it possessed and used. In the context of that claim, it had in particular challenged the validity of the DRD and the Irish implementing legislation. The Austrian case was a mass/class action of 11,130 applicants who sought to annul (part of) the Austrian measure implementing the DRD in light of the infringement of the right to the protection of their data. Since in both cases the applicants brought legal actions challenging the legality of national measures adopted to implement the DRD, the validity of the DRD itself was therefore also challenged, and the national court referred the matter to the ECJ.[47]

In its judgment of 8 April 2014, the ECJ performed a judicial review of fundamental rights compatibility that can be characterised as a quite classic (and clear) structure of reasoning, modelling itself largely upon the structure of reasoning of the ECtHR that we identified in Chapter 4 and in Section 6.2.2. The ECJ first determined whether the (retention obligation imposed by) the DRD falls within the scope of Articles 7, 8, and 11 Charter at all and, unsurprisingly, it concluded that it does.[48] The ECJ then assessed whether there is a prima facie interference with Articles 7 and 8 Charter, and concluded that that is indeed the case.[49] The ECJ subsequently assessed whether this interference can

protection' (2014) 39 *European Law Review* 835; Jürgen Kühling and Sonja Heitzer, 'Returning through the National Back Door? The future of data retention after the ECJ Judgment on Directive 2006/24 in the UK and Elsewhere' (2015) 40 *European Law Review* 263.

46 Sic website Digital Rights Ireland.

47 As noted by Lynskey (Orla Lynskey, 'The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland' (2014) 51 *Common Market Law Review* 1789), the DRD had already been subject to criticism by many Member States' constitutional courts. Furthermore, the DRD had been subject to a challenge of its legal basis, in the case C-301/06, *Ireland v Parliament and Council* ECLI:EU:C:2009:68, [2009] ECR I-593, but the ECJ had dismissed that challenge, stating that the internal market legal basis (art. 95 EC, which is now Art. 114 TFEU) had been correct. See also Marie-Pierre Granger and Kristina Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: telling off the EU legislator and teaching a lesson in privacy and data protection' (2014) 39 *European Law Review* 835, 839.

48 Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 24-31.

49 Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 32-37. [NB: ECJ does not formally assess whether the interference is 'provided by law', but that is a given, since it concerns a Directive].

be justified. In that regard, the Court first considered that the essence of Articles 7 and 8 Charter is not affected, since the content of the communications is not retained.[50] The Court found, secondly, that the 'material object' of the DRD, namely the prevention of serious crime, genuinely satisfies the requirement of having an objective of general interests.[51] The ECJ then went on to consider the proportionality of the measure. It first identified the intensity of the judicial review it might perform, which it set at a strict level, given the importance of data protection in the light of the right to private life, and the extent and seriousness of the interference caused by the DRD.[52] The Court then found that data retention might be an appropriate measure to prevent serious crime.[53]

As regards the necessity of the DRD, the Court recognised the importance of the fight against serious crime, but also warned that this does not in itself justify an interference with Articles 7 and 8 Charter, which is only allowed insofar as is strictly necessary. The Court went on to state that the legislation in question must lay down clear and precise rules as to scope and application, imposing minimum safeguards for effective protection of data subjects' rights. However, the scope of the DRD is extremely broad, and is therefore not limited to what is strictly necessary.[54] Moreover, it also does not offer sufficient safeguards for the data subjects with regard to the security of the data in the hands of the economic operators who retain the data, in the light of the economic considerations that they might make for the security of their systems. The ECJ also considered the risk of transfer of the data to locations outside the EU.[55] The DRD was declared invalid in its entirety, and, unlike the proposal made by AG Cruz Villalón, the Court did not limit the temporal effect of this finding.[56]

6.3.2 The ECJ's 'self' in *Digital Rights Ireland*

When we start reading the *Digital Rights Ireland* judgment, what stands out directly, and has perhaps received the most attention, is that the ECJ performed its review directly based on the Charter, and in a style and scheme of reasoning that was clearly inspired by the ECtHR. It is for this

[50] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 39-40.

[51] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 41-44; This is at odds with the aforementioned case C-301/06, *Ireland v Parliament and Council* ECLI:EU:C:2009:68, [2009] ECR I-593, in which the choice of the internal market provision as a legal basis was found to be valid.

[52] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 47-48.

[53] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 49-50. It has been said that the Court's assessment on this point was rather uncritical: Orla Lynskey, 'The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland' (2014) 51 *Common Market Law Review* 1789, 1807-1810.

[54] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 56-65.

[55] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 66-69.

[56] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 71.

reason that the *Digital Rights Ireland* judgment has caused commentators to ask whether the ECJ is now (finally) turning into a proper fundamental rights court.[57] That is a fair question: what role is the ECJ carving out for itself in its reasoning in *Digital Rights Ireland*?

Notice how the opening paragraphs of the ECJ's reasoning in *Digital Rights Ireland* are quite different from its obvious precedent, *Volker & Schecke*.[58] In that case, the ECJ had started its reasoning with a kind of preliminary point, stating that the right to the protection of personal data 'is not, however, an absolute right, but must be regarded in relation to its function in society',[59] emphasising that Article 8(2) Charter authorises the processing of personal data if certain conditions are met,[60] and that the Charter and the ECHR accept that limits are imposed on the exercise of the right to privacy and protection of personal data as long as the requirements of Article 52(1) and those of the ECHR are satisfied.[61] Although the ECJ ended up declaring a provision of the legislation at issue in *Volker & Schecke* partially invalid,[62] I think that stressing the non-absolute nature of the right and the possibilities for limitations at the beginning of a judgment sets a different kind of tone, like a caveat. By contrast, in *Digital Rights Ireland* the ECJ did no such thing, and started right away with the question whether the DPD fell within the scope of the Charter rights.[63] Notice also how starkly the Court's approach differed from the one followed by AG Cruz Villalón, who started his Opinion by a review of the DRD in light of the proportionality principle of Article 5(4) TEU, before turning to the DRD's compatibility with the Charter. The AG clarified that that proportionality review is different from the one undertaken as part of an assessment based on the fundamental rights of the Charter, since Article 5(4) TEU is meant to ensure the EU's respect for Member State competences, which is a different aim than assessment of proportionality of a measure that interferes with fundamental rights of individuals.[64]

The approach of the ECJ in *Digital Rights Ireland* was not only to follow the classic scheme of fundamental rights review, but also to apply a particularly strict review of the compatibility of an EU measure with the Charter and, more particularly, with the principle of proportionality. Paragraph 47 states:

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57 See Indra Spiecker genannt Döhmann, 'A new framework for information markets: Google Spain' (2015) 52 *Common Market Law Review* 1033, 1055.

58 Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063.

59 Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063, para 48.

60 Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063, para 49.

61 Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063, para 50.

62 Joined cases C-92/09 and C-93/09 *Volker & Schecke* ECLI:EU:C:2010:662, [2010] ECR I-11063, para 89.

63 Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, para 24 and onwards.

64 Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, Opinion of AG Cruz Villalón, para. 88-89. See for a more detailed discussion Orla Lynskey, 'The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland' (2014) 51 *Common Market Law Review* 1793-1796.

> With regard to the judicial review of compliance with [the conditions of proportionality], where interferences with fundamental rights are at stake, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference.

The Court continued this line of reasoning in paragraph 48, where it considered that

> In view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by the [DRD], the EU legislature's discretion is reduced, with the result that review of that discretion should be strict.

This is an unusual and therefore significant moment in the ECJ's reasoning: the ECJ's approach to reviewing EU legislation is usually more deferential.[65] It presents also a stark contrast, perhaps even an inconsistency, with its own previous judgment about the DRD's validity in *Ireland v Parliament and Council* in 2009, in which the Court was quite generous to the EU legislature for its choice of the internal market legislative basis of Article 95 EC (Art. 114 TFEU). Another inconsistency is that the Court in *Digital Rights Ireland* observed that the 'the material objective of [the DRD] is, (...), to contribute to the fight against serious crime and thus, ultimately, to public security', which seems to be in conflict with its assessment in paragraph 85 of *Ireland v Parliament and Council* that the DRD 'relates predominantly to the functioning of the internal market'.[66] This is therefore a remarkably different attitude from what we could have expected based on our 'prefiguration' of the legal framework in Section 6.2.

Let us consider the effect of this unusual intensity of review: it should heighten our sensitivity for the reasoning in the rest of the judgment, and it creates expectations for other cases in which fundamental rights (and not just

[65] Sybe A de Vries, 'The Charter of Fundamental Rights and the EU's 'creeping' competences: does the Charter have a centrifugal effect for fundamental rights in the EU?' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU law and Human Rights* (Edward Elgar Publishing 2017), 78-79; See also Aurelien Portuese, 'Principle of Proportionality as Principle of Economic Efficiency' (2013) 19 *European Law Journal* 612, 630; Marie-Pierre Granger and Kristina Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: telling off the EU legislator and teaching a lesson in privacy and data protection' (2014) 39 *European Law Review* 835, 844-845; and Jason Coppell and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously' (1992) 29 *Common Market Law Review* 669.

[66] Granger and Irion have speculated whether the ECJ in Digital Rights Ireland has tried to correct its 'faux pas' in Ireland v Parliament and Council. See Marie-Pierre Granger and Kristina Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: telling off the EU legislator and teaching a lesson in privacy and data protection' (2014) 39 *European Law Review* 835, 846.

the right to privacy and data protection) are at stake. Furthermore, by applying a more strict review, the Court not only emphasises the importance of the fundamental rights in themselves, but in (also) asserting that the judicial review should be strict, the ECJ claims a particular and important role for itself, as the institutional actor which guards fundamental rights, and assigns a particular role or task to the EU legislature, namely to protect fundamental rights more adequately in legislation.[67] Notice also how the Court refers in paragraph 47 to the ECtHR judgment in *S and Marper v UK* to support the strictness of the judicial review, aligning or likening, itself with the ECtHR, Europe's human rights court.

On several occasions, the Court amplifies the strict fundamental rights review by use of repetition, in rhetorical terms this is called 'parallelism', for instance in paragraphs 56 and 57: '*all* traffic data…*all* means of electronic communications…*all* subscribers' and '*all* persons…*all* means…*all* traffic data…'. The parallelism of the word 'all' is repeated in paragraph 58: '[the DRD] affects… *all* persons', and the Court emphasises the seriousness of the infringement by introducing another parallelism of the words 'even' and 'any':

> It therefore applies *even* to persons for whom there is no evidence capable of suggesting that their conduct might have a link, *even* an indirect or remote one, with serious crime. Furthermore, it does not provide for *any* exception, with the result that it applies *even* to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy. (emphasis supplied)

This continues in paragraph 59, 'moreover… does not require *any* relationship…' and in para graph 60, '…not only is there a general absence of limits in [the DRD] but [it] also fails to lay down *any* objective criteria by which to determine the limits…'.

The rhetorical effect of these parallelisms is that the text of the paragraphs seems to express a kind of exasperation, working on the reader's *pathos*.[68] The employment of this rhetorical device makes these passages livelier than the Court's usual, rather dry and formal, style. As noted in Chapter 3, the ECJ is not known for its appealing rhetorical style.[69] This break in its usual style and tone

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[67] Cf. Marie-Pierre Granger and Kristina Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: telling off the EU legislator and teaching a lesson in privacy and data protection' (2014) 39 *European Law Review* 835, 845-846.

[68] In his *Rhetoric*, Aristotle famously distinguished between the rhetorical elements of ethos, pathos and logos as modes of persuasion. Ethos draws on the speaker's personal character and reliability, pathos appeals to the sentiments of the audience, and logos refers to the logic and suitability of the arguments presented. See Ian Worthington (ed.), *A Companion to Greek Rhetoric*, (John Wiley & Sons 2006), 107-123.

[69] The ECJ's style has been called dry, terse and technical. See for instance Michal Bobek, *The Court of Justice of the European Union* (Research Paper in Law 02/2014) <https://www.coleurope.eu/sites/default/

raises the stakes for the subsequent assessment: the parallelisms of 'all', 'any', and 'even' call for an appropriately strong response. For the careful reader, it may therefore come as no surprise that the Court eventually concludes in paragraph 65 that the DRD 'entails a wide-ranging and particularly serious interference with those fundamental rights... [that is not] limited to what is strictly necessary', and subsequently declares the DRD invalid in its entirety.

6.3.3 Articulation by ECJ of dangers of mass surveillance

The judgment in *Digital Rights Ireland* contains other textual elements that are remarkable, this time for their narrative, world-sketching quality. In several significant passages the Court articulates the effects of the mass surveillance/data retention made possible by the DRD. These are small but significant instances of the ECJ showing an awareness of the role played in individuals' lives of (the aggregated data of) their electronic communications, and the consequences for the relationship between the rules of law at issue and their addressees/subjects. Consider the following passages:

> (...) Those data make it possible, in particular, to know the identity of the person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place. They also make it possible to know the frequency of the communications of the subscriber or registered user with certain persons during a given period. [Paragraph 26.]
>
> Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday lives, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them. [Paragraph 27.]

What is the tone of these passages and what are their effects? What we can see here is a court of law trying to give life to what is otherwise an abstract, technical legal issue. We see the Court trying to describe what it is like for a real person to live and communicate using these technologies, and for third persons to know and register all kinds of things about their lives. It is hard to judge these passages in isolation, but the comparison with the other case study in Chapter 7 will examine further how uncommon it is for the Court to evoke this sense of real life, of a real world in which individuals go about their business, and the ways in which their lives are affected by all kinds of laws and regulations.

This brings us to the next passage of this kind. The pathos of paragraphs 26 and 27 is continued and deepened in paragraph 37, where the ECJ considers that

files/uploads/news/researchpaper_2_2014_bobek.pdf> accessed 22 December 202. See also Giuseppe Federico Mancini and David T Keeling, 'Language, Culture and Politics in the Life of the European Court of Justice' (1995) 1 *Columbia Journal of European Law* 397, 397-398.

the DRD causes a particularly wide-ranging and serious interference with the rights to privacy and data protection. The Court adds:

> ....the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance.

This invites an immediate association with George Orwell's well-known dystopian novel Nineteen Eighty-Four, in which 'Big Brother', the ever-spying authority, the slogan 'Big Brother Is Watching You', the 'Thought Police' and the idea of being monitored all the time, all played an important role. What is it like for the Court to make such a cultural allusion? Also, from a more formal, legal standpoint, what is the Court doing here exactly? Apart from introducing a powerful element of pathos, the evocation of certain sentiments in the mind and hearts of the reader, the statement that the data's retention and use 'is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance' is an assumption about the thoughts and feelings about the individuals concerned. This is an assumption that is not backed up by any empirical data, made by a Court that does not usually speculate about 'feelings', and one may ask whether it is even the place of the Court to do so. Furthermore, this assumption, namely the 'Big Brother' narrative, has a value beyond superficial rhetoric or aesthetic style, since it serves to amplify the seriousness of the infringement of fundamental rights, which turns out to be a pivotal reason in paragraph 48 for the Court to break with its usual deference to the EU legislature and adopt a strict approach to the review of the DRD.

The matter of real-world consequences comes back in the proportionality assessment, where the Court notes that the DRD 'applies to all means of electronic communication, the use of which is very widespread and of growing importance in people's everyday lives'. And as the DRD covers all subscribers and registered users of these electronic communication technologies, '[I]t therefore entails an interference with the fundamental rights of practically the entire European population' (paragraph 56). Notice how these passages function not only as proof of the DRD's pitfalls, but also as a justification of the high level of scrutiny.

6.3.4 Control and territoriality

Let us turn our attention now to the other roles and other aspects of the normative world that are defined in this text. One thing that the reader may notice is the completely passive nature of the data subject, whom we can call the 'close other' as defined by Ricoeur in *Oneself as Another* that we discussed in Section 2.5.3 above, under the DRD. Individuals whose data are

retained seem to have zero agency, zero control of their data in these cases. The data is generated by the very use of the communication technologies and, as the Court notes in paragraphs 56-60, the DRD allows for no differentiation, limitation, or exception. The 'close other' has no agency under the DRD, and the legal proceedings leading up to the *Digital Rights Ireland* judgment were a means to 'take back control'. As the Court notes in paragraph 54 – with a reference to the ECtHR's case law – persons whose data have been retained must have 'sufficient guarantees to effectively protect their personal data against the risk of abuse and against all unlawful access and use of that data'. Remarkably, in the *Digital Rights Ireland* judgment, the actual data subjects who were the litigants were a privacy rights organisation on the one hand, and a group of over 10,000 litigants on the other hand. Very few details are discussed, and it is therefore fair to conclude that the details about their data or other aspects of their lives are, apparently, considered irrelevant.

The examination of the 'self' (namely, the ECJ) and the 'close other' in the world of the *Digital Rights Ireland* judgment brings us to the issue of the 'distant other', and to perhaps the 'outside' as well as the 'outsiders' of this normative universe. This comes at the very end of the Court's reasoning, almost as an afterthought: the problem of who has control and access to the data, once retained. It is only in paragraphs 66-67 that the Court observes that the DRD places the retention duties upon non-state actors, i.e. the parties (public authorities, but also – and perhaps more often – commercial actors) who provide the electronic communication services and/or networks, and that, moreover, these actors may have their own, economic, considerations regarding data security. In paragraph 68 the Court adds another –and final observation that the DRD does not require the data to be held within the EU, and that, consequently, the control by an independent authority, which is an 'essential component' of the protection offered by Article 8(3) Charter, is not ensured.[70] The judgment in *Digital Rights Ireland* does not go further into these matters, and it perhaps did not need to do so: there was sufficient cause to annul the contested Directive. However, it is a significant element in the world, the *nomos*, that the ECJ is sketching out in this judgment.

6.3.5 *Google Spain:* preliminary observations

Before we start examining our reading of the *Google Spain* case, let us consider the way in which it is different from the judgment in *Digital Rights Ireland*. The *Digital Rights Ireland* case concerned preliminary questions about the validity of a recent piece of legislation that had been contested by national courts from its adoption. The central question concerned whether the DRD in itself constituted an (unjustified) interference with the fundamental

[70] See Orla Lynskey, 'The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland' (2014) 51 *Common Market Law Review* 1789, 1807.

rights to privacy and protection of personal data as guaranteed by the Charter, which is why the ECJ performed the rather schematic fundamental rights review.

By contrast, the *Google Spain* case concerned the interpretation of provisions of the DPD, an act of secondary legislation that, as discussed in Section 6.2, had been adopted in 1995 and in force since 1998, and had already been subject to various preliminary references, and was generally considered (and accepted) as the basis for the data protection regime in Europe. The significant new feature in *Google Spain* was that it was the first time that the ECJ had had to interpret the DPD in relation to the activities of an Internet search engine. Despite its general acceptance, a growing criticism of the DPD was that it was rapidly becoming outdated in light of the new electronic and digital communication technologies such as the Internet, social media and smartphones,[71] and the question was whether the ECJ would succeed in keeping the DPD relevant amidst the technological developments until new legislation was adopted.

In light of these considerable differences in the kind of problem with which the ECJ was presented, we might expect to find a different kind of reasoning, which invites a different kind of reading as well. Although our close reading of the *Google Spain* judgment will largely follow the order of the text as it is written, our examination will focus on deeply understanding the kinds of arguments that are used, and on identifying moments and elements that are significant for our exploration of narratives of self, a vision of humanity and a worldview.

6.3.6 *Google Spain*: summary

The *Google Spain* case[72] concerned the following matter. Mario Costeja González, a Spanish national and resident, had been subject to a forced sale of his foreclosed house because of a social security debt in 1998. *La Vanguardia Ediciones*, a daily newspaper with a large circulation in Spain, had reported on that real estate auction. In 2010 this information was still available if one entered Mr Costeja González's name in the search engine Google, but Mr Costeja González did not want this information to be generally and publicly available anymore. By the forced sale and by the passage of time, this information had become irrelevant. He lodged a complaint with the AEPD (the Spanish data protection authority) against *La Vanguardia Ediciones*, as well as against Google

[71] Federico Ferretti, 'Data protection and the legitimate interests of data controllers: much ado about nothing or the winter of rights?' (2014) 52 *Common Market Law Review* 843.

[72] Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317; See for a general discussion: Indra Spiecker genannt Döhmann, 'A new framework for information markets: Google Spain' (2015) 52 *Common Market Law Review* 1033; Orla Lynskey, 'Control over Personal Data in a Digital Age: Google Spain v AEPD and Mario Costeja Gonzalez' (2015) 78 *The Modern Law Review* 522; Elizabeth Kelsey, 'Case Analysis – Google Spain SL and Google Inc. v AEPD and Mario Costeja González: Protection of personal data, freedom of information and the 'right to be forgotten'' (2014) European Human Rights Law Review 395-400.

Spain and Google Inc. Mr Costeja Gonzáles requested that *La Vanguardia* be ordered to remove or alter those pages so that this personal data did not appear in search results. Furthermore, he requested that Google be required to remove or conceal this personal data from the search results. In the course of appeal proceedings, the Spanish High Court was unsure of the rights and duties under the DPD of Mr Costeja González and of Internet search engine Google, and referred preliminary questions to the ECJ.

In its judgment of 13 May 2014, in response to three questions, the ECJ answered that: (1) search engines 'process' personal (and other) data, and that search engine operators are the 'controllers' in respect of that processing, since they determine the purposes and means of the processing;[73] (2) the DPD applies to data processing by search engine operators even if the actual processing is executed by the parent company which is established in a third country, when there is a subsidiary or branch in an EU Member State that undertakes activities, such as promoting and selling advertising, that are 'inextricably linked' with the data processing;[74] (3) the data subject may request – and the supervisory or judicial authority may order – the search engine operator to remove personal data from the list of search results following a search based on that person's name, if that information is inaccurate, inadequate, excessive, not up-to-date or kept for longer than necessary.[75]

6.3.7 The notion of 'control': articulation of what search engines do

Now let us take a closer look at how the ECJ constructed its reasoning, following a changed order of the preliminary questions, beginning with the second question about whether the activities of a search engine constitute data processing, and whether an operator of a search engine is a 'controller' within the meaning of the DPD. While a large part of the judgment stays very close to the vocabulary offered by the DPD itself and to some of the ECJ's own previous judgments as precedent, there are moments when you seem to hear the ECJ's own voice. These kinds of moments include when the ECJ articulates what search engines do, and what the possibility of obtaining a list of search results means for a person's private life, which is subsequently used as a reason to set a high level of protection for the right to privacy and data protection and, accordingly, for performing a broad interpretation of the notions of 'processing', 'controller' and of the territorial scope of the DPD.

As regards 'processing', it seems as if paragraph 28 still gives a reasonable description of the activity of search engines, namely:

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73 Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 21-41.

74 Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 42-60.

75 Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 62-99.

> ...in exploring the internet automatically, constantly and systematically in search of the information which is published there, the operator of a search engine 'collects' such data which it subsequently 'retrieves', 'records' and 'organises' within the framework of its indexing programmes, 'stores' on its servers and, as the case may be, 'discloses' and 'makes available' to its users in the form of lists of search results.

Notice how the Court neatly matches the description of the search engine's activities directly to terms contained in Article 2(b) DPD, and that there is a precedent available to support the conclusion that an activity can be data processing even if the data has already been published before and is not altered by the new processing.[76]

However, when we examine how the ECJ constructed its interpretation of the notion of 'controller', there is a clear lack of a description of what Google actually does that makes it a controller, nor is there a relevant precedent available to the Court. In paragraph 32 the Court refers to the definition of 'controller' contained in Article 2(d) DPD, namely the legal or natural person which determines the purposes and means of the processing of personal data. In paragraph 33, the Court merely states that it is the search engine operator which determines the purposes and means of its search engines, and concludes that, therefore, that search engine operator is the controller. This is a statement, not an argument backed up by facts, which in rhetorical terms would be called the argumentative fallacy, the 'proof by assertion'. It is only in paragraph 43, the section dealing with the question about the territorial scope of the DPD, that the Court reiterates the facts, which include a (brief) description of how Google's search engine actually works:

> Google Search indexes websites throughout the world, including websites located in Spain. The information indexed by its 'web crawlers' or robots, that is to say, computer programmes used to locate and sweep up the content of web pages methodically and automatically, is stored temporarily on servers whose State of location is unknown, that being kept secret for reasons of competition. [Paragraph 43, third indent.]

Would not this information have been relevant, even necessary, in the earlier part about the material scope of the previously mentioned notion of 'controller'? This invites the question whether, in editing the judgment, the order in which the questions had been answered was different. If question 1 had been answered first, then the information contained in bullet points in paragraph 43 would have been introduced at the beginning of the judgment, which would have provided context to, and reference/background material to, the answer to question 2 as it is currently contained in paragraphs 27-33. Be that as it may,

[76] Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 29-31, the ECJ refers to case C-73/07 *Satakunnan Markkinaporssi and Satamedia* EU:C:2008:727, [2008] ECR I-9831.

and while the Court's interpretation is understandable once we have read the facts contained in paragraph 43 (or with our own real-world knowledge about how search engines are operated by companies), in its current form, the Court's interpretation of 'controller' is vitiated by an unfortunate argumentative error.

The kind of haste with which the Court concludes that a search engine operator is a 'controller' in paragraph 33, is amplified, or justified, by what it considers in the following paragraphs. In paragraph 34, the Court considers that it needs to adopt a broad definition of controller in order to ensure the 'effective and complete protection of data subjects', and that it would be contrary to the wording and objective of the DPD 'to exclude the operator of a search engine from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties'. By stating this, the Court is responding to the arguments of Google that it did not exercise control over the data published on web pages that end up as links in the list of search results. Two different notions of control are contrasted here: Google emphasised the control over the original data itself, while various other parties, including Mr Costeja Gonzáles, emphasised the control that a search engine operator exercises over the subsequent processing of that data in the context of the search engine's activities. The Court chose the latter point of view, emphasising in paragraph 35 that 'the processing of personal data carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites, consisting in loading those data on an internet page'.

In what follows it becomes clear that the particular characteristics of and the role played by search engines in the current digitalised world, were contributing factors in according a broad interpretation of the notion of 'controller':

> Moreover, it is undisputed that that activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user making a search on the basis of the data subject's name, including to internet users who otherwise would not have found the web page on which those data are published. [Paragraph 36.]
>
> Also, the organisation and aggregation of information published on the internet that are effected by search engines with the aim of facilitating their users' access to that information may, when users carry out their search on the basis of an individual's name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject. [Paragraph 37.]

These considerations allow the ECJ to conclude in paragraph 38 that 'the activity of a search engine is therefore liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data' and that the operator of a search

engine must therefore ensure that the data processing meets the requirements of the DPD in order to give the DPD 'full effect' and to achieve 'effective and complete protection of data subjects, in particular of their right to privacy'.

What kind of action with words is this? We observe here an argument about 'control' that fails to specify what that control consists of, followed by paragraphs that emphasise how serious the potential risk is for a data subject's right to privacy and data protection. From a rhetorical point of view, the sequence of these elements lends an urgency to the Court's interpretation of 'controller'. Could we say that the urgency that the Court makes us feel (*pathos*), and the fact that the description of what search engines mean for the access to information on the internet is so accurate, more or less remedy the argumentative fallacy in paragraph 33? The whole of the argument about control seems persuasive, despite this flaw, and why is that?

Furthermore, if we take a more legal point of view, what kind of a notion of control, and the accompanying notions of responsibility and liability, do we see at work here? Is it a kind of legal fiction like strict liability, the way an owner is responsible for his dog's behaviour, even though a dog is a living being with a mind of its own and the owner is not, and perhaps cannot be, in actual full control of it all the time?

Note also that AG Jääskinen suggested a different interpretation of 'controller' and argued that because of the automated 'crawling', Google could not be called the 'controller' of the processing. He extensively explained the functioning of the search engine. The ECJ did not address this, and does not explain why it disagrees with the AG. Although we know from Chapter 3 that the Court rarely openly disagrees with the AG, could the Court's lack of explanation in paragraph 33 be explained by a desire to remain 'technologically neutral', i.e. curbing the risk of limiting the future reach and relevance of this interpretation if it is too tied to the current facts, which may be different in light of the fast moving developments in the field of digital technologies? If you wanted to give such a technologically neutral interpretation, what would be the way to go about that? How would that desire change the way in which you write and construct an argument? In addition, why has the Court not used some of the factual findings as mentioned in paragraph 43, and said something along the lines of 'The search engine operator – like Google in this case – determines the technological means by which the search engine functions, i.e. the search engine operator chooses the codes and algorithms that make up the "web crawlers" or robots, so that it therefore is the "controller"'? Would that have been a valuable addition, or would it have somehow detracted something from the usefulness of the interpretation?[77]

[77] Digital technologies are increasingly automated, but that does not mean that compiling a list of search results is not 'processing' of information. Search engine operators set up the company and the entire infrastructure for an internet search engine to function: they design, commission, or buy the necessary computer programmes. Moreover, although those programmes can increasingly function automatically or even autonomously, by the very fact of setting up the infrastructure the search engine operator

Finally, the Court adds that although there are technical possibilities for the publishers of websites containing the 'original' data to indicate to search engine operators that they wish certain information to be excluded from the search engine's automatic indexing, this does not mean that the operator of a search engine is released from its responsibility for the processing of personal data.[78] As noted by Spiecker-Dohmann, this seems to indicate that the ECJ does not impose a duty to adopt self-protection measures, i.e. to shield a web page from the 'crawling' algorithms, upon web page publishers.[79]

6.3.8 Territorial scope of the DPD: 'context of activities'

The next problem to which the ECJ had to respond was the matter of the territorial scope of the DPD: Google argued that its search engine activities were carried out exclusively by Google Inc in the US, while the Google Spain subsidiary only undertook advertising activities. That would mean that US-based Google Inc would not fall within the territorial scope of the DPD. Let us examine how the Court goes about constructing its response. The Court first notes the wording of Article 4(1)a DPD, which requires that Member States apply the national measures implementing the DPD to data processing '(...) carried out in the context of the activities of an establishment of the controller on the territory of the Member State...'. The ECJ notes that it is undisputed that Google Spain is a subsidiary of Google Inc and satisfies the definition of 'establishment' in light of Article 4 and recital 19 of the DPD's preamble.[80]

In paragraph 54 the ECJ notes – based on recitals 18-20 and Article 4 DPD – the intention of the EU legislature to prevent individuals from being deprived

determines the parameters of its subsequent functioning. Furthermore, the search engine operator buys or rents data centres which the search engine needs to function properly, and performs updates and other maintenance. This fulfils the criterion of 'determining the purposes and means of the data processing'. Furthermore, we do not know whether a search engine's algorithms are really that automatic and neutral. As a matter of fact, there seems to be a certain advantaging going on, as research about algorithmic discrimination shows. See Frederik Zuiderveen Borgesius, 'Discrimination, artificial intelligence, and algorithmic decision-making' (Study for the Council of Europe 2018) <https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73> accessed 22 December 2020; See also Jenifer Winter, 'Algorithmic Discrimination: Big Data Analytics and the Future of the Internet' in Jenifer Winter and Ryota Ono (eds), *The Future Internet. Public Administration and Information Technology*, vol 17 (Springer 2015); and for an insider view of how this works: Yael Eisenstat, 'The Real Reason Tech Struggles With Algorithmic Bias' (Wired 2019) <https://www.wired.com/story/the-real-reason-tech-struggles-with-algorithmic-bias/> accessed 22 December 2020; and Philipp Hacker, 'Teaching fairness to artificial intelligence: Existing and novel strategies against algorithmic discrimination under EU law' (2018) 55 *Common Market Law Review*, 1143.

78 Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 39-40.

79 Indra Spiecker genannt Döhmann, 'A new framework for information markets: Google Spain' (2015) 52 *Common Market Law Review* 1033, 1050.

80 Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 48-50.

of the protection of the DPD, and stated (more strongly) that, by prescribing a particularly broad territorial scope, it sought to prevent that protection from being circumvented.

The pivotal terms in the DPD are 'in the context of activities', and in paragraphs 55-57 the ECJ explains how Google Spain's and Google Inc's activities are connected. The ECJ assesses the undertaking's business model in some detail, observing that the activities of the search engine and those of the subsidiary selling and promoting advertising space are 'inextricably linked': advertisements make the search engine profitable, and those advertisements are displayed next to the search results list. In light of the foregoing, the display of personal data on the search results list constitutes processing, and it is accompanied by the advertisements linked to the search terms used. This means that the processing of the personal data is carried out in the context of the commercial and advertising activities of Google Spain.

In paragraph 58 the Court amplifies this argument by an *a contrario* argument: if Google were to escape applicability of the DPD, that would compromise the DPD's effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy with respect to the processing of personal data. Furthermore, in a subtle way, the Court makes assumptions about a search engine operator's behaviour and its inclination to try to circumvent the EU rules, which a broad reading of the DPD's provisions aims to prevent.

6.3.9 Extent of responsibilities of search engine operator

This brings us to the third part of the ECJ's judgment, in which it answers the second half of the second question, as well as the third preliminary question pertaining to the extent of the search engine operator's responsibilities, and the scope of the data subject's rights under Articles 12(b) and 14(1) a DPD.

The Court's reasoning begins with emphasising that the DPD seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy with respect to the processing of personal data, a statement that has the support of precedent, and that immediately sets the tone for the subsequent reasoning.[81]

In paragraph 67 the ECJ observes how that protection is reflected in what we could call the DPD's two-pronged approach: on the one hand it places obligations on controllers, and on the other hand it grants rights to data subjects. In paragraph 68, the ECJ stresses that the DPD must 'necessarily' be interpreted in the light of fundamental rights, a statement for which the Court also refers to precedent. In the next paragraph, the Court raises the stakes even higher, declaring that not only do Articles 7 and 8 Charter ensure the right to privacy and data protection, but also that Articles 6, 7, 12, 14 and 28 DPD implement

[81] Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 66.

the requirements set out by Article 8(2) Charter. With the expectations set so high, it may come as no surprise that the Court subsequently holds that the list of reasons mentioned in Article 12(b) for which a search engine operator may be held liable to rectify, erase or block certain data, is non-exhaustive, and the obligation may also arise from other kinds of non-observance of the conditions for lawful personal data processing.

This brings the Court to the discussion of Article 7(f) DPD which permits the processing of personal data for the purposes of the legitimate interests pursued by the controller or by the third party (contrary to the other grounds for legitimate data processing, such as by consent or contractual obligation). Article 7(f) DPD, however, also stipulates that those legitimate interests can be overridden by the interests or fundamental rights and freedoms of the data subject. The ECJ therefore concludes that that provision requires a balancing of the opposing rights and interests concerned, and adds that in that balancing, 'account must be taken of the significance of the data subjects rights' under Articles 7 and 8 Charter.

It is at this point that the Court could have sketched out a 'rectangle' of the rights and interests involved, i.e. the right to privacy and data protection of the data subject, the business rights of the search engine operator, the freedom of speech of journalists and other web publishers and, finally, the interests of the public in having access to this information.[82] However, the ECJ took a different course. It first extended the discussion by including the right to object (Art. 14(1) a DPD) in the discussion, observing that a balancing of interests is also required for the application of that provision, and that it allows in a more specific manner the taking into account of all the circumstances surrounding the data subject's particular situation. In light of the assessment of a data subject's objection to be carried out by the controller, the Court points out that an internet search based on an individual's name may significantly affect his fundamental rights to privacy and to the protection of his personal data, since the search engine's activity

> enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet – information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty – and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous. [Paragraph 80.]

[82] Indra Spiecker genannt Döhmann, 'A new framework for information markets: Google Spain' (2015) 52 *Common Market Law Review* 1033, 1045-1047; AG Jäaskinen did take into account the other interests involved, such as the freedom of expression and the right to conduct a business.

These are important and detailed observations about the 'real life' role and importance of search engines in our society. In paragraph 81, the Court follows these considerations by observing that this potentially serious interference cannot be justified by merely the search engine operator's economic interest. A fair balance must thus be struck between the legitimate interest of internet users to have access to that information, and the data subject's fundamental rights under Articles 7 and 8 Charter. However, the Court considers also that

> whilst it is true that the data subject's rights [under Articles 7 and 8 of the Charter] also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life, and on the interest of the public in having that information, which may vary according to the role played by the data subject in public life.[83]

What is the ECJ doing here? Was such a sweeping, solemn statement necessary? By stating that the rights of the data subject override 'as a general rule' the other interests involved, the Court thus makes it clear that it considers the data subject's rights to be of primary importance, which has considerable consequences for the allocation and burden of proof. This seems to signify a certain kind of fundamental rights approach, opening up questions about a hierarchy of norms between fundamental rights. Perhaps it makes the oversight (by the search engines/internet intermediaries themselves, as well as by the supervisory and, eventually, judicial authorities) a bit easier, since a reasonably motivated request for erasure will be granted, but where does it leave the other internet users in terms of rights and remedies and burden of proof? The default rule introduced here is perhaps a way to avoid making a more detailed ruling that includes these issues, since a political and public debate about the allocation of these responsibilities is appropriate.[84] Another question that the careful reader of the ECJ's case law may have is whether the data subject is granted rights without responsibilities. As noted above, there seems to be no duty upon web page publishers to take protective measures to exclude certain information from search results, and in the general statement in paragraph 81, which does make room for exceptions in light of the nature of the information, its sensitivity and the role played by the data subject in public life, there is no consideration of the data subject's own responsibility for placing certain personal data on the internet. We will see later on in Chapter 7 whether the theme of responsibilities and rights plays out in a coherent way throughout both case studies.

Continuing to add more and more details and nuances to the balancing of rights, the Court explains, in the following paragraphs, that the data processing by a search engine is distinct from, and additional to, the processing by the

[83] Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 81.

[84] Indra Spiecker genannt Döhmann, 'A new framework for information markets: Google Spain' (2015) 52 *Common Market Law Review* 1033, 1039.

original web page publisher, and that the consequences of data processing by a web page publisher and by a search engine are, for the data subject's private life, not necessarily the same:

> Given the ease with which information published on a website can be replicated on other sites and the fact that the persons responsible for its publication are not always subject to European Union legislation, effective and complete protection of data users could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites. [Paragraph 84.]

The removal of personal data from search results, therefore, does not presuppose the previous or simultaneous removal of that data from the web page where it was originally published, and the claims of the data subject on the one hand, and the available grounds for justification, such as journalistic purposes, on the other hand may, accordingly, be different.[85]

In line with its previous articulation of what search engines do in paragraphs 36, 37 and 80, the Court adds in paragraph 87:

> Indeed, since the inclusion in the list of results, displayed following a search made on the basis of a person's name, of a web page and of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page.

In the structure of the ECJ's judgment this statement concludes the section on the extent of the search engine operator's responsibilities, but together with the other instances of 'real life consequences', it also forms a rhetorical chain throughout the entire reasoning.

The last section deals with the scope of the data subject's rights, and the question whether the processing of certain personal data may prove to become unlawful after a certain period of time. In light of the assessment that the operator of a search engine must make of the data subject's request for removal of certain information from the list of search results following a search made on the basis of his name, the Court reaffirms its foregrounding of the data subject's rights:

> As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, as follows in particular from paragraph 81 of the present judgment, that

[85] Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 82-86.

> those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question. [Paragraph 97.]

In the last substantive paragraph of this already quite remarkable judgment, the ECJ adds another noteworthy move: in paragraph 98 the ECJ relates its interpretation of the DPD to the concrete factual situation of Mr Costeja Gonzáles. The paragraph is too long to quote word for word, but the Court firmly concludes that Mr Costeja Gonzáles 'establishes a right that that information should no longer be linked to his name by means of such a list'. The national court, which usually has the competence/prerogative to apply the ECJ's interpretation of EU law to the concrete case at hand, is left the meagre task of verifying whether there is a 'preponderant interest of the public in having (...) access to that information', although the Court also subtly notes that there do not appear to be such particular reasons.

What do we make of this paragraph? What does it mean for the ECJ to basically overstep its mandate? As we learned in Chapter 3, in a preliminary reference procedure the Court's task is to offer an interpretation of EU law, and it is for the national court to apply that interpretation to the facts and circumstances of the case at hand.

6.4 From configuration to refiguration – comparing *Digital Rights Ireland* and *Google Spain*

6.4.1 Comparability

As noted in Section 6.3.5, and as the reading has shown, the *Digital Rights Ireland* case and the *Google Spain* case were quite different procedures, resulting in different types of judgments, and inviting a different kind of reading. Consequently, the reading experiences and themes they offer are not as neatly comparable as the *Grzelczyk* and *Dano* cases in the previous chapter on EU citizenship. However, there is still merit in 'reading one work in light of the other', in order to see in what ways these texts are made to function, and in what way they have contributed to shaping the EU's current data protection regime. What follows is a thematic comparison following the directions of inquiry defined in the discussion of the *Digital Rights Ireland* judgment, and an assessment of the way in which they responded to the material offered by the legal framework and the cases preceding these landmark judgments.

6.4.2 The ECJ's 'self': a fundamental rights 'champion' and its rhetoric

In *Digital Rights Ireland* the ECJ not only applied the classic fundamental rights scheme of review, but adopted a particularly and unusually strict level of scrutiny. One could say that by doing so, it adopted the role of fundamental rights 'champion' for itself, seeking to respond to the new challenges of the digitalised world in a meaningful way. Moreover, it reinforced this fundamental rights focus through rhetorical and narrative devices, by appealing to the *pathos* of the reader. For instance, the ECJ took the opportunity to articulate what mass surveillance and access to aggregated personal data means in an individual's life. This gave even more depth and context to the strict fundamental rights review that it performed: in the articulation of these effects, the Court draws the interference 'closer' to the reader. Furthermore, the rhetorical device of parallelism, i.e. repetitions of 'all', 'even' and 'any' emphasised the absence of limits and therefore the seriousness of the breach, and therefore helped to justify the strictness of the review. The rhetoric and aesthetic of the Court's writing reinforce the 'movements' in the legal reasoning.

In the *Google Spain* judgment, the ECJ continues its streak as the 'champion' of fundamental rights that it set so firmly in *Digital Rights Ireland*. The effective and complete protection of the data subject's (fundamental) rights justified a broad interpretation of 'controller'. Similarly, the interpretation of the DPD 'in the light of' the Charter caused a broad interpretation of its territorial scope. Moreover, a high level of protection of the data subject's rights as well as a duty to interpret the DPD in the light of the Charter, led not only to a broad reading of these rights, but even to the Court effectively tipping the scales in favour of the data subject rights by stating (twice) that they 'as a (general) rule' override the interest of other internet users in obtaining that information or the economic interests of the search engine operator, thereby significantly affecting the way in which the various rights that are at play in determining a right to erasure may be balanced. Based on our review of previous case law in Section 6.2 a more balanced approach was expected, in which account would be taken of other rights.

Note how the ECJ in the *Google Spain* judgment only mentions the Charter and its own case law, instead of the case law of the ECtHR. Here we can observe what is sometimes called 'Charter-centrism', and it solidifies the ECJ's role as a fundamental rights court, and the EU legal order as an autonomous, self-referential fundamental rights regime.[86]

[86] Francesca Ferraro and Jesus Carmona, 'Fundamental Rights in the European Union: The Role of the Charter after the Lisbon Treaty', *European Parliamentary Research Service* 2015 PE 554.168, p. 14. See also Marten Breuer, "Impact of the Council of Europe on National Legal Systems", in Stefanie Schmal and Marten Breuer, *The Council of Europe: its Law and Policies* (Oxford University Press 2017) paragraph 36.87. See also Hanneke van Eijken and Pauline Phoa, 'The Scope of Article 20 TFEU Clarified in

Very closely connected to the ECJ's positioning as a fundamental rights 'champion' in the *Google Spain* judgment is the 'narration' of what search engines do and mean in our lives. The passages where the Court spends much time explaining how important search engines are not only in the dissemination of information, but also in creating a more or less structured overview or profile of a person, lead the Court to conclude that they constitute a significant interference with the right to privacy and data protection. These passages not only reinforce the fundamental rights perspective taken; they offer an additional justification for the broad interpretation of the DPD. In these passages, as in the *Digital Rights Ireland* judgment, we see a court of law doing its best to concretise and contextualise legal rules in relation to individuals' real lives.

6.4.3 The 'other': data subjects and a worldview

We noted that the 'close other' in the form of litigants is nearly invisible in the *Digital Rights Ireland* judgment. The particular circumstances or behaviours of the data protection activists in the Irish proceedings and the mass of claimants in the Austrian proceedings appear to be quite irrelevant for the ECJ.

As regards the 'distant other', at the very end of the *Digital Rights Ireland* judgment, the reader gets a glimpse of questions that will be important in the future, such as who controls the data that is retained, where, and how, and to what standards? The themes of control and responsibility, as well as a vague distrust or suspicion of third countries regarding data protection, are hinted at. The opposition that paragraph 68 introduces between the normative world of the EU, in which individuals' rights to privacy and data protection are apparently better protected and, elsewhere, unknown third countries that may have lower standards of protection, will, as we will see in the next sections, grow more pointed in the cases that followed *Digital Rights Ireland*.

Although the *Google Spain* judgment is one of the increasingly rare judgments in a preliminary reference procedure where the Court actually summarises and addresses the arguments of the parties,[87] it approaches the human in an impersonal way by adopting the DPD's terminology of the mere 'data subject'. Speaking about people in this way is a very passive conception of a person, seemingly lacking agency. The judgment can be seen as an attempt to make the data subject more active by 'empowering' him or her to object to the appearance in search results. The data subject may become more 'active' in the sense that he or she is the one who may object, but he or she is also passive, i.e., having to subject him- or herself, once more, to the assessment by the search engine operator, and eventually to the scrutiny of the data protection authority and judiciary.

Chavez-Vilchez: Are the Fundamental Rights of Minor EU Citizens Coming of Age?' (2018) *43 European Law* Review 949.

[87] See Chapter 3.

Moreover, there is a certain kind of irony in this judgment. In the media, the *Google Spain* judgment has been picked up as an example of the ECJ empowering the individual vis-à-vis international corporations such as Google Inc. However, one may wonder how empowering the *Google Spain* judgment actually is. In order to protect his or her privacy, the individual has to submit his or her request for erasure to the search engine operator, accompanied by an explanation of the 'compelling legitimate grounds relating to his particular situation', so exposing him- or herself even further to the search engine.

Our examination of the *Google Spain* judgments shows that it adds another element to where *Digital Rights Ireland* left off, by justifying the broad territorial application of the DPD with the aim of preventing circumvention, and implying that this will be the behaviour of search engines and other economic operators, which reveals a general distrust of such actors.

6.5 Refiguration in data protection

6.5.1 Resources for meaningful speech offered by *Digital Rights Ireland* and *Google Spain*

As we have concluded in the previous section, the *Digital Rights Ireland* judgment set out an uncommonly strict line of review based on fundamental rights, and the ECJ thus showed very little deference to the EU legislature. In *Google Spain*, the Court can be seen to 'wear a similar hat', as it applied a particularly broad and functional interpretation of the DPD in light of Articles 7 and 8 Charter for the concept of 'controller', for the territorial scope of the DPD and for the 'right to de-referencing'. In both cases, the Court departed from its usual dry and spare tone by including rhetorical devices and a narration of what mass surveillance and search results aggregation mean for data subjects in a modern society. Both judgments were praised for the firm, ambitious fundamental rights perspective,[88] on the one hand, but also criticised for lack of clarity on particular conditions, and for lack of realism, on the other hand.[89] Unsurprisingly, the *Digital Rights Ireland* and *Google Spain* cases were

[88] See for instance Orla Lynskey, 'The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland' (2014) 51 *Common Market Law Review* 1789, 1804, who called the *Digital Rights Ireland* judgment a 'victory for grassroots civil liberties organisations' and a 'major milestone in the development of a strong EU privacy policy'; Indra Spiecker genannt Döhmann, 'A new framework for information markets: Google Spain' (2015) 52 *Common Market Law Review* 1033.

[89] See, for instance, Els de Busser, 'Great Expectations from the Court of Justice: How the Judgements on Google and Data Retention Raised More Questions than They Answered' (2014) issue 2 *Eucrim: The European Criminal Law Associations' Forum* 69; Gerald Otto and Michael Seitlinger, '(K)ein Grund zum Jubeln!?' (2014) 3 *Medien und Recht* 3; Mistale Taylor, 'Google Spain Revisited: The Misunderstood Implementation of a Landmark Decision and How Public International Law Could Offer Guidance'

followed by many more cases in subsequent years and they continue to 'refigure' the materials offered by *Digital Rights Ireland* and *Google Spain*, allowing us to discern a '*Digital Rights Ireland* line' and a '*Google Spain* line', in which this particularly high level of protection of data subjects' rights was confirmed and refined. We will discuss these cases briefly hereafter.

6.5.2 *Schrems I*

The *Schrems I*[90] case concerned the complaint made by Austrian student Mr Schrems to the Irish data protection commissioner (DPC) concerning the DPC's refusal to investigate Schrems' complaint regarding the fact that Facebook Ireland Ltd transfers the personal data of its users to the USA and keeps it on servers there. Schrems had been a user of Facebook since 2008. A person residing in the EU who wishes to use Facebook concludes a contract with Facebook Ireland, a subsidiary of Facebook Inc, established in the US. Some or all personal data of EU Facebook users is transferred to servers of Facebook Inc that are located in the US, and undergo processing there. Schrems argued that, in the light of the revelations about the National Security Agency by Edward Snowden, the law and practice in the US did not ensure adequate protection against the surveillance activities engaged in by the US public authorities. The Commissioner took the view that he was not required to investigate the matters raised by Schrems, and rejected the complaint. He considered that there was no evidence that Schrems' data had been accessed by the National Security Agency. He argued that the adequacy had to be determined in light of Decision 2000/520, in which the Commission had determined that the level of protection in the US was adequate (the 'Safe Harbour' decision, based on Article 25 DPD). Schrems brought an action before the Irish High Court challenging this decision, which referred questions to the ECJ concerning the competences of nsa's in relation to Decision 2000/520. The Court's response, in essence, resulted in a review of the validity of this decision in the light of Articles 7 and 8 Charter.

More particularly, the ECJ considers at the start of its response to the questions that, based upon its previous decisions in, inter alia, *Digital Rights Ireland* and *Google Spain*, the DPD required not only an effective and complete, but also a high level of protection of the important fundamental rights to privacy and protection of personal data.[91] From that point of departure, the Court clarifies that nsa's are an essential component of the system of protection of personal data, finding the legal basis for their competences not only in the DPD but also

(2017) 3 *European Data Protection Law Review* 195; Paul de Hert and Vagelis Papakonstantinou, 'Google Spain: Addressing Critiques and Misunderstandings One Year Later' (2015) 22 *Maastricht Journal of European and Comparative Law* 624; Farhaan Uddin Ahmed, 'Right to be forgotten: a critique of the post-Costeja González paradigm' (2015) 21(6) *Computer and Telecommunications Law Review* 175.

[90] Case C-362/14 *Schrems I* ECLI:EU:C:2015:650.

[91] Case C-362/14 *Schrems I* ECLI:EU:C:2015:650, para 39.

in Article 8(3) Charter and Article 16(2) TFEU,[92] and that they should have full competence to examine a claim made by an individual. Such an examination may lead on the one hand to a confirmation of the validity of the underlying Safe Harbour decision (and, in turn, to a possible challenge of that finding before a court, which can make a preliminary reference in case of doubts), or, on the other hand, to the nsa's expressing doubts about the validity of the Safe Harbour decision, in which case the nsa's must have effective legal procedures to bring this question to a court, which can then make a preliminary reference to the ECJ to challenge the validity.[93] The adoption of an adequacy decision by the Commission under Article 25 DPD, such as the Safe Harbour decision, does not, therefore, pre-empt the competences of nsa's. The ECJ concludes that this is the issue in the *Schrems I* case: there are doubts about the validity of Decision 2000/520. The second part of the judgment therefore concerns the actual validity review by the ECJ.

According to the Court, the words 'adequate level of protection' required by Article 25 DPD mean that the legal order of the third country at issue guarantees a level of protection that is 'essentially equivalent' to that in the EU legal order. The Court also considered that if that were not the case, the high level of protection of personal data that the EU legal order requires, could be easily circumvented by transferring personal data to third countries.[94] An important lynchpin in the argument in the *Schrems I* judgment is the Court's interpretation in paragraph 78 of the level of intensity of its judicial review in the light of the Charter, which is based upon its reasoning in *Digital Rights Ireland*: in the light of the importance of the fundamental rights to privacy and protection of personal data and the large number of persons whose fundamental rights are 'liable to be affected' by the transfer of data to a third country if the level of protection is inadequate, the Commission's discretion is reduced, and the Court's level of review will be strict.[95]

As a result of this particularly strict review based on Articles 7 and 8 Charter, the Court declared Article 1 of Decision 2000/520 invalid for a number of reasons, most importantly, and with many references to *Digital Rights Ireland*, its limited personal scope and the general derogations that are permitted in the light of a very broad range of US national interests. These derogations are insufficiently limited and have insufficient (legal) remedies, so they are not limited to what is strictly necessary. Furthermore, under the Safe Harbour decision, the US authorities would be authorised, on a general basis, to access the content of communications, which affects the essence of the right to private life. Moreover, the Court found that Article 3 of Decision 2000/520, which limited nsa's competences, exceeded the Commission's mandated implementing powers. For these reasons, the Court declared Decision 2000/520 invalid.

92 Case C-362/14 *Schrems I* ECLI:EU:C:2015:650, para 40-41.

93 Case C-362/14 *Schrems I* ECLI:EU:C:2015:650, para 53-65.

94 Case C-362/14 *Schrems I* ECLI:EU:C:2015:650, para 73.

95 Case C-362/14 *Schrems I* ECLI:EU:C:2015:650, para 78.

The *Schrems I* case was received as controversial as well as revolutionary.[96] Notice how the Court continues the role of fundamental rights champion that it had so passionately adopted in *Digital Rights Ireland* and *Google Spain*. While in the *Digital Rights Ireland* judgment, the ECJ referred to the ECtHR case law to guide its interpretation of fundamental rights, in *Schrems I* it only referred to the Charter and to its own case law as precedent. The first several paragraphs are standardised, 'building block' references to *Digital Rights Ireland*, *Google Spain* and several other judgments. Furthermore, consider how, compared with the ECJ's judgments in *Digital Rights Ireland* and *Google Spain*, there is altogether less 'real life' narrating in this judgment. What explains this lack of narration? Was there no need for this narration as a justification for setting a high level of protection and a strict level of review, since that justification was already given in *Digital Rights Ireland* and *Google Spain*, and the ECJ can now rely on its own authority in precedent?

Note how the Court interprets the notion of 'adequate level of protection' as meaning 'essentially equivalent' to the protection under EU law. This positions the EU as a community of shared values and a high level of protection against not just the US, but against all third countries that allegedly have a lower level of protection of personal data. Seeds of this argument were already present in the *Digital Rights Ireland* and *Google Spain* judgments. Moreover, it is questionable whether, if the situation were actually judged according to the rules of the DPD itself, which also offers wide-ranging exemptions for reasons of public security and prevention and investigation/prosecution of crime, the level of protection in the EU regime would be as high as the ECJ seems to suggest.[97] Furthermore, notice the ambivalence with regard to the National Security Agency revelations of Snowden: the AG had argued that those recent revelations showed the significant weaknesses in the safe harbour decision, and made the Safe Harbour decision in that light invalid, whereas the ECJ ignored those arguments, and assessed the Safe Harbour decision's validity in general and in its totality, without the concrete example of a wide-ranging access by the National Security Agency being the evidence for its insufficient protection.

On the level of actors, consider how the ECJ places a great emphasis on the role of the nsa's, and pits them against the Commission as well as Member

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[96] Richard A Epstein, 'The ECJ's Fatal Imbalance: Its cavalier treatment of national security issues poses serious risk to public safety and sound commercial practices' (2016) 12 *European Constitutional Law Review* 330; Martin Scheinin, 'Towards evidence-based discussion on surveillance: A Rejoinder to Richard A. Epstein' (2016) 12 *European Constitutional Law Review* 341; Sylvie Peyrou, 'La Cour de justice de l'Union européenne, à l'avant-garde de la défense des droits numériques' (2015) 23 *Journal de droit européen* 395; Tuomas Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter' (2016) 12 *European Constitutional Law Review* 318.

[97] See Loïc Azoulai and Marijn van der Sluis, 'Institutionalizing personal data protection in times of global institutional distrust: *Schrems*' (2016) 53 *Common Market Law Review* 1343, 1364-1366.

States and private parties.[98] There is apparently no pre-emption in the case where the Commission has taken an adequacy decision, the judgment views the nsa's (and the ECJ) as ultimate protectors of EU data subjects' fundamental rights, against the Commission, which the ECJ seems to view as motivated predominantly by economic or trade interests and not sufficiently protective of fundamental rights.[99] However, nsa's actually have the task to ensure a 'fair balance' between all rights concerned, including the rights of the data processor and other internet users.

As the *Schrems I* judgment shows, the Court's approach that was developed in *Digital Rights Ireland* and *Google Spain* was continued and became even stricter in later cases.

6.5.3 DPD to GDPR

Meanwhile, the rapid developments in the area of digital communication technologies led to the large-scale 'update' of the data protection system in the form of the GDPR, on the proposal of the European Commission of 25 January 2012,[100] adopted in 2016,[101] entered into force in May 2018. The GDPR has as its legal basis Article 16(2) TFEU, which provides a specific legal basis for legislative action pertaining to data protection, whereas the DPD had the general internal market basis of Article 114 TFEU (formerly Art. 95 EC) as a legal basis because such a specific legal basis did not then exist.

The choice to change the legal instrument from a Directive to a Regulation means more intensive harmonisation and uniformity throughout the EU. The GDPR does not create an entirely new system of data protection, as it continues a large part of the DPD regime.[102] As part of the innovations introduced by the GDPR, it codifies several strands of the ECJ's case law, such as the *Google Spain* and *Digital Rights Ireland* case, for instance by introducing an explicit 'right to be forgotten' in Article 17 GDPR. Moreover, the personal scope of the GDPR is extended by the inclusion, within the concept of 'personal data', of the data subject's online identifier and location data. Apart from several other innovations in the data protection architecture, the GDPR introduces two new

[98] Usually, 'complete independence' meant independence from private parties or from national governmental interference. See Loïc Azoulai and Marijn van der Sluis, 'Institutionalizing personal data protection in times of global institutional distrust: *Schrems*' (2016) 53 *Common Market Law Review* 1343, 1358.

[99] See also Loïc Azoulai and Marijn van der Sluis, 'Institutionalizing personal data protection in times of global institutional distrust: *Schrems*' (2016) 53 *Common Market Law Review* 1343, 1358-1359.

[100] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)' COM (2012) 11 final.

[101] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

[102] See Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015), 5.

rights: the right to object to personal data being processed for direct marketing purposes and the right to data portability, i.e. being able to move data to another (social media) platform. Perhaps the biggest change is the extra-territoriality principle, by which any organisation in the world which processes personal data of EU residents (or which shows an intention to attract EU customers) needs to comply with the GDPR provisions (Art. 3(2) GDPR).

In terms of enforcement and oversight, the GDPR sets up a European Data Protection Board (replacing the former Article 29 Working Party and absorbing the European Data Protection Supervisor), which unites all the national data protection authorities and which may provide guidance and interpretation and adopt binding decisions in the case where several EU countries are concerned by the same case. The set-up of the Member States' data protection authorities has been strongly regulated and their powers have been harmonised as well. They are able to impose fines on businesses of up to €20 million or 4% of a company's worldwide turnover.[103]

6.5.4 The *Digital Rights Ireland/Schrems I* line

In the case *Tele2 Sverige/Watson*,[104] the ECJ responded to questions about the aftermath of its invalidation of the DRD, where national law posed similar data retention obligations. Relying on *Digital Rights Ireland*, but also referring to *Google Spain*, the Court reaffirms that the national data retention rules must be reviewed for compatibility with not only Directive 2002/58, which must be interpreted in the light of fundamental rights and as ensuring a particularly high level of protection of those rights, but also for compatibility with Articles 7, 8 and 11 Charter.[105] Since the national measures at issue were substantially similar to the data retention obligations under the DRD, the Court was able to rely on, and quote extensively from its *Digital Rights Ireland* judgment. For instance, it repeated its factual observations about the kind of data that is retained and what that retention means for, on the one hand, the data subject's right to privacy and personal data protection and, on the other hand, for users' freedom of expression.[106] In its review of the limits and safeguards offered by the national law, the Court repeats its rhetoric of 'all..., all..., all...' and 'even..., even..., even'[107] to express the severity of the infringement and the

[103] See for a comprehensive discussion of the GDPR, inter alia, Brendan van Alsenoy, *Data Protection Law in the EU: Roles, Responsibilities and Liability* (Intersentia 2019), pt III ch 7; and Lukas Feiler, Nikolaus Forgó and Michaela Weigl, *The EU General Data Protection Regulation (Gdpr): A Commentary.* (Globe Law and Business 2018).

[104] Joined cases C-203/15 and C-698/15 *Tele2 Sverige/Watson* ECLI:EU:C:2016:970; See for a full discussion Pam Storr, 'Blanket Storage of Communications Data – Proportional or not – Sweden asks ECJ for Clarification on Data Retention' (2015) 1 *European Data Protection Law Review* 230.

[105] Joined cases C-203/15 and C-698/15 *Tele2 Sverige/Watson* ECLI:EU:C:2016:970, para. 91-96.

[106] Joined cases C-203/15 and C-698/15 *Tele2 Sverige/Watson* ECLI:EU:C:2016:970, para 98-100.

[107] Joined cases C-203/15 and C-698/15 *Tele2 Sverige/Watson* ECLI:EU:C:2016:970, para 105.

absence of adequate safeguards that we identified in Section 6.3.2 concerning *Digital Rights Ireland*.

The Court's strict approach in *Digital Rights Ireland* and *Tele2 Sverige/Watson* was also followed in *Ministerio Fiscal*,[108] in which the ECJ clarified that a 'serious' criminal offence justifies a 'serious' interference with a person's fundamental right to privacy and protection of personal data, whereas, conversely, if the interference with these rights is not so far-reaching, it may be justified in the light of general investigation or prevention of crimes.[109]

Most recently, in the *Schrems II* case of 16 July 2020,[110] the Court's already very strict approach to privacy and data protection, culminated in an even stricter, perhaps even idealistic judgment. More particularly, the *Schrems II* case concerned the validity of the US-EU 'Privacy Shield' decision of the EU Commission, which was the successor to the Safe Harbour decision that the ECJ declared invalid in the *Schrems I* case. The national court at issue had submitted preliminary questions to the ECJ about the usage of standard contractual clauses (SCCs) as a basis for the transfer of personal data from an EU Member State to a third country in the absence of a (valid) adequacy decision about that country. It goes beyond the scope and aim of this book to discuss the *Schrems II* decision in detail, but it is important to note that the ECJ resumes its role as the fundamental rights court identified in Section 6.2, applying a particularly high level of protection and a strict standard of review. As a consequence, the ECJ declared the Privacy Shield decision invalid, since it was vitiated by more or less the same errors as the Safe Harbour decision that was the object of the *Schrems I* judgment.

6.5.5 The *Google Spain* line of cases

The *Google Spain* judgment has been confirmed and refined in its own line of cases. Wirtschaftsakademie Schleswig-Holstein (hereafter WA-SH[111]) is a private undertaking with the status of a public welfare institution, aimed at providing professional and vocational training, inter alia in the area of business and economics.[112] In the context of its services, it used a 'fan page' on Facebook, i.e. a Facebook user account on the Facebook platform to present itself to users of Facebook or to other visitors to the fan page. The administrator of the fan page can obtain anonymous statistical information on its visitors via 'Facebook insights', a service which Facebook makes available to them free of charge, under non-negotiable conditions of use. This information is collected by means of cookies, consisting of a unique user code, which are active for two years and stored by Facebook on the hard disk of the computer or other media

[108] Case C-207/16 *Ministerio Fiscal* ECLI:EU:C:2018:788.

[109] Case C-207/16 *Ministerio Fiscal* ECLI:EU:C:2018:788, para 56 et seq.

[110] Case C-311/18 *Schrems II* ECLI:EU:C:2020:559.

[111] Case C-210/16 *Wirtschaftsakademie Schleswig-Holstein* ECLI:EU:C:2018:388.

[112] Case C-210/16 *Wirtschaftsakademie Schleswig-Holstein* ECLI:EU:C:2018:388, para 14.

(such as smart devices) of the visitors to the fan page. At the time of the dispute, neither WA-SH nor Facebook notified its visitors of the storage and functioning of the cookies or of the subsequent processing of data.[113]

The regional data protection authority of the Land Schleswig-Holstein had ordered WA-SH to deactivate its fan page, which WA-SH contested, arguing that it was not responsible for the data processing by Facebook or the cookies installed by Facebook. These issues were put before the ECJ as preliminary questions, together with questions about the relationship between the various nsa's in the Member States, as a complaint about an application/usage of the Facebook platform would formally come within the jurisdiction of the Irish data protection commissioner, as Facebook has its formal European seat in Ireland.

The ECJ concludes, continuing its line of reasoning developed in *Google Spain*, that an administrator of a Facebook fan page determines – jointly with Facebook itself – the purposes and means of the data processing, most notably by determining the parameters based on target audience and its (marketing) objectives (geographical and demographical data, and online behaviour). Therefore, a Facebook fan page administrator is a 'controller' in the sense of the DPD, although the concept of joint responsibility also implies that not all controllers are equally responsible.

As regards the questions about the relationship between the nsa's in the various Member States and their respective spheres of competence, the ECJ concludes that each nsa's must be able to exercise all of its powers against a controller established on its territory, with complete independence, drawing on the *Schrems I* judgment. There is no obligation on the German nsa's to first call on the Irish nsa's before assessing the lawfulness of Facebook Germany's conduct (while the assessment of Facebook Germany's conduct is essentially an assessment of the conduct of Facebook Ireland). The ECJ thus goes very far to ensure a system of protection that is as complete as possible. For this part of the judgment, the Court refers 'to that effect' to the *Schrems I* judgment, which is a natural progression of the argument made in that case: if in that case nsa's must be able to examine the transfer of data to a third country independently of a prior assessment by the Commission (i.e., the Safe Harbour decision), then, *a fortiori*, they must also be able to act independently from their counterparts in other EU Member States.

This refinement of the *Google Spain* line continued in *Jehovan Todistajat*,[114] which was about the collection and processing of personal data by Jehovah's Witnesses in their door-to-door preaching, and *Fashion-ID*, which was about the joint responsibility of the website owner and the social media platform when a social media plugin (the 'like-button', in this case) is embedded in a website and, through that plugin, personal data is collected.[115] Furthermore, in *Fashion-ID*, the ECJ aligned its interpretation of the DPD with the GDPR, which had not

[113] Case C-210/16 *Wirtschaftsakademie Schleswig-Holstein* ECLI:EU:C:2018:388, para 15.

[114] Case C-25/17 *Jehovan Todistajat* ECLI:EU:C:2018:551.

[115] Case C-40/17 *Fashion-ID* ECLI:EU:C:2019:629.

entered into force at the time of the relevant facts of the case. The ECJ argued that its interpretation of the data protection rules should anticipate the entry into force of the GDPR in order to make its response to the preliminary questions as useful and future-proof as possible.[116]

The Google search engine was the subject of two preliminary reference procedures that culminated in judgments handed down on the same day, namely the *GC v CNIL* and *Google v CNIL* decisions of 24 September 2019. The *GC v CNIL* case concerned the data subject's right to have certain search results de-referenced, when they concern either special categories of information as defined by Article 8 DPD or Article 9 GDPR, or when the data subject has a certain role in public life. The Court repeated its assessment of the qualification of search engine operators as 'controllers', and of the role of search engines in both the dissemination of information in a modern, globalised world, as well as their capacity in creating a more or less structured and detailed profile of a data subject by the mere display and aggregation of search results following a search on the basis of the data subject's name.[117] Although the ECJ also repeated its 'Google Spain-formula' that the rights of the data subject 'override, as a rule' the rights of other internet users,[118] it also referred to Article 17(3) GDPR, which expressly provides that a right to erasure may be excluded in the light of the right of information as protected by Article 11 Charter.[119] In the legal reasoning that follows, the ECJ emphasises the need to balance the rights to privacy and protection of personal data as protected by the DPD and GDPR and Articles 7 and 8 Charter, with other rights such as the right of information as protected by Article 11 Charter.

The *Google v CNIL* case also concerned the duty to de-reference after a successful 'right to be forgotten' claim made by a data subject. In this preliminary reference procedure, questions were raised about the geographical scope of that duty, i.e. is there a duty to remove certain links from the search results for all local domain name extensions, or only locally, depending on, for instance, the location of the data subject? The Court reaffirmed its judgment in *Google Spain*, and explained that although a world-wide duty to de-reference would provide a full protection of the rights of the data subject, that would go beyond the territorial scope of application of the DPD and GDPR, and that not all third countries view these rights in the same way, nor do they offer the same

[116] See case C-40/17 *Fashion-ID* ECLI:EU:C:2019:629, para 62; See for a fuller discussion of the Google Spain/ WA-SH line: Nina Bontje and Eva Lachnit, 'Inzicht in Facebook Insights: over verantwoordelijkheid en bevoegdheid – De zaak Wirtschaftsakademie nader bekeken' (2018) issue 5 *Mediaforum: Tijdschrift voor Media- en Communicatierecht* 122; Charlotte Ducuing, Jessica Schroers and Els Kindt, 'The Wirtschaftsakademie fan page decision: A landmark on joint controllership – A challenge for supervisory authorities competences' (2018) 4 *European Data Protection Law Review* 547.

[117] Case C-136/17 *GC v CNIL* ECLI:EU:C:2019:773, para 35-36 and 46; referring to case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317, para 35-37 and 80.

[118] Case C-136/17 *GC v CNIL* ECLI:EU:C:2019:773, para 53 and 66.

[119] Case C-136/17 *GC v CNIL* ECLI:EU:C:2019:773, para 56-57.

protection. The duty to de-reference does, however, extend to all EU Member States, and therefore to all local domain name extensions in those States. The Court considers, however, that the balance of the rights and interests involved in the assessment of a claim to de-reference may differ from one Member State to another.

The *GC v CNIL* judgment and the *Google v CNIL* judgment still display a rather strict approach to the protection of personal data, prescribing a high level of protection of the right to privacy and to the protection of personal data, and to a complete and effective system of protection. However, they are perhaps more balanced than the *Google Spain* judgment as they stress the importance of taking into account the right to information, and not just the rights of the data subject, which was an issue for which the *Google Spain* judgment was criticised.[120]

Another example, which stands slightly apart from the two clear lines of the *Digital Rights Ireland* and *Google Spain* follow-up cases, is the judgment in the case *Planet 49*[121] of 1 October 2019, in which consent for personal data processing was given through pre-ticked check-boxes. The question was whether this was valid consent in accordance with Directive 2002/58. The Court stated that the interpretation of 'consent' in Directive 2002/58 must be the same as the concept of 'consent' in the DPD, and although the Court in its reasoning does not refer to *Digital Rights Ireland* or *Google Spain*, its interpretation of 'consent' fits within the paradigm of the strict, complete and effective protective of data subjects.

6.6 Conclusion

The ECJ's approach in the cases preceding *Digital Rights Ireland* and *Google Spain*, such as *Fisher* and *Lindqvist*, was already sensitive to fundamental rights, but it stayed within the language of 'balancing' all the interests that were at stake and, in addition, leaving it to the national court to do this. In *Volker & Schecke* the Court demonstrated a rather procedural approach: the legislature ought to have shown that it had taken into account all the interests, and it ought to have considered less onerous means of achieving its goals. Furthermore, in *Ireland v Parliament and Council*, the Court's review of the

[120] See for discussions of these cases: Silvia De Conca, 'GC et al v CNIL: Balancing the Right to Be Forgotten with the Freedom of Information, the Duties of a Search Engine Operator' (2019) 4 *European Data Protection Law Review* 561; Nathalie Martial-Braz, 'Le droit au déréférencement: vraie reconnaissance et faux-semblants!' (2019) *Dalloz IP/IT* 631; Vishv Priya Kohli, 'Square Pegs in Triangular Spaces: Right to be Forgotten' (2020) 42 *European Intellectual Property Review* 74; Philippe Bonneville, Christian Gänser and Sophie Markarian, 'Protection des données personnelles et de la vie privée – Obligations des exploitants de moteurs de recherche – Droit au déréférencement' (2019) *L'actualité juridique; droit administratif* 2297.

[121] Case C-673/17 *Planet 49* ECLI:EU:C:2019:801.

validity of the DRD showed a considerable amount of deference to the EU legislature. Such were the 'materials' that the ECJ had to work with, in addition to the material offered by the allegedly outdated DPD. The kind of data that was at stake in, for instance, *Lindqvist* already concerned online data, but it was at best embryonic, and could not be compared with the volume and ubiquitous nature of the data that was at stake in *Digital Rights Ireland*, *Google Spain* and the cases which followed.

Our close reading has shown that the Court, since its judgment in *Digital Rights Ireland*, has chosen a different path from before. In the *Digital Rights Ireland* judgment's strongly schematic kind of reasoning, the Court openly took on the role of a fundamental rights court. As observed before, the Court made a remarkable move by applying a strict level of scrutiny, paying much less deference to the EU legislature than it habitually does.

The *Google Spain* case, which was not a validity review but a response to preliminary questions about the interpretation of certain concepts, reads as less of a 'scheme'. In this case, fundamental rights served as interpretative 'topoi', i.e. justifying a broad interpretation of the rights under the DPD. However, the Court also effectively tipped the scales in favour of data protection by stating that the right to data protection 'overrides, as a rule' the other interests involved. This is different from the 'balancing' approach that we saw at work in *Fisher* and *Lindqvist*.

The narration by the Court that is particularly present in the *Digital Rights Ireland* and *Google Spain* cases, although less so perhaps in *Schrems I*, but particularly present again in, for instance, *WA-SH*, reinforces the effect of the fundamental rights perspective that the ECJ has chosen: explaining the importance of the solutions with *pathos*, and thereby establishing a close relationship between itself and the readers of the judgment. Perhaps the extra 'narration' in the earlier cases can be explained by the outdatedness of the legal framework in light of the rapidly changing world: the different approach of the ECJ needed more explanation and weightier justification.

The approach of the *Digital Rights Ireland* and *Google Spain* judgments is continued and compounded in the *Schrems I* judgment, and also in the other judgments. As we have seen, the high level of protection of the data subject's fundamental rights that the ECJ offers in these cases, resulted in a particularly strict European data protection regime that has been criticised for being so idealistic that it is unworkable. The recent cases of *Google v CNIL* and *GC v CNIL* show that the Court attempted to address the criticisms, by placing more emphasis on the balance that needs to be reached between the rights of the data subject and those of other parties.

In the preceding cases, the measures at issue were either national measures, or EU rules. Rarely, or not at all, did the issue of extraterritoriality arise. A latent presence in the *Digital Rights Ireland* and *Google Spain* judgments is a sort of suspicion of third countries, painting a picture of the EU as a community of values in which a high level of protection of personal data is offered, which

made the presence of sufficient safeguards for data subjects more important and justified, for instance, a broad territorial scope of the DPD. In *Schrems I*, this results in the ECJ interpreting the terms 'adequate level of protection' in such a strict way that only if a third country offers protection that is 'essentially equivalent' to the level offered by the EU, may the EU Commission adopt an adequacy decision. This approach is confirmed, and even reviewed more strictly, in the recent *Schrems II* case, in which the validity of the EU-US Privacy Shield – the successor to the Safe Harbour decision – was at stake. Furthermore, the broad territorial scope of the ECJ's interpretation of the DPD has been formalised in the GDPR.

Finally, it is interesting to note how little the people behind the data subjects or litigants seem to matter: they were either activists whose actual identities are unknown or irrelevant; or a private individual in the ironic situation of wanting to be 'forgotten', whose name is now forever tied to a well-known case. Details about their background, character or motives are not provided. As we will see in the next chapter, this raises questions about the importance of the individual's own responsibility for his or her data behaviour: so far, the data subject is approached as being passive, lacking agency, and therefore in need of protection and empowerment by the ECJ.

PART IV

Refiguration

CHAPTER 7

Synthesis

7.1 Goal of this chapter

In the case studies we turned our attention to a number of judgments of the ECJ which differed significantly in terms of subject-matter, and we did so informed by the hermeneutic way of reading developed in Chapter 2. I hope the case studies have demonstrated the usefulness of this way of reading for the areas of EU citizenship and of data protection, respectively, and this chapter will show us ways in which our 'hermeneutics for EU law' is helpful for thinking about the case law of the ECJ in a more holistic way, by which I mean in the light of the system of EU law as an integrated whole, across all kinds of cases and types of procedures. The goal of this chapter is therefore to compare the two case studies from the perspective of the ECJ's self and other. Stepping back from the detailed examination of the 'configuration' of the judgments that we performed in Chapter 5 and Chapter 6, we can ask what these texts mean, 'including as an exemplification of a way of life'.[1]

'Reading one work in light of another'[2] brings differences and similarities into sharper focus than studying these texts on their own. The judgments that we examined in such detail in both case studies represent a mind engaging in complex legal reasoning of a similar kind throughout, claiming authority of a certain interpretation of EU law. I say 'a mind' as we may take the collective effort of the members of that formation of the ECJ which dealt with the case as a single mind, despite the fact that they hail from a multitude of different countries and legal traditions: one and the same institution produced these texts, and in Chapter 3 we agreed to take the perspective of a jurist in an ideal-type situation of drafting the best judgment that he or she could. And since there is very little specialisation at the Court, the EU jurist who is our ideal reader-writer, therefore, is at heart a generalist. We are therefore justified in reading all kinds of ECJ judgments as springing from the same source, and in expecting a large degree of coherence and consistency, particularly in the light of the ECJ's constitutional role. As White has observed:

> The law is a constitutive rhetoric, which works through the creation of characters in relation to each other, and it can work only if the rules, the relations, and what is said are coherent with each other. (...) If we claim to perform two contradictory characters in alternation, what we have is neither of those, but the character either of a chameleon – an alternating contradiction – or of a hypocrite. If I hear a judge say, with deep sincerity, 'My concern is with the welfare of those who come before me,' I will believe him (or her) only if that voice, and conduct consistent with it, are regularly maintained...[3]

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[1] James B White, *The Edge of Meaning* (University of Chicago Press 2003), 134.

[2] James B White, *The Edge of Meaning* (University of Chicago Press 2003), 191.

[3] James B White, 'Making sense of what we do: The criminal law as a system of meaning' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 198-199.

The questions that are central to this chapter ask what kinds of characters are performed by the ECJ in these cases, and what roles are created for legal subjects and how coherent these roles and characters are. At this point, it is important to remember what has already been explained in Chapter 3: the overall goal in our hermeneutics is not 'episteme', universal, stable truths, but rather 'phronesis': practical wisdom that is discursive and dialogic. As expressed by White:

> The way of reading exemplified here is not an analytic technique that objectifies what it studies, nor is it a new conceptual system; rather, it is a way of responding to and thinking about the expressions of another mind.[4]

It is a way of asking better questions about the text, expressive of a desire to understand deeply and imagine coherently what it is like to work with the materials offered in EU law.[5]

7.2 The ECJ's self

7.2.1 A 'self' in narrative and rhetoric

In Chapter 3 we took on the task of examining our pre-understandings as regards the institution whose products are objects of our interpretation efforts: the ECJ. We asked what we should know about its mandate, the institutional design, its work processes and its internal culture, habits and traditions. We drew on Treaty texts, the Court's Statute and Rules of Procedure, and on publications of external academics as well as (former) members of the Court. What this resulted in was an exploration of the work processes at the ECJ, and the elements of structure, style and tone that are characteristic of the Court's judgments, as well as an inventory of quality standards, which all serve as factors that aid us when we start our close reading of these judgments. Moreover, in Chapter 4 we considered how the way in the Court's reasoning expresses a certain vision of humanity, also tells us something about how it sees itself.

As posited in Chapter 3, a familiarity with the Court's usual style and tone, gained in this stage of prefiguration, helps with noticing particular rhetorical features, a distinct narrative voice, or even style breaks, which could signify important moments in which the Court apparently needed to speak in a different way. As we will see, these moments may be explained because the legislative framework has changed, or because the particular factual circumstances of a case demand it. One constant factor is, however, the speaker, the author of these texts, namely the Court. In line with White's work, we can ask what kind

4 James B White, *When Words Lose Their Meaning* (University of Chicago Press 1984), 275.

5 For White, such an endeavour establishes a sincere relationship between the reader and the writer, what he – in perhaps an Aristotelian sense – calls 'friendship'. See James B White, *The Edge of Meaning* (University of Chicago Press 2003), 69.

of character a judgment exemplifies, not only for the legal subjects it speaks about, but also for the speaker him- or herself. All judgments of the ECJ claim authority for the particular interpretation of EU law contained therein, but they constitute at the same time a definition of the self in relation to these sources of authority.[6] In other words, a court's judgment may reveal an institutional self, what Ricoeur would call a type of 'being-in-the-world', the examination of which may lead to self-understanding. As Chapter 3 explained, we can find such an institutional self in the narrative voice of the ECJ that may be distant, impersonal and repetitive (but with the potential upside of recognisability and – perhaps – stability and coherence), or more original, lively and real (but with a risk of diverging translations and interpretations). Furthermore, a self is revealed in the Court's relationships with other EU institutions and with the Member States that it engages in throughout its legal reasoning.

White argued that reading a text about authority, like a judgment, is not just about arguments one way or the other, but about viewing the text as constitutive of a set of practices of an institution, by which it characterises itself:

> It is a mistake, [...] to think of 'arguments' about authority as if they could be reproduced as a set of culture-free propositional assertions. What a text offers us is a whole way of thinking and talking and being, a way of acting in relation to one's language and one's audience; it is this for which authority is ultimately claimed, [...].[7]

Let us start with the case study on data protection, which provided, at first glance, the strongest 'self' of the ECJ, which may point us in the right direction to reflect upon the character portrayed or performed by the ECJ in the EU citizenship case studies.

7.2.2 The ECJ's self in data protection case law

In the Court's legal reasoning in the data protection cases, the normative starting point in each case was primary EU law, namely the Treaties and, more importantly, fundamental rights. This had significant consequences for the Court's view of the relationship between primary and secondary law. For instance, the Court applied a particularly stringent standard of review to EU secondary legislation, with little deference to the EU legislature, leading to the invalidation of both the Data Retention Directive (DRD) in the *Digital Rights Ireland* case, and also of significant Commission decisions in the *Schrems I and II* cases which continued the Court's approach in *Digital Rights Ireland*. Similarly, in its judgment in *Google Spain*, the Court set out to achieve a high level of protection of data subjects' fundamental rights, which led to a particularly broad interpretation of both the substance and the territorial reach of the

6 James B White, *Acts of Hope* (The University of Chicago Press 1994), 275-276.

7 James B White, *Acts of Hope* (The University of Chicago Press 1994), 276.

Data Protection Directive (DPD). In the course of its reasoning in all of these cases, the Court gave prominence to data protection rights over all other rights, making fundamental rights its primary interpretative 'topos', as Beck would call it. Moreover, both the *Digital Rights Ireland* and *Google Spain* judgments contain several remarkable passages in which the ECJ elaborates on the real-world consequences of the issues, such as the impact of mass surveillance of digital communications and the importance of search engines in the modern world. These passages were not a result of the ECJ's engagement with the litigation-specific facts of the cases, but were instead general observations about the digital technologies and the measures at issue, and their presumed effects. Moreover, it is important to note that these passages did not merely provide context, but they functioned as important pivots in the Court's reasoning. As we learned in Chapter 3, such passages, in which the Court's own narrative voice can be heard, are actually quite rare, which signals to us, when they do occur, that they are significant and performative of a certain role. As noted in Chapter 6, throughout the close reading of the two landmark cases and the overview of subsequent judgments within the body of case law on the EU data protection rules that formed Chapter 6, we have observed the ECJ consistently – and ambitiously – in the role of a fundamental rights court.

7.2.3 The ECJ's self in the case law on EU citizens' access to social benefits

In the Court's judgment in *Grzelczyk* we have observed the Court moving towards inclusion of the EU citizen, using interpretative space creatively to supplement the legal framework that was in force at the time. The Court discussed why the previous case law and legislation was not pertinent or adequate to solve the problem, thereby justifying a new solution. The Court based its expansive interpretation on the Treaty itself, accompanying this interpretation with the solemn proclamation that 'Union citizenship is destined to be the fundamental status of the nationals of the Member States'. In the *Grzelczyk* case the way in which the Court relied on the constitutional charter of the EU, namely the Treaties, in order to interpret and supplement the existing legal framework in a broad way, gave an important constitutional dimension to the Court's reasoning, as defined by Muir.[8] Furthermore, the Court appealed to solidarity among the Member States and emphasised the importance of an individual assessment. As observed in Chapter 3, Section 3.6, as well as Chapter 5, Section 5.4.2, this rhetoric and reasoning is constitutive of a process of constitutionalisation of EU citizenship.

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[8] Cf. Elise Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit' (2018) 3 *European Papers* 1353, 1360-1362 and 1365-1366; and Hanneke van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015).

In *Dano*, by contrast, the Court's reasoning displayed a different attitude: the Court performed the judicial role in a different mode or character than it had done in *Grzelczyk*. As we observed in Chapter 5, the Court's reasoning paid lip service to the *Grzelczyk* formula, but the actual turning point, the beating heart of the judgment (or its interpretative 'topos') was the emphasis which the Court placed on the prevention of EU citizens becoming an unreasonable burden on the welfare systems of the host Member States and on the fact that any unequal treatment is inherent in the choices made in the Citizens' Directive (CD) by the EU legislature. The Court's interpretative 'movement' was from primary law to a very detailed reading of secondary law, with a rather surprising level of deference to the EU legislature. As we observed in Chapter 5, this approach is inconsistent with *Grzelczyk*.[9] Moreover, the Court's denial of the applicability of the EU Charter to Ms Dano's case was also inconsistent with the Court's other strands of case law on the scope of application of the Charter.[10] One could therefore characterise the Court's reasoning in *Dano* and the subsequent cases as revealing a tendency of 'deconstitutionalisation'.[11] Moreover, there is a noticeable relationship that the Court establishes with the facts of the case: emphasising certain facts and making assumptions, building up a certain rhetorical *pathos*, which plays a distinct role in the subsequent legal reasoning. If there is something of a market narrative discussed in Chapter 4, the Court's approach to the *Dano* case may be it.

7.2.4 Comparison of the relationship between primary and secondary law

As noted above in Section 7.2.2, when we examined the *Digital Rights Ireland* judgment, we noted a remarkable element, namely the unusually strict level of judicial review that the ECJ applied to the DRD, which led to its invalidation. In *Google Spain*, the Court interpreted the DPD broadly in order to provide the individual at issue, the data subject, with a very high level of protection. In both cases, the Court relied on primary EU law, i.e. the fundamental rights to privacy and data protection as protected by the EU Charter, as the basis for reviewing or interpreting secondary law. It must be noted that this aspect of the Court's approach in *Digital Rights Ireland* is not in itself uncommon, since a review of the validity of EU secondary legislation is necessarily done in light of primary law, but its remarkably strict level of scrutiny and the lack of deference

9 I therefore explicitly disagree with Gareth Davies' observations in Gareth Davies, 'Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication' (2018) 25 *Journal of European Public Policy* 1442.

10 See case C-133/15 *Chavez-Vilchez* ECLI:EU:C:2017:354 and case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105.

11 Cf. Elise Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit' (2018) 3 *European Papers* 1353, 1360-1362 and 1365-1366.

towards the EU legislature reveals a certain attitude towards the relationship between primary and secondary EU law that is similar to its interpretive approach in the Google Spain judgments and – as we will see – other preliminary rulings.

In *Grzelczyk* the Court concluded that the secondary legislation in force at the time did not specifically cover Mr Rudy Grzelczyk's situation. It then referred to primary law directly, i.e. to the provisions on EU citizenship in the EC Treaty at the time, in order to provide a solution for this case. Moreover, the Court even raised the stakes by adding what is now called the '*Grzelczyk*-formula', which constituted an even more strongly principled argument.

By contrast, the Court's reasoning in *Dano* and the subsequent cases of *Alimanovic*, *Garcia-Nieto* and *Commission v UK* revealed an inverse approach: the CD is held to be the ultimate norm in deciding Ms Dano's lawfulness of residence and, consequently, of her right to equal treatment, and the Treaty provisions on EU citizenship and equal treatment are trumped by this act of secondary legislation.

A comparison of these judgments therefore shows that the Court took a similar approach to the relationship between primary and secondary law in *Digital Rights Ireland*, *Google Spain* and *Grzelczyk*, while it inverted its approach in *Dano*. As noted by Syrpis, the inconsistencies in the ECJ's approach may be caused by different and competing views of the 'proper' relationship between primary and secondary law.[12] According to which of the views one adopts, there is a lesser or a greater amount of deference that the Court ought to pay to the legislature and, consequently, a larger or more limited role for the Court in these kinds of disputes. The Court's approach in *Digital Rights Ireland*, *Google Spain* and *Grzelczyk* creates an image of the EU as a community of rights, in which the ECJ is the ultimate protector of these rights. In *Dano*, however, the Courts shrinks its role vis-à-vis the EU legislature as well as the interests of Member States.[13] Generally, the principal reason for any court to exercise self-restraint in its assessment of secondary law, is the respect that courts should have for the democratically legitimised will expressed by the legislature.[14] Whilst this is true, also for the ECJ, it should be pointed out, particularly in the case of EU law, that such respect is due within the boundaries of EU primary law. However, most relevant for this research is the fact that Syrpis observed that it is currently impossible to predict what kind of effect the adoption of secondary legislation will have on the Court's case law, and that attempts to identify factors that

[12] Phil Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52 *Common Market Law Review* 461, 482.

[13] See also Julio Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (Oxford University Press 2018) 118-128. See also Niamh Nic Shuibhne, 'What I tell you three times is true: Lawful Residence and Equal Treatment after Dano' (2016) 23 *Maastricht Journal of European and Comparative Law* 908.

[14] Phil Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52 *Common Market Law Review* 461, 484.

determine the Court's approach are 'doomed to fail',[15] and, indeed, the judgment in *Dano* did not contain a rationalisation for the change of course.

7.2.5 Other elements

Apart from the intensity of review, the reliance on (or denial of) fundamental rights and the degree of deference paid to the EU legislature, there were other textual elements that the Court used in order to claim authority for its interpretation, and which may reveal the Court's 'self', namely the use of solemn proclamations and elements of narrative.

Solemn proclamations

A court of law sometimes uses what we could call 'solemn proclamations' to claim authority for a certain course of action and argument. For instance, when the Court proclaimed the *Grzelczyk*-formula, it can be viewed as a performative act, performative of a certain role that the ECJ saw itself fulfilling within the narrative of EU citizenship and, through this statement, the Court claimed authority for its broad interpretation of EU citizens' rights. Could we say that the same goes for the *Google Spain*-formula according to which the rights of the data subject override – as a general rule – other interests? It is a similarly solemn proclamation, which was repeated in subsequent cases, albeit slightly nuanced recently. Neither of these phrases is used in the legislative framework in force at the time; this really was the ECJ itself speaking. Is this a way of speaking that defines a 'constitutional moment' in the Court's legal reasoning?

When we read and compare these passages carefully, we can understand that they perform slightly different functions, and that they may present the Court with a different kind of problem in later cases. For instance, as noted in Chapter 5, the *Grzelczyk*-formula was introduced rather early in the Court's reasoning. After the ECJ had considered that there was no viable precedent and that Mr Grzelczyk did not fall within the scope of the application of secondary law, it turned to the Treaty provisions on equal treatment and EU citizenship, which needed to be interpreted in order to be made instructive for the resolution of the case at hand. The *Grzelczyk*-formula that is coined in paragraph 31 of the judgment is an interpretive 'topos', raising the stakes of the interpretive exercise that would follow.

In *Google Spain*, the 'formula' according to which the rights of the data subject override 'as a (general) rule' those of other internet users, came relatively late in the Court's judgment, namely in paragraph 81, to be repeated in paragraph 97. It is similar to the *Grzelczyk*-formula in its highly impersonal voice and absence of pronouns. However, it is introduced in the context of the balance of rights, and it can be viewed as loading the proverbial scales in favour of the data subject. This is a subtle difference, since the *Grzelczyk*-formula is

[15] Phil Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52 *Common Market Law Review* 461, 487.

formulated as a clear interpretive 'topos', whereas the *Google Spain*-formula affirms a kind of hierarchy of rights, affecting the way in which they can be weighed against one another.

We observed in Chapter 5 that the novelty of the *Grzelczyk*-formula was over time turned into a standard building block for the ECJ's case law on EU citizenship. This practice created expectations for its repetition, but it also has the effect of losing some of the reader's interest, as it faded into something of a cliché. One often feels the urge to skim or skip the 'copy-pasted' passages, and to look for the new reasoning that is specific to the case at hand. Inserting these building blocks into a judgment like *Dano* fits with these expectations, but it also creates the feeling of lip-service being paid since the rest of the reasoning is at odds with these quoted passages. Using such argumentative building blocks reveals the mechanistic, positivist vision on both language and law that we contrasted with a more complex vision of these forms of expression in Chapter 2, Section 2.2.1. In *Dano* this tension is not fully addressed, but as we observed in Chapter 5, in the subsequent cases of *Alimanovic*, *Garcia-Nieto* and *Commission v UK*, the Court quite drastically left the *Grzelczyk*-formula out of its reasoning. This decision raises questions about the value of the *Grzelczyk*-formula, and the consistency of the ECJ's approach in EU citizenship cases, since in other strands of case law the *Grzelczyk*-formula is still present. By contrast, the *Google Spain*-formula has experienced a different trajectory so far: being repeated and, instead of being abandoned, it is slightly modified in the more recent *GC and Google v CNIL* cases.

The nature of these statements may explain this difference: once the Court has stated that EU citizenship is destined to be the fundamental status of Member State nationals, it is hard to backtrack from such a statement. A 'fundamental status' is something that cannot be qualified, it cannot be 'a little' fundamental – it either is, or it is not fundamental. It seems that making a proclamation like the *Grzelczyk*-formula placed the ECJ in a difficult position as it allows for little nuance or qualification, or for little to no flexibility. The nature of the *Google Spain*-formula is different. Considering that the rights of the data subject 'override, as a (general) rule' the rights of other internet users or economic operators is a solemn statement, but it contained a qualification from the beginning, since where there is a 'rule', there may also be an exception. Moreover, there is a difference in the amount of time that has passed between *Grzelczyk* and *Dano*, namely thirteen years, and between *Google Spain* and the *GC and Google v CNIL* cases, namely only five years. It may be possible that after the same amount of time has passed since the *Google Spain* judgment, similar tensions and transformations will take place.

I want to make clear that I am not claiming here that there should be more or fewer of such proclamations or that they should be formulated in one way or the other. My suggestion is that if a court uses such a language and tone, it claims and performs a certain authority and a certain role. Given the very nature of solemn proclamations, they not only exert a strong influence on the

interpretation of the state of law in the case at hand, but they also set a particularly strong precedent, and the choices made for a specific phrasing transcend the particular circumstances of one case, which the Court will have to come to terms with in subsequent cases. As our close reading of the judgments in our case studies has shown, the subsequent 'career' or such solemn proclamations varies greatly, from mere finetuning in the data protection cases, to downgrading or even an abandonment in the EU citizenship cases. Therefore, how to treat such solemn proclamations merits thorough and continuous examination and reflection.

Narrative

The close reading of the judgments in the two case studies has drawn our attention to another aspect of the Court's narrative voice. We noticed in Chapter 6 that, in the course of its argument in *Digital Rights Ireland* and *Google Spain*, the Court stops a few times to consider the general importance and impact of digital technologies and the broad obligation of data retention, even commenting on the feelings which a system of mass surveillance would create in people's minds. Here the Court defines itself as one who can step back from the particular litigation at hand and who can take a bird's-eye view of societal developments and sentiments. The tone of these passages defines the Court as rational, objective and reasonably well-informed about modern technologies. The origins of these passages are unclear, as they do not seem to be based on the concrete facts of the cases or on empirical data submitted as evidence; rather, they seem to consist of general information that the Court deems universally true. These narrative passages, as we concluded in Chapter 6, functioned as important justification for raising the level of protection of data subjects, as well as raising the degree to which the ECJ would scrutinise the EU legislation at issue.

In the EU citizenship case study, however, the Court engaged with the specific facts of the cases at hand in order to contextualise the litigants' claims, leading, as we observed, to a certain positive framing in *Grzelczyk*, and a decidedly more negative framing in *Dano*. However, the ECJ did not comment on the general importance of migration for the litigants or, more generally, for EU citizens or even for the system of the EU that has been based upon the ideal of free movement. EU citizenship is the area of law that supposedly unites the peoples of Europe; it would have been possible to tell a story about real persons' lives, their hopes and dreams and the obstacles they face in creating a life in Europe, quite similar to the way in which the Court commented in largely general terms about the importance of digital communication technologies and the risks involved in their use in the data protection cases. However, the Court did not do so in *Grzelczyk* or *Dano*, and it generally does not have the habit of doing so in EU citizenship cases. Why is that? What would it be like if the Court had 'narrated' the story of intra-EU migration in the manner it did in the data protection cases? When the Court raised the intensity of review in *Digital Rights Ireland*, it did so in the light of the importance of the rights at stake as

well as the seriousness of the infringement, which the Court had explained in the narrative passages described previously. Remember that this is a normative choice based on a particular pathos constructed in these passages.

Conversely, the narration, and we could even call it framing, of the facts in the Court's two judgments on EU citizens' access to social benefits does not find its equal in the data protection cases. We will examine the more substantive effects of the presence or absence of such factual passages in Section 7.3, but from the perspective of the Court's 'self' we can observe that the Court's narration and narrative voice in the data protection cases was more distant from the actual litigants, but more protective of their rights, and in the EU citizenship cases the narration of the facts was more 'up close', but also more normatively focused on behaviour. We can therefore conclude that there is a striking difference between the Court's narrative voices in the two categories of cases.

7.2.6 Comparing the case law on EU citizens and data protection – explaining differences

By imposing a very strict level of review in the data protection cases, a stringent fundamental rights check, the Court adopts a certain role, namely, that of a constitutional, or even a human rights court. By contrast, as observed in Section 7.2.3 above, and building upon the theoretical discussion of Chapter 3, Section 3.6, although the Court's reasoning in *Grzelczyk* did seem to display the same constitutional character, in *Dano* the Court's role and attitude towards law seems to have changed; it seems to have become deconstitutionalised. Accordingly, between *Grzelczyk* and *Dano*, as well as between the *Dano*-line and the data protection cases, there seems to be a different character, a different self displayed or performed by the ECJ. How can we explain the different roles played by the Court?

Legal framework

At this point, we may ask whether the different respective legal frameworks explain the differences in the Court's approach. To a certain extent, they might do so. For this question it is useful to return to an aspect of 'prefiguration': in Chapter 5 we discussed the legal background of EU citizenship and the coordination of social welfare policies, and in Chapter 6 we examined the legal framework of the data protection regime. Let us begin by observing that data protection, the internal market – of which EU citizenship forms a part – and social policy are all shared competences. However, in data protection the EU has a larger competence since the regulation of the flow of data is more closely connected to the internal market. Furthermore, the EU legislature has, since the inclusion of Article 16 TFEU in the Lisbon Treaty and particularly since the GDPR, pre-empted a large portion of the field, while social policy (and particularly the issue of social security) is still largely the Member States' domain. The EU's legislative activities have been limited to coordination, most recently in the

form of Regulation 883/2004.[16] In that light, a more restrained approach is to be expected in cases concerning social benefits.

Both data protection and privacy, as well as social rights, are enshrined in the Charter. However, Articles 7 and 8 Charter, which ensure the right to privacy and data protection are not qualified, while Articles 26-35, which relate to social rights, are. More particularly, Article 34 Charter states that 'Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices'. The qualification clause added in this latter half of the provision may very well explain a more self-restrained approach of the Court. However, as we observed in Chapter 4, since Article 3(3) TEU's inclusion in the Lisbon Treaty, the EU is supposed to form a social market economy aimed at full employment and social progress. What this means concretely, and how it relates to the qualification clause identified above, remains to be seen.[17] Moreover, the secondary legislation at issue in the judgments examined in our case studies, i.e. the CD, Regulation 883/2004 and the DPD, do not contain provisions or directions that clearly determine the role of the Court. And, as noted by Syrpis, the level of detail of secondary legislation does not reliably predict the Court's approach to the relationship between primary and secondary law.[18] Furthermore, as we concluded in Section 5.2.3 in Chapter 5, the introduction of the CD was not, according to leading experts in the field, a 'watershed moment' in the ECJ's approach, as cases decided since the entry into force of the CD more or less continued the Court's line of constitutionalised reasoning that it had developed beforehand, up until *Dano*.[19]

As for the applicability of the EU Charter, it is important to note that the Court's review is indeed more far-reaching in *Digital Rights Ireland* and *Schrems I* and *Schrems II*, as the subject of review is EU legislation and in such cases the Charter applies fully. By contrast, in the EU citizenship cases the subjects

[16] See Articles 151-161 TFEU, and for a more detailed discussion, for instance, Cecilia Bruzelius and Martin Seeleib-Kaiser, 'EU Citizenship and Social Rights' in Patricia Kennett and Noemi Lendvai-Bainton (eds), *Handbook of European Social Policy* (Edward Elgar Publishing 2017); Frans Pennings, 'EU Citizenship: Access to Social Benefits in Other EU Member States' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 307.

[17] See for instance, Cecilia Bruzelius and Martin Seeleib-Kaiser, 'EU Citizenship and Social Rights' in Patricia Kennett and Noemi Lendvai-Bainton (eds), *Handbook of European Social Policy* (Edward Elgar Publishing 2017).

[18] Phil Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52 *Common Market Law Review* 461, 486.

[19] See Nic Shuibhne, 'The trajectory of citizenship case law does not map neatly enough onto a timeline that would support the adoption of Directive 2004/38 as the sole explanatory factor for recent legal change', in Niamh Nic Shuibhne, 'Consensus as Challenge and Retraction of Rights: Can Lessons Be Drawn from – and for – EU Citizenship Law?' in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019), 436.

under review are Member States' measures, meaning that the applicability of the Charter is subject to the restrictions of Article 52(1) Charter. However, the Court's denial of applicability of the Charter in *Dano* is, given the Court's own judgments in *Åkerberg Fransson* and *Chavez-Vilchez*, inconsistent.[20]

Moreover, in *Google Spain*, there is an equally strong application of the Charter as a tool to interpret the DPD as in *Digital Rights Ireland* and *Schrems I*, but this interpretation imposes obligations on private parties, thereby creating a horizontal application of the rights to privacy and data protection that is not foreseen by the Charter. If a measure of restraint is appropriate for the Court vis-à-vis Member States in light of the division of competences, is not even more restraint warranted in horizontal situations? Furthermore, after the *Dano* judgment the Court handed down its rulings in the cases of *Egenberger*[21] and *Bauer*[22] in which it accepted the horizontal direct effect of Articles 21, 47 and 31(2) Charter, it is an even more urgent question why the Court's approach to the applicability of the Charter to Member State measures such as those at issue in *Dano*, is so inconsistent.

In light of the foregoing, we may conclude that the 'prefigurative' study of the legal frameworks, combined with the examination of the 'configuration' of these judgments, does not define clear factors or parameters to determine the role of and narrative voice that the Court can assume in a given judgment. This is problematic since a lack of consistency in the ECJ's approach will affect not only legal certainty, but also the legitimacy of the Court's case law and the EU legal order more generally.[23]

Policy dynamics

Another avenue that we may take in our search for explanations for the changing roles of the Court is that of the need for flexibility in the light of current events. Indeed, this is a challenge that every court of law faces: the tension between coherence and consistency of its own case law, and the need for flexibility and evolution in light of new societal developments. In the realm of data protection, it has been argued that since the DPD was at risk of becoming outdated, it was for the Court to step in to keep the DPD relevant in light of the rapid developments in digital communication technologies until new legislation could be adopted. Conversely, it has been asserted that the Court's change of direction in cases pertaining to EU citizens' access to social benefits since *Dano*

[20] See case C-133/15 *Chavez-Vilchez* ECLI:EU:C:2017:354 and case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105; see also Hanneke van Eijken and Pauline Phoa, 'The Scope of Article 20 TFEU Clarified in Chavez-Vilchez: Are the Fundamental Rights of Minor EU Citizens Coming of Age?' (2018) *43 European Law* Review 949.

[21] Case C-414/16, *Vera Egenberger* ECLI:EU:C:2018:257.

[22] Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871.

[23] Phil Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52 *Common Market Law Review* 461, 487.

is related to the rise of Euroscepticism, to the fear of alleged 'benefit tourism' from certain Member States and, generally, to Brexit.[24]

As White has asked:

> One question for the [United States Supreme Court], then, is how far it should seek to understand the larger currents of feeling and attitude that are at work here, and how far it should restrict itself to familiar conceptions of the issue and to familiar ways of talking about it. Is it possible, or proper, for the [United States Supreme Court] to shift the ways we talk about this issue to include what is now left out, on both sides?[25]

As the Court has no habit of addressing such societal and jurisprudential changes expressly, this remains an open question, one that cannot be exhaustively answered within the scope of this research. It is, however, important to ask such a question, whenever a change seems to have taken place.

7.2.7 Subconclusion on the ECJ's self

The fact that the ECJ shows restraint or deference, or the opposite, does not tell us very much in itself. A larger or a smaller role of the Court could be determined by the legal framework and, more importantly, the division of competences of the area at issue. However, fluctuations in the Court's role become an item of interest if they cannot be explained by the legal framework. For instance, think of a change in approach within the Court's legal reasoning pertaining to the same legal issues, such as the change in approach between *Grzelczyk* and *Dano*. Or a difference in approach between legal issues that are substantively different, such as EU citizenship and data protection, but formally, i.e. institutionally and procedurally, so similar that one would expect a more or less similar treatment. It is the same Court, interpreting directives that comprise elements of economic interests and fundamental (social) rights, and the same type of procedure, namely, the preliminary reference procedure. How can we explain or reconcile the rhetorical richness and more generous and ambitious, protective stance of the ECJ in data protection, with the paucity of its rhetoric and exclusionary reasoning in the cases pertaining to EU citizens' access to social benefits? If it were a matter of surface-level rhetoric only, one could argue that it is a coincidence, happenstance, attributable to the choice of one or the other reporting judge who has a particular personal drafting style. However, these elements all perform important functions within the legal reasoning, and are, hence, not normatively innocent. Such elements ought,

[24] Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom' (2017) 54 *Common Market Law Review* 209.

[25] James B White, *Acts of Hope* (The University of Chicago Press 1994), 167: in discussion of the series of abortion cases up to the US Supreme Court's decision in Planned Parenthood v Casey, 505 U.S. 833 (1992).

therefore not to be considered as a matter of coincidence or mere personal style. Moreover, as our research has shown, the effects of these passages are continued and compounded in subsequent case law, and the repercussions, whether positive or negative, are embedded in the case law from a systemic point of view.[26]

7.3 Vision of humanity – 'the other'

7.3.1 Introduction

In Chapter 4 we examined background information – what could be considered the prefiguration or pre-understandings – to the encounter between the economic rights and interests in light of the EU's internal market on the one hand, and the EU-level protection of fundamental rights on the other hand. After an overview of the most important legal-historical developments of these two areas of law, that chapter explored the deeper layers of legal reasoning about economic interests on the one hand, and about fundamental rights on the other hand. What we discovered is that within the structures of legal reasoning about these two categories of rights there are what can be called narratives of the market and of fundamental rights, respectively, which can be found in the way one speaks of human action and motivation, agency and responsibility. The prefiguration of the legal and contextual framework of each case may help to formulate certain expectations for the substance of the legal reasoning. However, while one would expect internal market law to be representative of market narratives, and fundamental rights law to be representative of fundamental rights narratives, it turned out to be not a clear or clean division. An important discovery was that 'human rights discourse' can actually have the paradoxical effect of contributing to or perpetuating inequalities and oppression. It is therefore extremely important to pay particular attention to deep structures and narratives in legal reasoning in order to understand what kind of vision of humanity is at work in a judgment.

This invites us to look again, and more closely, at the judgments that we read as part of the case studies, and ask what kind of vision of humanity is at play there. In the judgments on EU citizenship, the description of the facts already provided ample material about the litigants (and their behaviour) for a reflection on this topic, leading us to view the framing of the facts as performing a particular task in relation to the actual legal reasoning about their status and rights. By contrast, the description of the facts pertaining to the (behaviour of) litigants in the *Digital Rights Ireland* case and the *Google Spain* case was quite limited and seemed to play a minimal, if not completely irrelevant role in the Court's reasoning about their right to data protection. However, the Court's silence on the role of the data subject does not mean that it is impossible to

[26] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2014), 42-43.

reflect upon what kind of vision of humanity is at work – albeit in a latent, covert way – in those judgments.

Let us first examine the vision on humanity that we observed at work in the EU citizenship cases more closely, in order to identify elements that help us to ask questions about the vision of humanity that may be present in the Court's reasoning on data protection.

7.3.2 A vision of humanity in case law on EU citizens' access to social benefits

In Chapter 5, we noticed in our close reading of the *Grzelczyk* and the *Dano* judgments that the ECJ provided particular details about the litigants, such as their country of origin, occupation, level of education and, in the case of Ms Dano, her and her son's age and the identity of her son's father ('unknown'). Our examination of the configuration of these judgments has, furthermore, revealed how these details, i.e. descriptions of facts as well as assumptions about motives, about the lives and behaviours of the litigants, were made to perform a certain function within the legal reasoning of the ECJ: justifying, in Mr Grzelczyk's case, a broad interpretation of the rules, and in Ms Dano's case, conversely, a narrow interpretation.

In that respect, the line of reasoning employed by the ECJ can be typified as having a punitive element that emphasises control over and responsibility for one's life and behaviour: an EU citizen is held responsible for her life choices, such as education, migration and employment status, and is, consequently, held responsible for needing to rely on social benefits in the host Member States. Needing such social rights is framed as something negative, something to be avoided, and social benefits are at best to be deserved by displaying good behaviour.

As we suggested, this is not just a particular narrative within the *Dano* judgment, but it had been present all along, perhaps in a latent fashion, in previous case law such as *Grzelczyk*. Although the *Grzelczyk* judgment had predominantly been celebrated as contributing to the empowerment of economically inactive EU citizens, on a deeper level the emphasis lay on education and (potential to) work as a measure of Rudy Grzelczyk's worth, justifying a generous interpretation of his rights as an EU citizen. These judgments – taken together, and in the light of the compounded effect of the cases subsequent to *Dano* – invite the question whether EU citizenship is still nothing more than market-citizenship, with an underlying view of humanity as homo economicus, or the liberal (or neo-liberal) view of man or woman as self-entrepreneur. We have problematised these views in Chapters 4 and 5.

The passages examined in detail in Chapter 5 show how, in the judgments involving economically inactive EU citizens' access to social benefits, the facts interact with the legal reasoning in such a way that deservingness, responsibility

and control are important themes at a deep level of the reasoning, turning the dials on the level of protection that EU citizens receive.

7.3.3 A vision of humanity in data protection case law

By contrast, the judgments that we studied as part of Chapter 6, the case study on data protection, offered very little information about the litigants. We learned that they possess certain devices and/or use certain platforms, resulting in their data being processed, to which they object or, in the case of Mr Costeja Gonzales, we learned that he objects to certain information about himself still being available on the Internet. While we get to know what this information is, and while we also receive factual details as to why the ECJ thinks that Mr Costeja Gonzales may have a successful claim for erasure of this information from the search results of the search engine Google, we actually learn very little about the litigants' behaviour or motives that is in any degree comparable with the information given, and assumptions made, about the litigants in the EU citizenship cases.

Did we not find elements of control and responsibility in the data protection cases at all, then? As we saw in Chapter 6, these themes do indeed play a role, but in a very different sense and with different consequences. In our examination of the *Digital Rights Ireland* and *Google Spain* cases, we noticed that the data subjects were treated as entirely passive, with little agency, which had to be corrected in terms of an active and far-reaching (also in terms of geography) protection of their rights by the ECJ, by national courts and authorities, and through positive obligations resting on data controllers.

In its interpretation of the DPD and the right to data protection, the Court employs a vocabulary of responsibility, control, and rights and remedies, and therefore of agency; however, the data subject is (allowed to be) passive. In sharp contrast to the EU citizenship cases, there is no duty resting upon individuals to behave responsibly, i.e. to take measures to protect themselves and to avoid needing the protection of the right to privacy and data protection.

7.3.4 Comparison and searching for explanations

What do these texts – about EU citizens' access to social benefits and about data protection – ask of us as readers? Can we conclude that these judgments, read together, ask us to accept that, in certain cases, details and assumptions about the litigants' lives and motives are more relevant than in other cases? Can the conception of individuals' responsibility be so different from one kind of case to the next? Let us start our exploration of these questions by asking whether the legal framework explains these differences, since it would be rash to ascribe a variation in the vision of humanity to the ECJ when the legal materials it works with predetermine such a vision.

Explanations in the EU citizenship framework

Do the provisions in primary or secondary law on EU citizenship, or the Court's own case law as relevant precedent, require the kinds of details about character and behaviour that the Court provided in *Grzelczyk* and *Dano*, and the ensuing connections made in the legal reasoning? The text of the Treaty provisions on EU citizenship do not reveal such criteria, since the only requirement is holding the nationality of a Member State (Article 20 TFEU), and they refer generally to the limits and conditions laid down in either the Treaties (but there are no such conditions) or in the measures adopted to give effect to the EU citizenship provisions, which in our case is the CD.

In the CD there is a little more material pointing in the direction of behavioural standards or a 'good versus bad citizen' narrative, albeit sparsely, and there are competing elements that emphasise the status of EU citizenship as a fundamental freedom. For instance, recital 2 recalls that the free movement of persons is one of the fundamental freedoms of the internal market, recital 3 reiterates the *Grzelczyk*-formula ('Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right to free movement and residence'), recital 4 explains that the CD's aim is to facilitate the exercise of the rights to free movement and residence and recital 5 states that the right of EU citizens to move and reside 'is to be exercised under objective conditions of freedom and dignity', and by consequence extending such rights to family members.

As noted by the ECJ in *Dano*, recital 10 warns that migrated EU citizens should not become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence, which is reiterated in Article 7(1)b, for instance. However, as becomes clear from recitals 16, 23 and 24, migrated EU citizens are protected from expulsion as long as they do not become an unreasonable burden, and these recitals offer guidelines for the criteria for assessment, such as whether the difficulties are temporary, taking into account the duration of residence, personal circumstances and the amount of aid granted (recital 16). In the case of expulsion based on public policy or security, there are also factors that need to be taken into account, such as the degree of integration in the host Member State, the length of residence, age, state of health, family and economic situation and links with the country of origin. The greater the degree of integration, the greater the protection (recitals 23 and 24 and Article 28 CD), which reflects the assessment of the 'real link' of 'genuine degree of integration' developed in cases such as *D'Hoop* and *Grzelczyk*, as discussed in Chapter 5, but which did not form part of the Court's reasoning in *Dano*.

Moreover, the CD makes an important difference between workers and non-workers, and it has a gradual system of protection depending on the period of residence and on the level of economic activity or self-sufficiency. EU citizens have a right to reside in their host Member State for up to three months without any conditions (Article 6) and for periods longer than three months up to five

years with specific conditions depending on economic activity or self-sufficiency (see Article 7(1)). After five years of continuous lawful residence, an EU citizen obtains a right of permanent residence, with no subsequent conditions (Article 16). Workers, self-employed people and job-seekers enjoy stronger protection, for instance against expulsion (Article 14(4)) and workers/self-employed people who reach the age of retirement, or who have worked but are permanently incapable of working, can apply sooner for permanent residency (Article 17).

It is also noteworthy that Article 27 CD states that the restriction of the right to free movement and residence on grounds of public policy, security or health may not be invoked to serve economic ends. Furthermore, there is an express provision about abuse of rights (Art. 35 CD), which of course directly concerns an EU citizen's behaviour but which was, however, not part of the Court's reasoning in *Dano*.

The legal framework on EU citizenship, therefore, is inconclusive, as the CD balances factors that are still tied to the internal market and to economic narratives (clearly advantaging workers and self-employed people over economically inactive people and, as O'Brien pointed out, myopic, if not biased, in terms of what it counts as economically valuable activities),[27] as well as factors and criteria that allow for a more detailed assessment of the personal circumstances that may establish a degree of integration of the EU citizen in the host Member State. These criteria are objectively determinable, such as duration of residence or whether the difficulties are temporary, and not related to behaviour. Moreover, there are other cases in which there seemed to be reason to doubt the motives of the litigants, such as in the *Chen*[28] judgment, and in *K.A. & Others*, which the ECJ either did not comment upon, or found 'immaterial'.[29]

Explanations in the data protection framework

Now let us turn to the legal framework of data protection and see if there is some kind of vision of humanity pre-set in the materials. Neither Article 16 TFEU nor Articles 7 or 8 Charter give us any information or criteria with regard to a data subject's responsibility or deservingness of protection, merely stating that 'everyone' has a right to protection of data concerning them, without qualification. Within the EU data protection legal framework, at the time of the *Digital Rights Ireland* and *Google Spain* judgments the DPD and, currently, the GDPR, it is actually a relevant question whether the data subject consented to the data processing, or if the data processing happened in the context of a contract.[30]

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[27] Charlotte O'Brien, 'I trade, therefore I am: Legal Personhood in the European Union' (2013) 50 *Common Market Law Review* 1643.

[28] Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639, [2004] ECR I-9925; see Dimitry Kochenov and Justin Lindeboom, 'Breaking Chinese Law: Making European One' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

[29] Case C-82/16 *K.A. and Others vs Belgische Staat* ECLI:EU:C:2018:308, para 77-97.

[30] See recital 30 and 33 and article 7 DPD and recital 40 and Art. 6 and 7 GDPR.

However, the data processing at issue in the cases examined in Chapter 6 did not concern consent or a contract, but processing for the legitimate interests of others.

There are very few provisions of the DPD or the GDPR that mention any behaviour or responsibility on the side of the data subject, save recital 55 of the DPD, which refers to the data subject's own fault in sustaining damages (the GDPR does not contain such a consideration) and Article 8(2)e GDPR which lifts the prohibition on processing special categories of sensitive data if this data is 'manifestly made public by the data subject' himself or herself (see also Article 9(2)e GDPR). Although recital 6 GDPR considers that 'natural persons increasingly make personal information available publicly and globally', and recitals 32, 42-43 as well as Articles 4(11) and 7 GDPR elaborate a high standard for valid consent (implying that after the data subject gives explicit consent, less protection is offered, see for instance recital 71), none go so far as to detail a responsibility for the data subject to protect himself or herself. In the *WA-SH* judgment, there is perhaps a shadow of an argument based on the responsibility of the data subject to protect himself or herself, where the ECJ considered that the responsibility of the data controller is even greater towards data subjects who are not users of Facebook.[31] What is implicit in an argument like this, is the fact that a user of Facebook – because of the very fact that he/she used the platform and therefore willingly shares his/her data with Facebook – has a degree of protection that is slightly less than individuals who are not users of Facebook.

Other explanation: consumer versus commodity

The legal framework of EU citizenship does seem to put a slightly larger emphasis on individuals' behaviour and life circumstances than the legal framework on data protection. There is, however, a surplus of meaning in the judgments that we examined that is not fully explained by the legal framework. The pre-existing case law and legislation pertaining to EU citizens' access to social benefits may have required an assessment of a degree of integration in a host Member State, but that was based on objective criteria such as the duration of the residence in the host Member States. The age, irregular family circumstances, or the alleged motives for using free movement rights were irrelevant in light of the CD and of prior case law. In the same vein we can conclude that the legal framework for data protection perhaps contributed to a passive conception of the data subject, but it did not require the complete absence of a discussion of the other rights involved.

How can we reconcile this view of humanity in the data protection cases, i.e. a quite passive, vulnerable data subject who needs to be protected with a wide range of measures, broadly interpreted in light of fundamental rights, with the view of humanity that is at play in the cases in which EU citizens claim access to social benefits, i.e. a view of humanity as active, responsible agents who are in control of their lives, and who can be blamed for 'bad behaviour' if they need social benefits? Put differently: how can we think of a person as lacking agency

[31] See case C-210/16 *Wirtschaftsakademie Schleswig-Holstein* ECLI:EU:C:2018:388, para. 41.

and control, and therefore as not responsible and in need of a high level of protection in one type of case, and as having such agency, control and ultimately so much responsibility that one can be excluded from protection in another type of case? And, perhaps more importantly, based on what parameters do we determine if the vision of humanity ought to be consistent throughout the Court's case law at all, or whether there are reasons to adhere to a sector-specific or differentiated vision of humanity?

The themes of responsibility, control and, consequently, the 'deservingness' of rights, and the different approach that the ECJ takes in these cases have very real consequences: a different factual framing, different emphases and assumptions, a different angle on the legal questions at issue, i.e. something is a fundamental rights issue or an internal market issue, and, as a consequence, a different intensity of review and margin of interpretation of the legislation at issue, that we also discussed in Section 7.2 on the Court's 'self'.

Perhaps this train of thought leads us to reflect on the following questions. Could it be that the underlying narrative in EU citizenship views individuals as *consumers* of free movement rights and the accompanying advantages? And that the Court, accordingly, has a benchmark for that consumer, to hold him or her responsible for his or her behaviour and life choices?[32] And if that is true, then does the case law of the Court on data protection also view individuals as consumers of personal data, but hold them to a less responsible standard? If a data subject were to be viewed as a 'consumer' of a digital communication technology service, then the generation, processing and storage of data would be a by-product of the consumption of that service, almost accidental, or for monitoring purposes. The problem with the business model of the modern internet, however, with its search engines, social media and big data, is that personal data is often actually the 'payment' for free services. Data collection, processing and storage is no longer accidental, but intentionally generated and mined as an aim in itself. Accordingly, the model or standard of the human and of human behaviour has changed: the data subject is commodified,[33] and consent – which is, moreover, often carelessly given – has lost value. This may explain or justify the enhanced protection of data subjects and the view of humanity in that sense as less active and responsible than in EU citizenship cases. Our examination of the legal reasoning in the data protection cases makes it clear that this is a problematic tendency that is not limited to the newly adopted Digital Content and Digital Services Directive.[34]

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[32] For a problematisation of the vision of individuals as consumer, see Gareth Davies, 'The Consumer, the Citizen, the Human Being' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU law*, (Hart Publishing 2016); See also Sybe A de Vries, 'The Court of Justice's 'Paradigm Consumer' in EU Free Movement Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU law*, (Hart Publishing 2016).

[33] Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015), 2.

[34] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1; See also the very comprehensive discussion of this new legislation and the issue of the data-paying

Paradoxically, the far-reaching protection of data subjects may aim to give them more agency, but the very high level of protection could also make them more passive and less circumspect. As active consumers, data subjects would have a level of agency and responsibility, as passive data-commodity they are to be 'handled with care', protected against abuse, but also against themselves.[35] The rights of data subjects seem to be comprehensively protected in the case law of the Court, but how is one to avoid thereby enabling a further passivity and commodification, actually taking away agency and responsibility? This is one of the pitfalls of the human rights discourse that we identified in Chapter 4, i.e. that fundamental rights protection may actually contribute to some type of oppression or inequality.

The other end of the spectrum is equally ironic: we cannot claim that the level of responsibility and agency that is expected of Ms Dano and the way that these implicit/latent criteria function within the Court's legal reasoning, respect her humanity or truly empower her. This is not to say that the only outcome that would have given her such respect or empowerment, would have been granting her the social benefit in question.[36] Rather, regardless of the outcome, our close reading of the *Dano* case in Chapter 5 has revealed several moments and movements in the Court's reasoning that are highly problematic given how they reduce her to certain material criteria and make implicit assumptions about her character and motives. The oversimplification of this reasoning does not live up to the promise made or ambition shown when the Court held that 'EU citizenship is destined to be the fundamental status of the nationals of the Member States' in the *Grzelczyk* case.

7.4 Imputability and voice

In order to structure our thinking about the matters discussed in this Chapter, i.e. the Court's 'self' and the vision of humanity that are revealed in its legal reasoning, it may be helpful to consult Ricoeur's reflections

consumer by Zohar Efroni, 'Gaps and opportunities: The rudimentary protection for 'data-paying consumers' under new EU consumer protection law' (2020) 57 *Common Market Law Review* 799. See also the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

35 Mireille Hildebrandt, 'Introduction: A multifocal view of human agency in the era of autonomic computing' in Mireille Hildebrandt and Antoinette Rouvroy (eds), *Law, human agency, and autonomic computing: the philosophy of law meets the philosophy of technology* (Routledge 2011), 2.

36 Jacqueson and Pennings make the enlightening observation that '[t]he same outcome could have been reached by means of the link approach or by simply saying that a person not seeking work is not entitled to the non-contributory unemployment benefit that was claimed by Ms. Dano. *Dano* seems therefore to be more inspired by the fear of welfare tourism expressed by some Member States than by consistent criteria'. Catherine Jacqueson and Frans Pennings, 'Equal Treatment of Mobile Persons in the Context of a Social Market Economy' (2019) 15 *Utrecht Law Review* 64, 79.

about the individual as a subject of rights. He located the essence of the 'subject of rights' in 'imputability', i.e. in the ability to designate oneself as the agent who acts or speaks, and takes responsibility for one's actions.[37] This much fits with the elements of responsibility and agency that seemed to be required of Ms Dano. However, in his examination of the subject of rights there is another pivotal element that the capable human being needs in order to be a real, actualised, subject of rights, namely 'interpersonal forms of otherness' and 'institutional forms of association'. By this Ricoeur means that a double discursive mediation is necessary, i.e. an 'I-Thou dialogue with other individual people', as well as institutional mediation of otherness in general. Ricoeur gives the example of speaking: a speaker can identify herself as speaker, but it only makes sense in the situation of interlocution, of dialogue,[38] i.e. when there is a second person, the hearer. Another pivotal element of Ricoeur's phenomenology of the capable, autonomous human being is 'the ability to gather one's own life into an intelligible and acceptable narrative', i.e. to form one's narrative identity. It goes beyond the scope of this research to discuss Ricoeur's theory of the capable human being/subject of rights further, but at this point let me summarise it as follows: he emphasised the importance of narrating one's life on the one hand, and being truly heard, being truly recognised by the listener, on the other hand. This is, I believe, the element of voice. Ricoeur also noted that 'people do not simply lack power; they are deprived of it', and courts may be instrumental and, therefore, complicit in depriving them of such voice and power.[39]

Adding this element to our examination of the EU citizenship and data protection judgments, we can ask whether such 'voice' is granted to the individuals at issue. One observation on the basis of this perspective is that a result of the *Dano*-line of judgments is that 'voice' is reduced by placing economically inactive EU citizens outside the system: they are not only excluded from the right to equal treatment, but also from the scope of application of the Charter. Moreover, the Court's interaction with the facts within the legal reasoning shows that assumptions may be made about the EU citizens at issue, which is a further reduction of 'voice'.

The data subject in the data protection cases seems to be getting more rights and remedies, which enhances the element of 'voice'. However, the passive conception of the data subject does not seem to fulfil the criteria for 'imputability', which is equally problematic.

Furthermore, Ricoeur's philosophical anthropology calls for a combined reflection on the role (the 'self') performed by the author, in our case, the ECJ, in its texts, and the vision of humanity (the 'other') reflected therein. Questions therefore need to be asked not only about the role played by the Court in one

[37] Paul Ricoeur, *The Just* (David Pellauer tr, University of Chicago Press 2000), 1-10 and Paul Ricoeur, *Reflections on the Just* (David Pellauer tr, The University of Chicago Press 2007) 72-90; See also David M Kaplan (ed), *Reading Ricoeur* (State University of New York Press 2008), 3-4.

[38] Paul Ricoeur, *The Just* (David Pellauer tr, University of Chicago Press 2000), 5-6.

[39] Paul Ricoeur, *Reflections on the Just* (David Pellauer tr, The University of Chicago Press 2007), 77.

case or another, but also about the interaction between that role and the vision of humanity at play in these cases. With renewed urgency we therefore ask what it can possibly mean if the Court's reasoning displays a deconstitutionalising tendency in the *Dano* case, while at the same time employs a kind of framing of the facts of the case that reduces Ms Dano to the 'bad' citizen in an implicit 'good versus bad citizen' normative narrative. Or conversely, if the Court takes up the role of a fundamental rights court, how can it afford to grant the greatest protection to the data subject without contributing to his or her further commodification? The narrativisation that needs to occur around these questions is an ongoing process of professional and personal self-reflection in our legal education and academic debates.

CHAPTER 8

Concluding Observations

'When we discover that we have in this world no earth or rock to stand or walk upon but only shifting sea and sky and wind, the mature response is not to lament the loss of fixity but to learn to sail.'

James Boyd White, *Acts of Hope*

8.1 Adjudication: a creative 'praxis'

The introductory chapter of this book invited the reader to think of the world of EU law, and particularly the work of the ECJ, not as a machine or as something that can be definitively and exhaustively captured in a grand theory, but as an intellectual and cultural process. It has likened the adjudicative praxis at the Court to a literary activity, a set of discourses or languages, that is to say: ways of thinking, talking and acting in this world.[1] Furthermore, it invited the reader to view the judgments of the Court as 'artefacts', products of a certain culture, which (re-)produce this culture as well, and to imagine him or herself in the position of participating in this creative process.

The main research question that we set out to explore was:

What are the narratives of self and other that we can find in EU internal market law and EU fundamental rights protection, and how do they affect the ECJ's adjudicative 'praxis'?

In order to answer that question, we first needed 1) a theory to convince the audience (whom I presumed to be a bit sceptical) that there are such things as 'narratives of self and other' at play in legal reasoning at all, and that it is a useful enterprise to think about these narratives; and 2) a methodology that would help to uncover such narratives, if there are any, in the ECJ's case law. We have found such theoretical and methodological help in a combination of the work of White and Ricoeur. As a demonstration of this methodology, we have examined two categories of cases, namely cases concerning migrated, economically inactive EU citizens' access to social benefits in their host Member State, and cases concerning the protection of personal data and the right to privacy.

In the following sections, I will summarise, and reflect upon, what we have learned in the separate chapters and case studies in Sections 8.2 to 8.5 as a path towards the main research question. Section 8.6 will offer a response to this question. Since I think that this research project has brought more useful things to our attention than just this response to the main research question, the subsequent Section 8.7 will add some final reflections.

[1] James B White, *Acts of Hope* (The University of Chicago Press 1994), 306.

8.2 Explaining and understanding: pre-, con- and refiguration

As explained in Chapter 1, this research project views adjudication as a *praxis* of reading and writing. In order to think clearly about what it means to read and write in EU law, particularly in the preliminary reference procedure, and substantively on the topic of the balance between the economic interests of the internal market on the one hand, and fundamental rights protection on the other, it has proved useful to draw upon literary theory. The nexus between law and literature has been commented upon by 'Law and Literature' scholars across the globe. In my research, I have examined the overlap between the work of American 'Law and Literature' scholar James Boyd White, and the work within the realm of hermeneutic philosophy of French philosopher Paul Ricoeur.

Within hermeneutic philosophy, generally, a central theme is the distinction between the stages of explaining and of understanding, and Ricoeur urges us to pay equal attention to both. The *explaining* stage of textual analysis and description seems like familiar territory for jurists, but looks may deceive, since it turns out that jurists do not actually use the full spectrum of analytical tools that hermeneutical philosophy and literary theory offer. For instance, language philosophy reveals an inherent uncertainty about the meaning of words, particularly in a multi-lingual and multi-cultural setting, that is not regularly, nor fully, accounted for in more classic legal methodologies. Furthermore, rhetorical and narratological analysis may help to uncover underlying patterns, norms and narratives that are at play in our legal language, such as proposals for a 'self' and, in its views of humanity and the world, an 'other'.

The hermeneutic stage of *understanding* – which is less familiar territory for traditional, doctrinally oriented jurists – is not just intellectually challenging, but also practically useful, and – I maintain – necessary from an ethical point of view. Where the explanatory stage is more descriptive, the stage of understanding is evaluative and normative but in a self-reflective rather than a dogmatic sense: how to come to terms with, and speak about the inherent ambiguities of our legal language? What kinds of norms and narratives did the explaining stage reveal, what proposals for a self and a community with others are made, and how to respond to these proposals? How to have a meaningful conversation about these topics – as a judge with our (international) colleagues in a deliberation, and in a draft text for a judgment, or as a student of EU law, preparing ourselves for a life in practice?

The distinction between explaining and understanding, and particularly the stage of understanding, can be somewhat esoteric. I found Ricoeur's threefold distinction of pre-, con- and refiguration most helpful in structuring this meta-level thinking about the process of interpretation. Moreover, White's take on these matters seemed similar to Ricoeur's, but it proved altogether more accessible. White invites us to ask: what are the resources for meaningful speech and thought in this culture? By what art are they reconstituted in this particular

text? What kind of character does the author of a text create for him- or herself and for others, and for the community? What would it mean to use this form of expression, what do I think of that prospect? These four questions also concern more or less temporal 'stages' in the reading process, and I have used them to supplement Ricoeur's notions of pre-, con-, and refiguration with more practical, concrete questions.

In other words, based on the combined teachings of Ricoeur and White, and with the reality – the phenomenology – of a jurist's *praxis* in mind, the three stages in a jurist's work can be thought of in the following ways.

1. The beginning of – and preparing for – the interpretative exercise. This includes a stage that Ricoeur would call *prefiguration*, i.e. a reflection on the pre-understandings, the knowledge of resources for meaningful speech and thought, as well as constraints or limits and cultural competences that are necessary in order to engage meaningfully with a text at all. Based upon the pre-understandings, we also form certain expectations as to the patterns and norms that may be present in a concrete text.

2. The engagement with the concrete, particular texts at hand as objects to be interpreted in a process of close reading, what Ricoeur would call the *configuration*. Here we examine the art by which the previously mentioned resources are reconstituted and, at least in our case, we pay attention to the kind of character which the author performs in the text, what we have called the self-understanding, as well as the view of humanity it demonstrates. In this stage, it is crucial to pay attention to the phenomenon of reading, by documenting as accurately as possible our reading process. This makes our description and the ensuing analysis transparent for and shareable with our reader. This phenomenological perspective also helps to overcome the pure subjectivity of the reading experience.

3. The forward-looking evaluation of the 'outcome' of the interpretative exercise. This is what Ricoeur would call *refiguration*. The understanding that is mediated by the explanation in the stage of configuration also encompasses a deep reflection on the themes of the self-understanding of the ECJ and the vision of humanity, that – ideally at least – translates into real consequences for a new text, a new judgment, for instance, in which these themes and resources are refigured, and the actual impact on the lives of the subjects of EU law.

8.3 Prefiguration

An interpretative process that follows the teachings of Ricoeur and White and helps us firstly to uncover our pre-understandings: the norms, habits and traditions, as well as ideologies and myths that (mostly, largely unconsciously) steer our thoughts and reasoning.

8.3.1 The Court of Justice

In Chapter 3 we suggested that it is necessary to know something about the workings of the ECJ in order to be able to read and interpret its case law accurately. To appreciate and evaluate its performance, we need to know its traditions, style and method of working, including habits – however sparse or subtle – of rhetoric and narrative. However, as we saw in Chapter 3, judgments of the ECJ are sometimes the imperfect products of an imperfect negotiation process for consensus, and legal aesthetics and internal coherence are sometimes sacrificed for the ideal of consensus. Furthermore, the time constraints put upon the judges' cabinets to process cases, place serious limits on the time that a judge or his or her référendaire can spend on a final edit. However, we – the 'audience' of these texts who are often external to the Court – can only take a judgment, once it is published, at face value. Knowing too much about the internal challenges and constraints at the Court can make one cynical about the value of paying attention to details of language and rhetoric, which is unhelpful in our endeavour to understand the legal reasoning of the ECJ. We have to presume that there are good people working there, trying to produce something meaningful and valuable. Should we in fact care about the internal, organizational challenges and habits within the ECJ at all?

We found a response to this question by looking at Ricoeur's so-called triadic ethics: the parties in the national proceedings as well as the broader public, including the academic community, have a right to expect an end-product of a process that endeavours to produce high-quality products that aim at achieving justice. Therefore, judicial quality can only be assessed on the basis of some idea (or ideal) of excellence. The aim of this research has not been to reconstruct something of the intent of the ECJ with this or that particular judgment, but rather to develop guidelines for the systemic and holistic evaluation of its output. Nevertheless, it remains an open question as to how to negotiate the tension between the realism of the actual daily life of working at the ECJ, and our idealism about the quality of judicial reasoning. There is not one right answer to this question, but hopefully this research invites the reader to reflect, in his or her own work as a jurist, the possibilities and constraints of one's language. There is no quick fix or universal method or stable answer, but it requires a personal, continuous investigation of what it is like to do this work, of what counts as 'coherent', 'consistent', 'clear', or 'convincing'.

Moreover, the assessment of these criteria is, as suggested in Chapter 3, dependent on the particular view of the 'form of life', i.e. the understanding/characterization of the Court in a certain role and with a certain task. As we saw in Chapter 3, this has led to a discussion of elements that contribute to a court's 'self', in the sense of a 'supreme court', a 'constitutional court' or a 'human rights court', and the responsibilities that come with assuming such roles.

8.3.2 Internal market versus fundamental rights

Chapter 4 examined the general substantive pre-understandings that form the background to any case relating to rights of the internal market and fundamental rights. Much in the same way as Chapter 3 started from the legislative framework, i.e. the Treaty provisions and other formal documents on the workings of the Court, Chapter 4 started from the legal framework and moved towards case law and academic doctrine, delving into the pre-understandings of this discussion layer by layer. We tried to identify whether the legal framework offers a particular way of balancing conflicts between these interests or of reconciling them one way or another. What rose to the surface during our exploration was the question whether there is a distinct narrative of the internal market, or one of fundamental rights, within the case law of the ECJ, as has sometimes been asserted by scholars of EU law. In our exploration of that question, we not only looked at certain schemes of reasoning about these rights, but also reviewed academic literature that identifies a certain 'economic' way of reasoning, which involved a vision of an individual as 'homo economicus', or as a rational self-entrepreneur. What this means for legal practice is that such an economic way of reasoning impacts on the way in which human agency and responsibility are viewed: individuals are seen as ultimately responsible for their actions and choices and if they find themselves in dire straits it has probably been due to their own bad behaviour.

The next question that presented itself was whether there is any solace in a human rights narrative which could provide a viable, perhaps more just, alternative to this economic vision of humanity. At this point we reviewed what a 'human rights discourse' might look like, and what kind of vision of humanity is at play there. What transpired is that even within the hopeful discourse of human rights, aimed at empowering and protecting individuals, there can be narrative elements that lead to continued oppression and inequality. The presence, therefore, of a system of fundamental rights, or the success of a claim based upon them, does not always mean that a legal system, or its legal narratives, are changed from an economic to a human rights narrative. Here, too, the way in which individuals are spoken about, their agency and responsibility, are important indicators of the kind of narrative that is truly at play in legal reasoning and they therefore need careful examination.

8.3.3 Reflections on the stage of prefiguration

The stage of prefiguration, as noted above, was for a large part a familiar exercise in charting the legal context and framework of a certain area of law, i.e. an overview of the Treaty provisions, secondary legislation and prior case law and academic literature. This classic approach allows us to characterise the system of law that makes up the context of this case, and to appreciate how a particular judgment fits within that system. What the hermeneutic stage of

prefiguration adds to the classic doctrinal approach to legal research, is a deeper attention to norms and patterns as materials/resources for deciding any future case, thereby creating expectations, not just for the legal resolution that may be reached in this system, but also for larger narratives that are at work in the materials, in the way the facts are described, or in rhetorical devices that the Court employs.

As already pointed out in Chapter 2, the stage of prefiguration is simply a heuristic to distinguish between stages of understanding. There is actually no objective or stable vantage point from which to look back and make an inventory of all the pre-understandings one has or needs before starting the interpretative exercise, since most of one's pre-understandings are unconscious. Chapters 3 and 4, as well as the first sections of Chapter 5 and Chapter 6, were demonstrations of how one could go about making the unconscious, conscious. We went about this layer by layer, like peeling an onion, asking at each consecutive, deeper layer: do we now know enough to read a judgment of the Court satisfactorily, to be able to meaningfully evaluate the Court's performance? This was a necessarily open-ended process, and the questions inherently resist a final answer.

8.4 Configuration: case studies

As argued in Chapter 2, more often than not cases are read for their outcomes, and their textual configuration is taken for granted. A more detailed discussion of the particularities of a text's configuration, including elements of rhetoric and narrative, would allow for a greater, more informed as well as informative cross-cultural dialogue, as it would require a more detailed account of what 'coherent' or 'clear' means to each individual from her or his own cultural background, as well as the open question as to whether justice had been done in this particular case.

The combination of White's teachings with Ricoeur's teachings has offered us a quite structured as well as critical methodology of close reading, that consists of several layers of reading and re-reading, which helps us to understand more deeply what is said in a judgment and how it is said. Indeed, as suggested by Ricoeur, such a stage of structured explanation helps uncover the 'depth-semantics' of a text, which on the one hand guards against a pure projection of subjectivity onto the text and, on the other hand, helps to guard the reader against the 'seduction' played out by the text,[2] which obscures the narratives employed and personae performed by the ECJ that may also be violent and authoritarian, and which may undercut the more positive, rights-based and idealistic surface level narratives. The two case studies were therefore demonstrations of the hermeneutical way of reading developed in Chapter 2,

[2] See Korthals Altes L, 'Le tournant éthique dans la théorie littéraire: impasse ou ouverture?' (1999) 31(3) *Études Littéraires* 39.

documenting the experience of separating the stages of prefiguration, configuration and refiguration and, while doing so, paying attention to narratives of self and other that we explored in Chapters 3 and 4, and that may be at work in the Court's texts.

8.4.1 EU citizens' access to social benefits

As we applied our hermeneutic theory to the case law of the ECJ on access to social benefits by a close reading of the *Grzelczyk* and *Dano* judgments, we noticed that initially certain expectations were raised by the legal framework and, more importantly, by prior judgments of the Court in terms of norms and patterns of reasoning. In earlier decisions on economically inactive EU citizens' access to social benefits, the Court had interpreted the legal framework broadly, focusing on the protection of the individual. One could say that the ECJ showed itself at first, in the *Grzelczyk* case, in the role of a constitutional court, employing what we could call constitutional reasoning (i.e. referring to primary law norms, leading to a broad interpretation of, and even supplementing secondary legislation). However, with the *Dano* judgment and subsequent cases, the Court seemed to retreat to a different kind of reasoning, performing a different kind of role by inverting the normative hierarchy (secondary legislation becoming the 'super-norm', primary law playing no role at all) and denying the applicability of the Charter of Fundamental Rights on a questionable line of reasoning that was inconsistent with its other case law on the scope of the Charter.

Furthermore, a close reading of the textual configuration of the *Grzelczyk* and *Dano* judgments revealed that a strong narrative of the 'good versus the bad citizen' was at work in the reasoning. More particularly, the norm for 'good' or 'bad' behaviour was noticeable in a certain kind of reasoning about the EU citizen's occupation and behaviour, which implied an assumption that was being made about a citizen's responsibility for her or his living conditions as a result of personal choices.

8.4.2 The rights to data protection and privacy

In the case study on the protection of personal data and privacy, we subjected the Court's judgments in *Digital Rights Ireland* and in *Google Spain* to our hermeneutical process of close reading. What immediately caught our attention was the strong fundamental rights focus of the ECJ. In *Digital Rights Ireland* the judicial review that the Court performed of the EU legislation at issue was of an uncommonly strict level, and the Court's review led to the Data Retention Directive's invalidation. In *Google Spain*, the Court emphasised the need for a high level of protection of data subject's rights, and interpreted the Data Protection Directive broadly. In cases subsequent *to Digital Rights Ireland* and *Google Spain*, the Court's approach is confirmed and continued, portraying the Court in data protection cases as a true fundamental rights champion.

Moreover, in the *Digital Rights Ireland* and *Google Spain* cases we noticed remarkable rhetorical passages, recounting various factual aspects of the importance and pervasiveness of digital technologies, which displayed the Court's own voice in a way that we did not see in the EU citizenship cases in Chapter 5. These passages were not mere style; they played a critical role in the legal reasoning, and they seem to indicate that, in these cases, the Court not only played a different role, but that this role also allowed the Court to speak in a different way, with a different voice.

8.5 Moving from configuration to refiguration: synthesis

As predicted in Chapter 2, it was hard to separate the stages of configuration and refiguration, as an attempt to accurately describe and explain what is at work in a text very soon moves into the more reflective stage of evaluating a text, particularly in the case of legal judgments, where we read a judgment not as a self-standing textual unit, but in the sequence of prior and future cases. Furthermore, without the actual need to 'refigure' what we have learned in the 'configuration' of the next judgment, since we are not in the position of working at the Court, it is difficult to think about refiguration as something different from just a review of the cases that succeeded the four judgments that were examined in detail in the case studies. In Chapter 7 we re-examined the cases from our case studies and brought them in dialogue with each other. By this I mean that certain themes and issues that rose to our attention in the individual readings of one set of cases were taken up and re-examined in the other cases.

The role of a fundamental rights court that the Court performed so strongly in the data protection cases, invited a further examination of the kind of role that the Court performed in the EU citizenship cases. And the other way around, the problematic narrative of the responsible 'homo economicus', which was quite visibly at work in the EU citizenship cases, invited a deeper reflection on and a renewed attention to the vision of humanity that could be at play – more latent, less visibly – in the data protection cases.

What really stood out in these case studies – albeit in different ways as was reflected upon in Chapter 7 – was how intertwined the narration of the facts was with the legal reasoning. I think many jurists would say that an account of the facts of a case in a judgment is 'neutral', i.e., normatively innocent, but we have seen in the de *Grzelczyk* and *Dano* cases that actually it is far from neutral. Furthermore, the effects of the narration of the facts and the framing of them reverberate, and are reinforced, throughout the legal reasoning of the judgment at hand, as well as in subsequent cases. As noted above, the narrative of the good versus the bad citizen may be so compelling, so seductive, that it affects the jurist's capacity for consistent legal reasoning within the jurisdictional boundaries of her or his mandate. For instance, in what ways did the narrative

of the good versus the bad citizen contribute to the Court adopting a broad, or a narrow reading of the EU citizen's rights in the *Grzelczyk* and *Dano* judgments? In the data protection cases, the role of the digital communications technologies in society clearly played a pivotal role in justifying the Court's role and intensity of review.

The refined exploration of these themes, i.e. the self-understanding of the Court that its writings reveal and the vision of humanity at play in the judgments of the Court, resulted in an open-ended meditation on both themes. This line of inquiry invited questions such as whether litigants' behaviour is less relevant in data protection cases than in EU citizenship cases, and if this is explained by the legal framework, or if it is due to something else. The same question can be asked about the issue of the sense of self proposed and performed by the Court in its judgments: is the Court's role entirely determined by or dependent on the legal framework? If not, what explained these differences? We concluded in Chapter 7 that there is a surplus of meaning in the texts of the Court that cannot be fully explained by the legal framework and that should, therefore, be attributed to the Court's use of creative choice. Pivotal questions that should be asked are: what are the criteria for how the Court should use this creative space? How consistent should the Court be from one case to another, from one legal field to another? Again, as noted above, these questions resist answers of an exhaustive, final kind, but they merit asking nonetheless, and the notion of 'coherence' seems to play an important role.

What these case studies show, is that my way of reading is not so much a departure from the more traditional/classic way of legal interpretation, as an additional layer to it. Moreover, what we learned from doing these two case studies is that it is actually hard not to 'fall' for the seduction of the text, i.e. for its framing of the facts and for the legal content, and read for the legal solution when reading a judgment for the first couple of times. It is actually on the fifth or tenth round of close reading that rhetoric and narrative patterns start to become clear.

Our hermeneutic way of reading equally helps to give substance to evaluations of the Court's legal reasoning. Through the process of close reading, we get so intimately acquainted with the Court's usual style that we notice when there are style breaks, or other significant fluctuations. As such, our methodology may help to clearly see what the quality of legal reasoning is in a given judgment, or, as Weatherill suggested, whether something is more a 'circumlocuacious statement of a result'.

In Chapter 3, we saw how authors like Beck identified certain interpretative 'topoi'. While reading the Court's case law in our two case studies, we could clearly see that the use of the 'topos' of legislative intent has changed: before *Dano*, the purpose of the CD had been to facilitate free movement, while in *Dano* it was suddenly the prevention of unreasonable burdens. The process of close reading a judgment is greatly enhanced by knowledge of such argumentative devices, as it allows us to identify the kind of argumentative tools that

the Court uses, but they only gain their significance in the whole of a judgment, and, as it turns out, when we compare lines of similar cases over time. Our hermeneutic methodology not only helps us clearly discern the textual, rhetorical details of a judgment (its configuration), but it also invites us to ask questions about why the Court's approach may change from case to case, what justifies such a change, and if the Court a) should explain a change at all (which depends on your view of/standards for the judicial function) and b) if so, whether it is successful in explaining the need for such a change.

The synthesis undertaken in Chapter 7 has shown that there are two levels of reflection that are opened up by our hermeneutic approach: namely to examine and evaluate the texts as performances in terms of *form* and of *substance*. We examined the substance in more detail in the previous section on the vision of humanity that is at play in the judgments. As regards form, we not only assessed whether the judgments live up to certain quality criteria and what kind of role the ECJ seems to be playing, we also reflect on our act of reading and judging these texts, asking how we do this reading and judging, what we need in order to participate meaningfully in the discourse about the Court's legal reasoning, and how we form our evaluative standards for the kind of role, the kind of character we *want* the ECJ to perform.

Furthermore, we noticed that it makes a difference whether we read from a relatively distant, external academic point of view, or from a close-up, involved, internal point of view of the legal practitioner, imagining ourselves in the position of someone who is tasked to write the next judgment. This is a more participatory kind of reading, actively looking for materials to work with, but also asking questions about ourselves and our craft: what would it be like to write this kind of text? How would we deal with a similar question? What are other ways to talk about these issues? What can we say within this discourse, and what cannot be said?

The methodology of hermeneutic close reading of the text of the judgments, but also of examining the legal framework for expectations as well as explanations allows for a more refined, precise and fair discussion of the work of the Court. Criticism of the Court's role and rhetoric risks assuming too much, accusing the Court of certain things that are actually determined by the legislation at issue. The themes of 'self' and 'other' or vision of humanity help refine the lens through which we read and discuss the Court's case law. Moreover, asking these questions about the presence of narratives of 'self' and 'other' in judgments from the ECJ from an imagined internal perspective, also invited a sense of responsibility, and therefore they turned into ethical, self-reflective questions: what are these narratives asking of me, how do we become their ideal readers, and do we want to become the ideal reader? Do we let ourselves be seduced by this narrative, and what does that say about us? More particularly, if we agree with this good versus bad citizen narrative for instance, do we tend to overlook the argumentative flaws and inconsistencies of these judgments? Reading in this participatory way also teaches us an awareness of the limits of

what is expressible in this language, and to come to terms with these limits. And if, for instance, reductions prove to be necessary and unavoidable in the language of the law, then we should think about how we make such reductions, and which kind of reduction is most acceptable. As Ricoeur put it: 'The test is then not that of the stranger at our door but that of the strangeness of ourselves as an other. We thus have also to welcome ourselves as an other.'[3]

8.6 Answering the main research question

The research question that this study set out to answer was:

What are the narratives of self and other that we can find in EU internal market law and EU fundamental rights protection, and how do they affect the ECJ's adjudicative 'praxis'?

It may be obvious by now that, in the cases that we have examined, there were important traces of certain kinds of narratives about humanity and self-understanding at work in the Court's reasoning. As a preliminary point, however, I want to submit that it would be too simplistic to say, as some authors seem to do, that the outcome of a case tells us anything about these narratives. What I have found in doing the case studies, is that a narrative in a judgment is formed not just by the outcome, but by a complex interplay of different elements, such as the way in which the ECJ speaks about the litigants and about life in the EU in general, and, at a deeper level, in the movements, assumptions, the twists, turns, and tensions that are present in the Court's reasoning. We have learned in this research that a victorious claim based on fundamental rights can at the same time undercut the rights that are protected, if it is phrased in a kind of language that is reductive of the individuals it protects, thereby contributing to or maintaining existing inequalities and/or oppression. At the same time, given the division of competences and the mutual permeability that we observed in Chapter 4, internal market mechanisms and reasoning may very well be used to protect fundamental (social) rights.[4]

That being said, the close reading of the judgments in our two case studies has shown that there is a certain way of talking about human agency and human responsibility that is noticeably different in EU citizenship cases (access to social benefits) than in data protection cases. The way in which the EU citizens in question were spoken about in terms of their level of education and

[3] Paul Ricoeur, *Reflections on the Just* (David Pellauer tr, The University of Chicago Press 2007), 28.

[4] As argued by Sybe A de Vries, *Grondrechten binnen de Europese Interne Markt: een tragikomisch conflict tussen waarden en de 'Domus Europaea'* (Uitgeverij Paris 2016), 19-22; See also Sybe A de Vries, 'Protecting Fundamental (Social) Rights through the Lens of the EU internal market: the Quest for a More 'Holistic Approach'.' (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 203.

their ability to work reduces the human experience to economic parameters. Moreover, the inclusion of implicit considerations about their behaviour, such as the age at which Ms Dano had a child and other family circumstances, or in terms of Mr Grzelczyk 'doing his best' or, by contrast, Ms Dano having the 'sole intention' to use a Member State's social welfare system to fund her existence, puts the conversation in normative terms, namely that of an idea of the 'good' citizen who is deserving of equal treatment and social rights, versus a 'bad' citizen, who is not. The configuration of these judgments revealed a narrative that views every person as a kind of self-entrepreneur whose duty it is to make such life choices so as to avoid needing social assistance in the first place. This is a vision of humanity that we identified in Chapter 4 as 'economic', or 'market-'based.

By contrast, in the data protection cases, the behaviour of the litigants did not seem relevant at all, and the protection of the data subject's rights was not dependent on a corresponding responsibility to make 'good' choices in terms of doing her or his best not to need protection. The Court's legal reasoning contained passages in which it explained – with *pathos* – the importance of digital technologies in our daily lives and the vulnerabilities that these technologies bring. This is an entirely different kind of narrative about humanity, accounting and allowing for human vulnerabilities and striving for empowerment. Could this be the fundamental rights narrative that solves or counters the 'economic' narrative described above? There is certainly reason to be hopeful about this narrative. However, as we noticed in our re-examination of this narrative in Chapter 7, there is a risk that this alternative vision of humanity conceives of human agency and human responsibility in such a passive way that it contributes to a further commodification of individuals in the face of digital technologies.

The self-understanding of the Court that is exemplified in its textual performance varied throughout the cases we read. For instance, the level of scrutiny, or deference, with which the Court approaches Member State measures as well as EU legislation, shows whether or not the Court performs a bigger, more audacious role. Like the substantive narrative of a certain vision of humanity, such aspects of the self of the Court can largely depend on the constitutional parameters of a certain legal field, i.e. to what extent something is an EU competence, if the EU has legislated for a certain field and to what intensity. However, there is still a degree to which the Court seems to have made – consciously or unconsciously – a choice for a certain role.

The way in which the Court writes is also revelatory of a sense of self-understanding of the Court: the impersonal, third-person narration, with an abundance of 'building block' phrases or passages cited from previous case law, represents a certain choice. We need to pay extra attention when we come across breaks in that habitual style or differences in the standard building blocks, with the disappearance of such passages in certain cases. As we observed in Chapter 6, the Court not only seems to adopt the role of a fundamental rights court in

the data protection cases in terms of starting point and intensity of its judicial review, but it also seems that this role allowed or even required the Court to speak in a certain way that is markedly different from the way in which it speaks in cases concerning EU citizens' access to social benefit, allowing for more *pathos* in its rhetoric. These are the ways in which the Court's legal reasoning reveals a certain character, but one could say that the reverse is also true: the kind of character, the kind of self that the Court adopts, influences the way it discharges its responsibility, i.e. its adjudicative *praxis*.

The cases that we examined did *not* reveal a coherent or a stable narrative of 'self' or of 'other'. However, the performance of different roles in different cases, or the choice of a certain narrative, may not be problematic if the Court adequately explains why certain cases merit a different treatment from others. For instance, for the purposes of a workable system of consumer protection a certain benchmark of an average consumer, which is inherently reductive, may be necessary and unavoidable.[5] Moreover, as we have seen, the differences in the Court's approach can be explained with reference to differences in the division of competences between the EU and the Member States and, consequently, to differences in the legal framework of each respective field. It may actually not be for the Court, given the separation of powers in a democratic society, to change or create such narratives on its own. However, laying these narratives bare, making them manifest instead of latent, will help to: (a) determine for the Court whether it is overstepping its jurisdictional boundaries or mandate; and (b) bring focus to the discussion of these narratives in the appropriate democratic fora. For instance, the narrative of the 'good' citizen is not mere window-dressing or innocent rhetoric but, as we have seen in our close reading in Chapter 5, it performs an important role in the legal reasoning about EU citizens, and has a concrete impact on the way in which rights are protected and responsibilities are allocated. Such a narrative, and its alternatives, deserve a thorough debate, whether by the legal academia, by the community of jurists working at the Court, or in the appropriate democratic fora.

Both the protection of individuals' rights and the protection of the division of competences between the EU and its Member States falls within the task of the ECJ as a constitutional court, but how to choose between them? For instance, between *Grzelczyk*, or even the *Brey* case, and the *Dano* judgment, a shift seems to have taken place in the role performed by the Court: from a focus on protecting individual rights, to the protection of the division of competences. There may have been perfectly good reasons for this shift, but the Court has failed to explain and rationalise why one perspective prevails over the other. Such an explanation ought to be based on legal considerations that should be independent from more moralistic notions such as the 'deservingness' of one person or another. Furthermore, the systemic coherence that EU law and the ECJ's

[5] But there may be different conceptions of a consumer, see Norbert Reich, 'Vulnerable Consumers in EU Law', in Dorota Leczykiewicz and Stephen Weatherill (eds), *The images of the consumer in EU law: legislation, free movement and competition law* (Hart Publishing 2016).

jurisprudence ought to have across legal fields, does not mean that there should be one stable narrative or vision of humanity for all areas of law. In certain ways, a flourishing democracy needs public and thorough contestation of and discussion about these topics, including by its judiciary.[6]

8.7 One more thing...

In this book I have explored ways of thinking about the ECJ's adjudicative praxis as a complex cultural, creative process which is inextricably linked with questions about the kind of character a jurist within this system can perform, and the characters which it ascribes to the people about whom the law speaks. Its central message has been that the narrative, vocabulary, and the quality or craftsmanship of a judgment reflect a vision of the institutional self and of the parties in the proceedings at hand, and the community to which they all belong. The difficult and ambiguous notion of 'self' is also about the relationship between our professional roles within an institution like the ECJ, and our own internal lives. I have argued that if we want to do justice to these three 'parties' (self, close and distant other), then we should pay attention to, and continuously reflect upon, the way we read texts and the way we write them. I believe that asking such questions will lead to more clear, consistent and just judgments, irrespective of the particular field of law. By offering a refined vocabulary and methodology, the aim of this research has been to contribute to the discussion of the ECJ's legal reasoning in cases in which it balances economic and fundamental rights.

The objective of this hermeneutic enterprise, particularly in the legal context, is not *episteme*, theoretical knowledge, but rather *phronesis*, practical knowledge, that is particular and contextual, if not casuistic,[7] and inherently open-textured. Since the 'final' stage in the hermeneutic arc is, according to Ricoeur, the refiguration of the newly gained understanding into a new context, the practical wisdom gained, for instance about the narratives of self and other in the case law of the Court, cannot be fully grasped nor reproduced or changed until the application of this wisdom to a concrete case, i.e. the next time we use (or decide not to use or change) the resources for meaningful speech that the interpreted texts offered. The whole process is and remains dynamic and contextual. Moreover, as explained in Chapter 2, we need to accept the fact that – despite best efforts to use a clear methodology – there will remain ambiguities and uncertainties about the interpretation of a text. Nothing can be done about that, and we can only learn to sail, as White would say. Different readers may arrive at different conclusions about the meaning of a text in different times. However, as White stresses, such ambiguities and uncertainties

6 Cf. Mark Dawson, 'Regenerating Europe through Human Rights? Proceduralism in European Human Rights Law' (2013) 14 *German Law Journal* 651.

7 Jeanne Gaakeer, *Judging from experience: law, praxis, humanities* (Edinburgh University Press 2019).

> are a necessary part of what we mean by both law and by literature and are in fact essential to the highest achievement of both of these forms of expression. It is not only necessary but right that there be serious argument and disagreement about the meaning of such texts. Indeed the establishment of such arguments, and the management of the terms in which they proceed, is one of the major purposes both of literary and of legal texts.[8]

What a jurist can learn from taking this literary perspective on law is not only the methodologies offered by literary theory, but also more general attitudes, what Gaakeer – referring to John Keats – has called 'negative capability', or – referring to Coleridge – the principle of 'willing suspension of disbelief'. The latter concerns the acceptance, if only momentarily, of the world portrayed and proposed by others, before a harmonious resolution can be arrived at. The former concerns the ability to deal with the discomfort of 'being in uncertainties', i.e. the contingencies and ambiguities that are inherent in any use of language, and legal language is no exception.[9] In different terms, White has suggested that his way of thinking about law and literature 'is a way of moving from ordinary life into a conversation the aim of which is to enlarge both one's sense of what we do not know, and cannot, and our sense that on these terms life can still be lived in a good and satisfactory way'.[10]

As we have seen, the European Court of Justice is faced on a daily basis with a multitude of both conceptual and practical demands, challenges and constraints. In the way it handles them the Court, consciously or unconsciously, performs a certain role, and demonstrates a certain vision of humanity, what we have called narratives of 'self and other'. The aim of this book has not been to prescribe certain narratives as better than others. Rather, my aim has been to provide a way to think carefully about these matters, aided by insights from hermeneutic philosophy, and this process is inherently personal and open-ended, leading at best to *phronesis,* rather than *episteme*. A reflection on these narratives, and an examination of a sample of the judgments of the ECJ in light of them, may reveal – as it has in our case – inconsistencies in terms of voice, style, intensity of review, that are not entirely justified or explained by the respective legal frameworks. My purpose is not, however, to expose the Court or to imply a certain intention or even a real bias on the part of (the jurists working at) the Court, for that would be an act of destruction and betrayal. Far from it, the methodology outlined here contributes to a refined way of reading ECJ case law that permits more accurate and fair evaluations. More particularly, is important to note that the examination of 'self' in this study carried a kind of duality: on the one hand it is a reflection on the ECJ as an institutional author and actor from an external perspective, observing and evaluating what kind of role we

8 James B White, 'Reading Law and Reading Literature: Law as Language' in James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 78-79.

9 Jeanne Gaakeer, '(Con)Temporary Law' (2007) 11 *European Journal of English Studies* 29, 31-32.

10 James B White, *Acts of Hope* (The University of Chicago Press 1994), 305.

think the Court is playing, but it is also, or at the same time, an invitation to a more personal reflection on our self-understanding as a jurist: given the textual configuration of these judgments, what kind of role could we play, if we were to work at the Court, with these texts as our materials? The questions asked and observations made about the ECJ's self are therefore inherently reflexive and ethical: what does it mean for an EU jurist to live a good life, with and for others in just institutions? In that respect, confronting biases, if there are any, is good for a court's self-understanding and the narrative it creates around its 'self'.

My aim in this study has been to suggest paths of enquiry about the patterns and inconsistencies which we observed in the case studies, and ways to ask questions about what we found, in order to understand more thoroughly, as well as a path towards taking a measure of responsibility: for in the perspective that we imagined ourselves in, our position is that of an (aspiring) co-creator of these texts. We do our best to draft good judgments, knowing that will not attain perfection, while trying to learn to do it better each time.[11] Asking the questions that this study promotes is valuable and necessary, as is learning to live with the discomfort of never having one clear, right answer to them, of moving back and forth between idealism and realism. These uncertainties that we unavoidably need to endure may actually be what gives life to our legal profession. I hope this book has exemplified my response to White's 'ultimate' and provocative question: 'how can an intelligent and educated person possibly spend her life working with the law, when life is short, and there is much else to do?'[12]

[11] Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013) 54: to quote Judge Edward: 'I must say that I sometimes wonder whether I am on the same planet as some of the commentators. Taking part in the Court's deliberations, I see only a group of judges from different countries seeking to find acceptable legal solutions to practical legal problems.'; David Edward, 'Direct effect: myth, mess or mystery?' in Jolande M Prinssen and Annette Schrauwen (eds), *Direct effect: rethinking a classic of EC legal doctrine* (Europa law Publishing 2002), 3.

[12] James B White, *The Legal Imagination* (1st edn. University of Chicago Press 1973 – 45th anniversary edition Wolters Kluwer 2018), xxii.

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Nederlandse samenvatting

1. EU recht als creatieve 'praxis'

Dit proefschrift nodigt de lezer uit om te denken over de wereld van het Europese recht, en in het bijzonder over het werk van het Hof van Justitie van de Europese Unie (hierna: het Hof), niet als een machine of als iets dat definitief en uitputtend in een grootse theorie kan worden vastgelegd, maar als een intellectueel en cultureel proces. Dit onderzoek vergelijkt de rechtspraak van het Hof met een literaire activiteit, een discours of taal, dat wil zeggen: een manier van denken, praten en handelen in deze wereld. De arresten van het Hof kunnen worden beschouwd als 'kunstvoorwerpen', producten van een bepaalde cultuur, die deze cultuur ook (re)produceren. De lezer van dit boek wordt bovendien uitgedaagd om zich voor te stellen dat hij of zij aan dit creatieve proces deelneemt.

De centrale onderzoeksvraag is:

Wat zijn de narratieven over het 'zelf' en 'de ander' die we kunnen vinden in het Europese interne markt recht en de bescherming van de grondrechten in de EU, en hoe beïnvloeden zij de rechterlijke 'praxis' van het Hof van Justitie?

Om die vraag te beantwoorden, hebben we 1) een theorie nodig om het lezerspubliek te overtuigen dat er zoiets bestaat als 'narratieven over het "zelf" en "de ander"' in juridische argumentatie, en dat het nuttig is om over deze narratieven na te denken; en 2) een methodologie die helpt om dergelijke narratieven, als die er zijn, te ontdekken in de jurisprudentie van het Hof. We vinden theoretische en methodologische hulp in een combinatie van het werk van de Amerikaanse 'Law and Literature' wetenschapper James Boyd White en de Franse filosoof Paul Ricoeur. Als een demonstratie van deze methodologie onderzoeken we vervolgens twee categorieën zaken, namelijk zaken met betrekking tot de aanspraken van gemigreerde, economisch inactieve EU-burgers op sociale uitkeringen in hun lidstaat van ontvangst, en zaken met betrekking tot de bescherming van persoonsgegevens en het recht op privacy.

In de volgende paragrafen zal ik samenvatten wat we hebben geleerd in de afzonderlijke hoofdstukken en de casestudies als een pad naar de beantwoording van de centrale onderzoeksvraag. In paragraaf 5 zal een antwoord op deze vraag worden geformuleerd. De daaropvolgende paragraaf 6 voegt een aantal laatste beschouwingen toe.

2. Uitleggen en begrijpen: pre-, con- en refiguratie

In hoofdstuk 2 wordt nader uitgelegd dat dit onderzoeksproject de rechterlijke taak ziet als een *praxis* van lezen en schrijven. Om helder na te denken over wat het betekent om in het Europese recht te lezen en te schrijven, met name over de afweging tussen de economische belangen van de interne markt enerzijds en de bescherming van de grondrechten anderzijds, bleken de literatuurwetenschappen nuttige inzichten te bieden. Het verband tussen recht en literatuur is door 'Law and Literature' geleerden, zoals James Boyd White, over de hele wereld becommentarieerd. Hoofdstuk 2 onderzocht de overlap tussen het werk van James Boyd White en het werk van de Franse filosoof Paul Ricoeur binnen het domein van de hermeneutische filosofie.

In de hermeneutische filosofie is een centraal thema het onderscheid tussen de stadia van *verklaren* en van *begrijpen*, en Ricoeur pleit ervoor om gelijke aandacht te besteden aan beide. Het *verklarende* stadium van tekstanalyse en beschrijving is een tamelijk vertrouwd terrein voor juristen, maar juristen maken niet gebruik van het volledige spectrum van analytische instrumenten die hermeneutische filosofie en literatuurwetenschappen bieden. Zo onthult de taalfilosofie een inherente onzekerheid over de betekenis van woorden, met name in een meertalige en multiculturele context, dat niet vaak of volledig wordt besproken in meer klassieke juridische methodologieën. Bovendien kunnen retorische en narratologische analyses helpen om onderliggende patronen, normen en narratieven te ontdekken die in onze juridische taal spelen, zoals voorstellen voor een 'zelf' en, in een mens- en wereldbeeld, een 'ander'.

De hermeneutische fase van *begrijpen* is minder vertrouwd gebied voor traditionele, doctrinair georiënteerde juristen. Deze uitdagende fase van interpretatie is echter niet alleen nuttig, maar ook vanuit zowel praktisch als ethisch oogpunt noodzakelijk. Waar de verklarende fase beschrijvend is, is het stadium van begrijpen evaluatief en normatief, maar dan wel eerder in een reflexieve, dan in dogmatische zin: hoe dienen wij, als beroepsgroep, om te gaan met, en te spreken over de inherente dubbelzinnigheden van onze juridische taal? Wat voor normen en narratieven onthulde het verklarende stadium, welke voorstellen voor een zelf en een samenleving met anderen worden gedaan, en moeten of kunnen we hoe op deze voorstellen reageren? Hoe kunnen we een zinvol gesprek over deze onderwerpen voeren – als rechter met onze (internationale) collega's in een beraad, in een ontwerptekst voor een arrest, of als student EU-recht, zich voorbereidend op een leven in de praktijk?

Het onderscheid tussen *verklaren* en *begrijpen*, en in het bijzonder het stadium van begrijpen, lijkt enigszins esoterisch. Ricoeur's drievoudige onderscheid tussen pre-, con- en refiguratie vond ik nuttig bij het structureren van dit metaniveau van denken over het proces van interpretatie. Bovendien was White's visie op deze vragen vergelijkbaar met die van Ricoeur, en het bleek bovendien een stuk toegankelijker. White nodigt ons uit om te vragen: wat zijn de middelen voor betekenisvolle taal in deze cultuur? Hoe worden deze middelen gebruikt – en herboren – in een specifieke tekst? Wat voor karakter creëert de auteur van een tekst voor hem- of haarzelf en voor anderen, en voor de samenleving? Hoe zou het zijn om deze uitdrukkingsvorm te gebruiken? Deze vier vragen hebben ook betrekking afzonderlijke fasen in het leesproces, en ik heb ze gebruikt om Ricoeur's begrippen van pre-, con- en refiguratie te concretiseren.

Op basis van de synthese tussen het werk van Ricoeur en White, en met de werkelijkheid – de fenomenologie — van de *praxis* van een EU-jurist in het achterhoofd, kunnen drie fasen in het werk van deze jurist op de volgende manieren worden gezien.

1. Het begint met de voorbereiding van de interpretatieve exercitie. Dit omvat een fase die Ricoeur *prefiguratie* zou noemen, d.w.z. een reflectie op het voorafgaande begrip, de kennis van de middelen voor betekenisvolle taalgebruik en diens beperkingen, evenals de culturele competenties die nodig zijn om zinvol te kunnen omgaan met een tekst. Op basis van dit voorafgaande begrip, het 'voorverstaan', vormen we ook bepaalde verwachtingen met betrekking tot de patronen

en normen die we in een concrete tekst kunnen aantreffen.

2. Wanneer we aan de slag gaan met concrete, specifieke teksten als interpretatie-objecten in een proces van nauwgezet lezen, belanden we in wat Ricoeur de *configuratie* zou noemen. Hier onderzoeken we de manier, de 'kunst' waarmee de eerdergenoemde middelen voor betekenisvol taalgebruik worden gebruikt. In onze methodologie besteden we aandacht aan het soort karakter dat de auteur in de tekst laat zien, wat we het zelfbegrip of zelfbeeld noemen, evenals het mens- en wereldbeeld dat de tekst tentoonspreidt. In dit stadium is het van cruciaal belang om aandacht te besteden aan het fenomeen van het lezen als zodanig. We doen dit door ons leesproces zo nauwkeurig mogelijk te documenteren. Dit maakt onze beschrijving en de daaruit voortvloeiende analyse transparant voor, en deelbaar met, onze lezer. Dit fenomenologische perspectief helpt ook om een pure projectie van onze subjectiviteit te voorkomen.

3. Ten slotte is daar de evaluatie van het resultaat van de interpretatieve exercitie. Dit is wat Ricoeur *refiguratie* zou noemen. Het begrip van de tekst wordt bereikt door de analyse die in het stadium van de configuratie is ondernomen, aan een diepgaande reflectie te onderwerpen. Dit kan aan de hand van de eerdergenoemde thema's van zelf- en mensbeeld gedaan worden. Deze elementen hebben – idealiter althans – reële gevolgen voor een nieuwe tekst, een nieuw arrest bijvoorbeeld, waarin deze thema's en middelen worden geherformuleerd. Zo krijgt het interpretatieproces een daadwerkelijke impact op het leven van de rechtssubjecten van de EU.

3. Prefiguratie

3.1 Het Hof van Justitie

Hoofdstuk 3 past de theorieën van Ricoeur en White toe door erop te wijzen dat het noodzakelijk is iets te weten over de organisatie en de werkprocessen van het Hof om zijn jurisprudentie nauwkeurig te kunnen lezen en interpreteren. Om de prestaties van het Hof te evalueren en op waarde te schatten, moeten we de tradities, schrijfstijl en werkwijze kennen, inclusief de retorische en narratieve gewoonten – hoe schaars of subtiel ook.

De uitspraken van het Hof van Justitie zijn echter soms ook de onvolmaakte producten van een onvolmaakt onderhandelingsproces, waarbij juridische esthetiek en interne samenhang worden soms opgeofferd om consensus te bereiken. Bovendien werken de kabinetten van de rechters onder grote tijdsdruk, hetgeen verdere beperkingen stelt aan de tijd die een rechter of zijn of haar referendarissen aan redactie en retoriek kan besteden. Kennis over de interne uitdagingen en beperkingen bij het Hof, kan ons derhalve cynisch maken over de waarde van aandacht voor details van taal en retoriek voor een juist begrip van de jurisprudentie van het hof. Waarom pleit dit boek er dan toch voor aandacht aan deze elementen te besteden?

We vonden een antwoord op deze vraag door te kijken naar Ricoeur's zogenoemde triadische ethiek, volgens welke ieder mens streeft naar een goed leven, met en voor anderen, in rechtvaardige instituties. Vanuit dat perspectief bezien, alsmede vanuit het participerende perspectief van 'co-creatie' dat wij in dit onderzoek als vertrekpunt namen, gaan wij er van uit dat er goede en eerlijke mensen

bij het Hof werken die in hun werk recht willen doen aan zichzelf als professional, aan de procespartijen en aan de samenleving in het algemeen. Daarom kan de kwaliteit van de rechtspraak door het Hof alleen worden beoordeeld op basis van een idee (of ideaal) van excellentie. Het blijft een open vraag hoe we om moeten gaan met de spanning tussen de realiteit van het dagelijkse werk (en alle uitdagingen en beperkingen) van het Hof en ons idealisme over de kwaliteit van de juridische argumentatie. Er is geen enkel snel, stabiel of juist antwoord op deze vraag, maar hopelijk nodigt dit onderzoek de lezer uit om in zijn of haar eigen werk als jurist de mogelijkheden en beperkingen van de taal te bevragen. Dit vereist een persoonlijk, doorlopend onderzoek van hoe het is om dit werk te doen, bijvoorbeeld van wat telt als 'coherent', 'consistent', 'helder' of 'overtuigend'.

Bovendien is de beoordeling van deze criteria afhankelijk van het karakteriseren van het Hof in een bepaalde rol en met een bepaalde taak. Dit leidt tot een discussie over elementen die bijdragen aan het zelfbeeld van het Hof, in de zin van simpelweg een rechtbank van laatste aanleg, een constitutioneel hof, of een mensenrechtenhof, en over de verantwoordelijkheden die met het vervullen van deze rollen gepaard gaan.

3.2 Interne markt versus grondrechten

Hoofdstuk 4 onderzoekt de algemene materiële voorafgaande kennis die achtergrond vormt van elke zaak met betrekking tot de rechten van de interne markt en de grondrechten. Hoofdstuk 4 start vanuit het juridische kader en ging over naar jurisprudentie en academische doctrines. Op die werden het voorafgaande begrip, het 'voor-verstaan', laag voor laag afgepeld. Wij hebben onderzocht of het juridische kader een specifieke manier voorschrijft om conflicten tussen deze belangen op te lossen of om deze belangen en rechten op een andere manier met elkaar te verzoenen. Wat tijdens onze verkenning naar voren kwam, was de vraag of er in de jurisprudentie van het Hof een duidelijke narratief is over de interne markt of over de grondrechten, zoals soms wel wordt beweerd door geleerden van het EU-recht. Tijdens de zoektocht naar het antwoord op die vraag hebben we niet alleen gekeken naar bepaalde beoordelingsschema's over deze rechten, maar ook naar wetenschappelijke literatuur die een bepaalde 'economische' of marktgerelateerde manier van redeneren identificeert. Dit mensbeeld ziet de individu als 'homo economicus', of als een rationele 'zelfondernemer'. Een dergelijke economische manier van redeneren heeft gevolgen voor de manier waarop menselijke 'agency', in de zin van handelingsvermogen, en verantwoordelijkheid in het recht vorm krijgen: individuen worden gezien als ultiem verantwoordelijk voor hun daden en hun keuzes, en als ze zich (socio-economische) moeilijkheden bevinden is dat waarschijnlijk het gevolg van hun eigen slechte gedrag.

De volgende vraag die zich aandiende was of er dan ook een grondrechtennarratief is dat een aannemelijk, misschien rechtvaardiger, alternatief zou kunnen bieden voor dit beperkte economische mensbeeld. We bespraken hoe een 'grondrechtendiscours' eruit zou kunnen zien, en wat voor soort mensbeeld daarin speelt. Wat echter bleek, is dat zelfs binnen het hoopvolle discours van de grondrechten, gericht op het versterken en beschermen van individuen, er narratieve elementen kunnen zijn die leiden tot, en bijdragen aan, onderdruk-

king en ongelijkheid. Het enkele bestaan van een systeem van grondrechten, of het succes van een op grondrechten gebaseerde claim, betekent dus niet altijd dat een rechtsstelsel, of zijn juridische narratieven, transformeert van een economisch naar een mensenrechtenverhaal. Ook hier zijn de manieren waarop over individuen en hun handelingsvermogen en verantwoordelijkheid wordt gesproken, belangrijke indicatoren van het soort narratief dat daadwerkelijk speelt in juridische argumentatie, en daarom moeten zij zorgvuldig worden onderzocht.

Het stadium van prefiguratie is slechts een heuristisch hulpmiddel om onderscheid te maken tussen stadia van integratie. Er is eigenlijk geen objectief of stabiel punt waarvan uit je terug kunt kijken en een inventaris op kan maken van al het 'voor-verstaan' dat men nodig heeft voordat men met de interpretatieve exercitie begint, aangezien het grootste deel van deze voorkennis onbewust is. Hoofdstukken 3 en 4, evenals de eerste paragrafen van hoofdstuk 5 en hoofdstuk 6, zijn demonstraties van hoe men het onbewuste, bewust kan maken. We gingen laag voor laag te werk, zoals het pellen van een ui, en bij elke opeenvolgende, diepere laag vroegen we: weten we nu genoeg om een arrest van het Hof goed te lezen, om de prestaties van het Hof op betekenisvolle wijze te beoordelen? Dit was noodzakelijkerwijs een proces met een open einde, omdat deze vragen elke poging tot een definitieve, universele beantwoording weerstaan.

4. Configuratie: casestudies

Doorgaans worden arresten gelezen voor hun uitkomsten, en hun tekstuele configuratie wordt als vanzelfsprekend of relatief onbelangrijk beschouwd. Een meer gedetailleerde bespreking van de bijzonderheden van de configuratie van een tekst, met inbegrip van retorische en narratieve elementen, maakt een breder en beter geïnformeerde interculturele dialoog mogelijk. Een dergelijke gedetailleerde bespreking vraagt immers om een specifieke uitleg, door elke individuele lezer vanuit zijn of haar culturele context, van wat bijvoorbeeld 'coherent' of 'duidelijk' is. Daarnaast speelt steeds de open vraag of er in dit specifieke geval recht is gedaan, aan de procespartijen en de rechtsgemeenschap van de EU, maar ook aan het Hof als auteur zelf.

De combinatie van de inzichten van White en Ricoeur biedt een gestructureerde en kritische methodologie van nauwgezet lezen, die bestaat uit verschillende rondes van lezen en herlezen, wat ons helpt om dieper te begrijpen wat er wordt gezegd in een arrest en hoe het wordt gezegd. Zoals Ricoeur betoogde, helpt de fase van gestructureerde analyse de 'diepte-semantiek' van een tekst aan het licht te brengen, die enerzijds beschermt tegen een zuivere projectie van de subjectiviteit van de lezer op de tekst en anderzijds tegen de 'verleiding' die door de tekst wordt uitgeoefend. Aantrekkelijke, verleidelijke retoriek kan de door het Hof gehanteerde narratieven en rollen verhullen. Twee casestudies demonstreren de hermeneutische manier van lezen, ontwikkeld in hoofdstuk 2, met aandacht voor het zelfbeeld van het Hof en het mensbeeld dat uit de teksten naar voren komt.

4.1 De toegang van EU-burgers tot sociale uitkeringen

Hoofdstuk 5 past onze hermeneutische theorie toe op de jurisprudentie van het Hof over de toegang van economisch inactieve EU-burgers tot sociale

uitkeringen, door de arresten *Grzelczyk* en *Dano* nauwgezet te lezen. Tijdens het doen van de casestudy, merkten we dat het juridische kader, en, belangrijker nog, eerdere arresten van het Hof, aanvankelijk bepaalde verwachtingen omtrent normen en argumentatiepatronen wekten. In eerdere beslissingen over de toegang van economisch inactieve EU-burgers tot sociale uitkeringen had het Hof namelijk het juridische kader breed geïnterpreteerd, met een nadruk op de bescherming van het individu. Op basis van onze hermeneutische analyse zouden we kunnen zeggen dat het Hof in de zaak *Grzelczyk* de rol van een constitutioneel hof speelde, waarbij het gebruik maakte van wat we een constitutionele argumentatie zouden kunnen noemen, dat wil zeggen het verwijzen naar normen van primair recht, wat leidt tot een brede interpretatie van, en zelfs een aanvulling op, het afgeleide recht. Met het *Dano*-arrest en de daaropvolgende zaken leek het Hof zich echter terug te trekken tot een ander soort argumentatie, waarbij het een andere rol speelde. In *Dano* keerde het Hof de normatieve hiërarchie om (secundaire wetgeving wordt de 'supernorm', primair recht speelt nagenoeg geen rol) en ontkende de toepasselijkheid van het Handvest van de Grondrechten op basis van een twijfelachtige redenering, in tegenspraak met eerdere jurisprudentie van het Hof over de werkingssfeer van het Handvest.

Bovendien bleek uit een nauwkeurige lezing van de tekstuele configuratie van de arresten *Grzelczyk* en *Dano* dat een sterk narratief van de 'goede versus de slechte burger' aan het werk was in de argumentatie van het Hof. Meer in het bijzonder was de norm voor 'goed' of 'slecht' gedrag voelbaar in de redeneringen van het Hof over het gedrag en de levenssituatie van de EU-burgers in kwestie. Hieraan ligt een veronderstelling ten grondslag dat een burger verantwoordelijk is voor zijn of haar levensomstandigheden als gevolg van persoonlijke keuzes, wat wij in hoofdstuk 4 als een 'economisch' of marktgerelateerd mensbeeld problematiseerden.

4.2 Het recht op gegevensbescherming en privacy

In de casestudy over de bescherming van persoonsgegevens en privacy hebben we de arresten van het Hof in *Digital Rights Ireland* en in *Google Spain* onderworpen aan ons hermeneutische proces van 'close reading'. Wat onmiddellijk onze aandacht trok, was de sterke focus van het Hof op grondrechten. In *Digital Rights Ireland* was de rechterlijke toetsing die het Hof van de betrokken EU-wetgeving verrichtte van een ongewoon streng niveau, en dit leidde tot de ongeldigheid van de Dataretentierichtlijn. In het arrest *Google Spain* benadrukte het Hof de noodzaak van een hoog niveau van bescherming van de rechten van de betrokkene en interpreteerde het de richtlijn Gegevensbescherming in ruime zin. In zaken na *Digital Rights Ireland* en *Google Spain* is de aanpak van het Hof bevestigd en voortgezet, en trad het Hof steeds op als een echte voorvechter van de grondrechten. Bovendien bevatten de arresten in *Digital Rights Ireland* en *Google Spain* opmerkelijke retorische passages, waarin verschillende aspecten van de rol van digitale technologieën in onze samenleving werden besproken. In die passages klinkt de eigen stem van het Hof op een manier door die onvergelijkbaar is met de stem van het Hof in de EU-burgerschapszaken. Deze passages betroffen voorts niet louter stijl; zij waren van doorslaggevend belang in de juridische argumentatie van het Hof en zij lijken erop te wijzen dat het Hof in deze

zaken niet alleen een andere rol speelde, maar ook dat deze rol het Hof in staat stelde, of zelfs noodzaakte, om met een andere stem te spreken.

5. Antwoord op de centrale onderzoeksvraag

De onderzoeksvraag die deze studie wilde beantwoorden was:

Wat zijn de narratieven over het 'zelf' en 'de ander' die we kunnen vinden in het Europese interne markt recht en de bescherming van de grondrechten in de EU, en hoe beïnvloeden zij de rechterlijke 'praxis' van het Hof van Justitie?

In de zaken die we hebben bestudeerd, vonden we belangrijke sporen van bepaalde soorten zelf- en mensbeelden. Het narratief in een arrest wordt immers niet alleen gevormd door de uitkomst van de zaak, maar door een complex samenspel van verschillende elementen, zoals de manier waarop het Hof spreekt over de procespartijen en over het leven in de EU in het algemeen, en, op een dieper niveau, in de veronderstellingen, de wendingen en de spanningen die aanwezig zijn in de argumentatie van het Hof. We hebben in dit onderzoek geleerd dat een zegevierende claim op basis van grondrechten toch deze rechten kan ondermijnen, als het wordt geformuleerd in een soort taal die reductief is ten opzichte van de mensen die het beoogt te beschermen. Hierdoor kunnen de bestaande ongelijkheden en/of vormen van onderdrukking worden bevorderd of gehandhaafd. Tegelijkertijd kunnen, gezien de verdeling van bevoegdheden en de wederzijdse 'permeabiliteit' die tussen het interne markt recht en de grondrechten bestaat, de mechanismen en de rechten van de interne markt zeer goed worden gebruikt om de fundamentele (sociale) rechten te beschermen.

De nauwkeurige lezing van de arresten in onze twee casestudies heeft aangetoond dat er een bepaalde manier is om te spreken over menselijk handelingsvermogen en menselijke verantwoordelijkheid die in EU-burgerschapszaken merkbaar anders is dan in de zaken over gegevensbescherming. De manier waarop over het opleidingsniveau en arbeidsvermogen van de EU-burgers in kwestie werd gesproken, reduceert de menselijke ervaring tot economische parameters. Bovendien dragen de impliciete overwegingen over hun gedrag, zoals de leeftijd waarop mevrouw Dano een kind (van een onbekende vader) kreeg of dat zij het sociale stelsel van Duitsland gebruikt om haar bestaan te financieren, of in tegenstelling daartoe, dat de heer Grzelczyk 'zijn best heeft gedaan' om zijn studie te bekostigen, het gesprek in normatieve termen, namelijk het idee van de 'goede' burger die gelijke behandeling en sociale rechten verdient, versus een 'slechte' burger, die dat niet verdient. De configuratie van deze oordelen onthulde een narratief dat iedere persoon ziet als een soort van 'zelf-ondernemer' wiens plicht het is om zodanige levenskeuzes te maken dat aanspraak op sociale bijstand of andere rechten vermeden wordt. Dit is een mensbeeld dat we in hoofdstuk 4 hebben geïdentificeerd als 'economisch' of 'marktgebaseerd'.

In de zaken over gegevensbescherming daarentegen leek het gedrag van de procespartijen helemaal niet relevant, en de bescherming van de rechten van de betrokkene was niet afhankelijk van een overeenkomstige verantwoordelijkheid om 'goede' keuzes te maken in die zin dat datasubjecten geen plicht hebben om te voorkomen dat zij de EU-grondrechten moeten inroepen. Dit is een heel

ander soort mensbeeld, met een ander narratief over menselijke kwetsbaarheden, verantwoordelijkheden en het streven naar 'empowerment'. Zou dit het grondrechtennarratief kunnen zijn dat een alternatief biedt voor het 'economische' narratief? Er is beslist reden om hoopvol over dit narratief te zijn. Er bestaat echter een risico dat dit alternatieve mensbeeld op zodanige passieve manier een voorstelling maakt van menselijk handelingsvermogen en menselijke verantwoordelijkheid, dat het helaas bijdraagt tot een verdere commodificatie van individuen ten opzichte van digitale technologieën.

Ook het zelfbeeld van het Hof, dat in zijn tekstuele configuraties wordt gedemonstreerd, varieerde in de zaken die wij lazen. Zo blijkt bijvoorbeeld uit de intensiteit van de toetsing waaraan het de maatregelen van de lidstaten of de EU-wetgeving benaderde, of het Hof al dan niet een grotere, belangrijkere rol vervulde. Net als de inhoudelijke aspecten van een bepaald mensbeeld kunnen dergelijke aspecten van het zelfbeeld van het Hof grotendeels afhangen van de constitutionele parameters van een bepaald juridisch gebied, d.w.z. in welke mate iets een bevoegdheid van de EU is, indien de EU voor een bepaald gebied wetgeving heeft uitgevaardigd en hoe uitputtend die wetgeving is. Er zijn niettemin aanwijzingen dat het Hof, ondanks deze factoren, bewust of onbewust een keuze voor een bepaalde rol lijkt te maken.

Zo draagt de manier waarop het Hof schrijft bij aan een bepaald zelfbeeld: de onpersoonlijke vertelstijl in derde-persoon enkelvoud, met een overvloed aan bouwsteen- zinnen of passages uit de voorgaande jurisprudentie, vertegenwoordigt een bepaalde keuze. Daarom moeten we extra aandacht besteden wanneer we passages tegenkomen die breken met deze gebruikelijke stijl of verschillen in de standaard bouwstenen, en zeker wanneer van dergelijke standaard passages ineens verdwijnen. Dit zijn manieren waarop de argumentatie van het Hof een bepaald karakter aan het licht brengt, maar men zou kunnen zeggen dat het omgekeerde ook waar is: het soort karakter, het soort zelf dat het Hof aanneemt, beïnvloedt de manier waarop het zich van zijn verantwoordelijkheid kwijt, d.w.z. zijn juridische *praxis*.

De zaken die we onderzochten onthulden geen coherent of stabiel narratief van het 'zelf' of de 'ander'. Het optreden van het Hof in verschillende rollen in verschillende gevallen, of de keuze voor een bepaald narratief, hoeft echter niet problematisch te zijn als het Hof naar behoren uitlegt waarom bepaalde zaken een andere behandeling verdienen dan andere. Bovendien kunnen de verschillen in de aanpak van het Hof worden verklaard aan de hand van verschillen in de verdeling van bevoegdheden tussen de EU en de lidstaten en bijgevolg ook verschillen in het juridisch kader van elk gebied. Het is in feite niet aan het Hof om, gezien de scheiding der machten in een democratische samenleving, dergelijke narratieven alleen te veranderen of te creëren. Echter, het blootleggen van deze narratieven, het openbaar in plaats van latent maken, zal helpen om a) voor het Hof vast te stellen of het zijn bevoegdheidsgrenzen overschrijdt, b) de nadruk te leggen op het belang van de bespreking van deze narratieven in de juiste democratische fora, en c) om het lezerspubliek – waarvan de meesten ook juristen zullen zijn – te laten ervaren op welke subtiele, onbewuste wijze verschillende narratieven in juridisch taalgebruik kunnen doorwerken.

6. Nog één ding...

Dit boek verkende manieren om te denken over de rechterlijke *praxis* van het Hof van Justitie van de Europese Unie als een complex cultureel en creatief proces dat onlosmakelijk verbonden is met vragen over het soort rol dat een jurist binnen dit systeem kan vervullen, en over de rollen die het toeschrijft aan de mensen over wie de wet spreekt. De centrale boodschap is dat het narratief, het taalgebruik en de kwaliteit of het vakmanschap van een rechterlijk oordeel een beeld weerspiegelen van het institutionele 'zelf', en van de partijen in de procedures en van de gemeenschap waartoe zij allen behoren als de 'ander'. Het moeilijke en dubbelzinnige begrip 'zelf' gaat ook over de relatie tussen onze professionele rol, bijvoorbeeld binnen een instelling als het Hof, en ons eigen interne leven. Ik heb betoogd dat als we recht willen doen aan deze drie 'partijen' (onszelf, de nabije ander, en de ander die verder van ons staat) we aandacht moeten besteden aan, en voortdurend moeten nadenken over, de manier waarop we teksten lezen en de manier waarop we ze schrijven. Ik denk dat het stellen van dergelijke vragen zal leiden tot duidelijker, consistenter en rechtvaardiger uitspraken, ongeacht het specifieke rechtsgebied. Door een verfijnde vocabulaire en methodologie aan te bieden, was het doel van dit onderzoek een bijdrage te leveren aan de discussie over de juridische argumentatie van het Hof in zaken waarin het economische en grondrechten tegen elkaar afweegt.

Zoals we hebben gezien, wordt het Hof dagelijks geconfronteerd met tal van zowel conceptuele als praktische eisen, uitdagingen en beperkingen. In de manier waarop het daarmee omgaat, vervult het Hof bewust of onbewust een bepaalde rol, en demonstreert het een bepaald mensbeeld, wat we narratieven van 'zelf' en de 'ander' hebben genoemd. Het doel van dit proefschrift was niet om bepaalde narratieven als beter dan andere voor te schrijven. Mijn doel was veeleer om een manier te bieden om zorgvuldig over deze zaken na te denken, geholpen door inzichten uit de hermeneutische filosofie. Het doel van deze hermeneutische exercitie, is niet *epistèmè*, theoretische kennis, maar eerder *phronèsis*, praktische wijsheid, die specifiek en contextueel, zo niet casuïstisch is, en onvermijdelijk een open karakter heeft. Een reflectie op narratieven, en een onderzoek van een kleine selectie van de arresten van het Hof in het licht daarvan, kan – zoals bij ons het geval is – inconsistenties aan het licht brengen in bijvoorbeeld stem, stijl en intensiteit van toetsing, die niet volledig worden verklaard of gerechtvaardigd door de respectieve juridische kaders. Mijn doel is echter niet om het Hof te 'ontmaskeren' in die zin dat een zekere activistische intentie of zelfs een echte vooringenomenheid van de kant van (de juristen die bij) het Hof aan het licht zou worden gebracht, want dat zou een daad van vernietiging en verraad zijn. Integendeel, de in deze studie geschetste methodologie draagt bij tot een verfijnde manier om jurisprudentie van het Hof van Justitie te lezen die leidt tot nauwkeurigere en eerlijkere evaluaties. Meer in het bijzonder is het belangrijk op te merken dat het onderzoek van het 'zelf' in dit proefschrift gekenmerkt werd door een soort dualiteit: aan de ene kant is het een reflectie op het Hof van Justitie als een institutionele auteur en acteur vanuit een extern perspectief, waarbij wordt bekeken en beoordeeld wat voor rol wij denken dat het Hof speelt, maar het is ook, of tegelijkertijd, een uitnodiging tot een meer persoonlijke reflectie op

ons zelfbegrip als jurist: gezien de tekstuele configuratie van deze arresten, wat voor rol zouden *wij* kunnen spelen, als wij bij het Hof zouden werken, met deze teksten als ons materiaal? De gestelde vragen en opmerkingen over het 'zelf' van het Hof zijn dus inherent reflexief en ethisch: wat betekent het voor een EU-jurist om een goed leven te leiden, met en voor anderen in rechtvaardige instituties?

Mijn doel in deze studie was om een manier voor te stellen om patronen en inconsistenties in de rechtspraak van het Hof te bevragen en begrijpen, evenals een pad naar het nemen van een mate van verantwoordelijkheid. Het perspectief waarin we ons immers verbeeldden, is die van een medeschepper van deze teksten. Het stellen van de vragen die deze studie bepleit, is mijns inziens waardevol en noodzakelijk, evenals het leren leven met het ongemak om op deze vragen nooit een duidelijk, juist antwoord te hebben, om heen en weer te gaan tussen idealisme en realisme. Deze onvermijdelijke onzekerheden zijn echter wat ons juridische beroep leven geeft. Dit boek is mijn antwoord op White's provocerende vraag '*How can an intelligent and educated person spend her life working with the law, when life is short, and there is so much else to do?*'[1]

[1] James B White, *The Legal Imagination* (University of Chicago Press 1973), p. xxii.