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**Human Rights, European Union and the Constitutional
Discourse**

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Obsah

1. INTRODUCTION	1
2. HUMAN RIGHTS IN THE CONTEMPORARY LIBERAL DISCOURSE AND THE CRITIQUE OF RIGHTS – DELIMITING THE FOUNDATIONS	3
2.1. THE MAINSTREAM DISCOURSE ABOUT HUMAN RIGHTS AND ITS ROOTS.....	4
2.2. CRITIQUE OF RIGHTS AND RIGHTS LANGUAGE	6
3. HUMAN RIGHTS LANGUAGE AND THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE	9
3.1. THE PERIOD OF NEGLECT	9
3.2. THE EVOLUTION OF HUMAN RIGHTS BEING PART OF THE GENERAL PRINCIPLES OF COMMUNITY LAW	10
4. SOURCES OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION	14
4.1. PROCESS OF RECOGNITION OF FUNDAMENTAL RIGHTS	15
4.1.1. INSIDE PERSPECTIVE OF FUNDAMENTAL RIGHTS	15
4.1.2. OUTSIDE PERSPECTIVE OF FUNDAMENTAL RIGHTS.....	19
4.2. FUNDAMENTAL RIGHTS RECOGNIZED TO BE PART OF THE GENERAL PRINCIPLES OF LAW	22
4.3. CONCLUSION	27
5. HUMAN RIGHTS LIMITING THE POWER	28
5.1. FUNDAMENTAL RIGHTS AS LIMITS TO COMMUNITY'S ACTIONS.....	29
5.2. FUNDAMENTAL RIGHTS AS LIMITS TO MEMBER STATES' ACTIONS	35
5.3. CONCLUSION	38
6. HUMAN RIGHTS AND COMMON MARKET	39
6.1. FUNDAMENTAL RIGHTS AS JUSTIFICATION FOR DEROGATION FROM THE TREATY.....	40
6.2. FUNDAMENTAL RIGHTS APPLIED TO MEMBER STATES' ACTIONS WHEN THEY DEROGATE FROM THE TREATY.....	54
6.3. CONCLUSION	59
7. HUMAN RIGHTS, INTEGRATION AND JUSTIFICATION	62

7.1.	HUMAN RIGHTS SERVING AS A LEGITIMATION	63
7.2.	HUMAN RIGHTS AS AN INTEGRATING FORCE	64
8.	CONCLUSION	67

1. INTRODUCTION

Since *Stauder*¹ the language of human rights has proliferated within the realm of the European Union. The language of rights has expanded both through the discourse and recently, in connection with adoption of the Lisbon Treaty, also through artefacts. Therefore, the practice of human rights within the European Union has gradually attracted academic attention as well. Within my studies it has always been emphasised that human rights have natural character. Within the lessons on human rights, most of the attention was then paid to sources of human rights and scope of their protection.² However, it became soon apparent that such positive language, through which human rights has always been explained to us, does not capture the real practice of human rights policies or adjudication. The self-evident nature of human rights as an expression of core human values that may not be compromised did not explain and did not answer why was at the same time possible to limit them in name of other Member States' or European policies.

Within this thesis I have decided to adopt the critical perspective of human rights. The reason why I have chosen such an approach dates back to my studies at the University of Helsinki. The self-explanatory universal and absolute nature of human rights was within the classes under a constant attack that undermined the liberal presuppositions about human rights. The non-compromising character, that human rights are claimed to have, could not stand the practice of constant compromising of human rights. Such experience has led me to a realization that human rights are nothing more than policy. Indeed, we have always treated them as a policy (e.g. within the faculty moot courts that regarded cases under the European Convention on Human Rights (ECHR)). However, the policy has always been concealed behind the liberal presuppositions that have always, despite the experience that human rights has been treated as a policy, been regarded to be valid.

The critique of human rights, at least to the extent that I have had an occasion to acquaint with, regarded principally human rights practices within international law. Therefore, I have chosen to write about human rights adjudication within the European Union, since I have had a feeling that such practice has been within the critical

¹ Case 29/69, *Erich Stauder v City of Ulm – Sozialamt*. [1969] E.C.R. 419, at p. 425.

² Within the studies I have experienced such approach to human rights throughout the branches of law (constitutional, international as well as European).

perspective of human rights neglected.³ Within this thesis I will aim at elaboration of the case law of the European Court of Justice (ECJ) regarding human rights. It is because the critique of rights has lot of common with critique of adjudication in general for the reason that it is particularly the adjudication, within which we experience human rights in conflict with interests.

Therefore, I will elaborate case law of the ECJ from the critical perspective trying to outline situations in which human rights perform as politics within (i) the process of recognition of human rights to be part of the Community legal system (legalization), (ii) situations in which human rights are said to limit power and (iii) situations, in which human rights conflict with common market freedoms. The last section will draw from conclusions reached in the previous sections and will lead to a generalization of such conclusions aiming at elaboration of the power of human rights language within justification and integration process of the European Union, since motives of justification and integration are pervaded throughout the case law, often lying behind the human rights language.

The primary concern of this thesis is human rights and human rights language. Even though I will analyse case law of the ECJ and therefore a practical side of human rights, the idea of this thesis goes into deeper theoretical foundations of human rights, which it tries to challenge. The critique does not at first place point to good or bad practices of the ECJ even though that conclusion about serious/instrumental human rights adjudication may naturally arise. However the thesis points to situation why such a use is possible at all. The answer has to be founded in theoretical justification of human rights. So the critique of use of the human rights language is an outcome of a recognition that the deeper theoretical basics of human rights are undermined by the fact that they reveal to be a mere policy. The aim of the thesis is to show that even though the European Union perceives itself and is also perceived by others to be based upon liberal conception of human rights; such assumption is untenable in the various contexts of human rights adjudication. Furthermore, this thesis points to the contradictions between the language of rights used by the ECJ (that takes an advantage of the attributes of human rights that are ascribed to them by the liberal discourse) and the real practice of adjudication. In this respect the language is not that powerful as it is presupposed by the liberal discourse. And even though the alleged power of the language is used also

³ Even though that such assumption has appeared to be false, the critique of human rights within the European Union seems to be less represented than the one in international law.

within justification and integration forces I argue that such use has only an instrumental force.

The method I have chosen for this thesis is an analytical one. The main object of my focus is case law of the ECJ. In that respect the aim of this thesis is not to give an analysis of the exhaust case law regarding human rights but to develop the critique on few concrete cases. I will draw from the argumentation used either by the ECJ or Advocate Generals making more abstract conclusions about the foundational theory of human rights.

This thesis is written in English. It is because the overwhelming literature that I have used is in English and for addressing arguments and quotations it is easier to maintain the original language.

2. HUMAN RIGHTS IN THE CONTEMPORARY LIBERAL DISCOURSE AND THE CRITIQUE OF RIGHTS – DELIMITING THE FOUNDATIONS

There exists no single and cohesive conception answering the question of what human rights are within the current legal discourse about human rights. However, the mainstream perception of human rights is based upon notions such as inviolability and universality of human rights. Human rights are said to be rights of individuals imposed against other interest of the society represented and performed by a government, which may potentially threaten autonomy of an individual.⁴ Such perspective has its roots in liberal understanding of human rights. Therefore, I will at the beginning briefly develop the conceptual foundations of the liberal theory on human rights.

Critique of rights does not present a self-contained ontological answer about human rights, similarly as the liberal theory. It rather aims at challenging current mainstream discourse pointing out the relation between law and politics. Such relation is also the common denominator of the critical legal studies (CLS) that is otherwise internally divided into various strands. CLS is sometimes accused from being a

⁴ See WEILER, Joseph H.H. *The constitution of Europe: "Do the new clothes have an Emperor?" and other essays on European integration*. Cambridge: Cambridge University Press, 1999, 364 pp. ISBN 0-521-58567-8, at p. 106.

destructive project⁵ for the reason that law is sometimes not only related to power, but also equated to power.

Within this thesis I will follow the school established at the University of Helsinki. Such project of critique has nothing in common with destruction. The critique does not necessarily question the truth about human rights and it does not challenge value of human rights. Rather the other way around, it regards the language of rights to be of a special importance for its ability to dress claims against oppression and exclusion and bring them within the political deliberation and contestation. Sometimes the critique equals the language of rights with rights themselves. Human rights pursuant to such view do not exist beyond the language (suggesting that there is no outside source of human rights). The critique developed within the Helsinki University does not undermine existence of human rights outside the human rights discourse and language of rights. Human rights may exist outside the discourse; however, the truth about human rights may be recognized only through particular language of rights. The language of rights thus plays twofold role. It translates the particular experience into universal terms of human rights, which then may be applied back only through the particular language of rights. Therefore, on one hand it has the potential of universalisation; on the other hand the language has only a particular voice. As universal human rights may exist only as an aspiration or a horizon that transcends the particular language in a form of values that we regard worthy protecting.

2.1. THE MAINSTREAM DISCOURSE ABOUT HUMAN RIGHTS AND ITS ROOTS

Mainstream position perceives human rights as protecting existence, autonomy and independent development of a human being and it is based upon anthropocentric view of a modern democracy, where an individual and its autonomy is placed into the centre and the power of a state or a supranational institution to be legitimate shall serve only for purpose of enhancing the protection of an individual.⁶ The idea of individual autonomy is inherent in human rights conception, making human rights a special type of normative entitlement that makes them absolute and valid regardless of context and

⁵ See MINDA, Gary. *Postmodern legal movements: law and jurisprudence at century's end*. New York: New York University Press, c1995, xii, 350 pp. ISBN 0-8147-5510-0, at p. 107.

⁶ See TICHÝ, Luboš, ARNOLD Rainer, ZEMÁNEK Jiří, KRÁL Richard a DUMBROVSKÝ Tomáš. *Evropské právo*. 4. reprint. Praha: C.H. Beck, 2011, 953 pp. ISBN 978-80-7400-333-2, at pp. 114-115.

immediate applicable.⁷ In different words, the appeal for human rights stems from presupposition of their existence in a realm of apolitical absoluteness (being inherent to human beings), which means that they may not be compromised enabling us to use them as trump cards against collective perception of good⁸ (e.g. property rights against the collective benefit, which may be reached by an expropriation). Presumed existence of rights in an apolitical absoluteness lends to the rights claims a sense of objectivity, meaning that they cannot be reduced to mere value judgements.⁹ The liberal theory of human rights builds its ideas upon distinction between facts and values, law and politics. Human rights are factoid in a sense that they express universal uncontested truth.¹⁰ Another connotation of universal and factoid nature of human rights within the liberal discourse is that they exist both as outside (incontestable values) as well as inside rights (legal enactments). Such division has a great implication for the human rights language, which is perceived as mediating between the inside and outside perspective, bearing features of objectivity and truth.

For the above described nature, human rights are regarded to be value benchmark of modern states or supranational institutions. For their ultimate normative claims, they provide justification for law. Since human rights transcend these legally enacted in constitutions or international treaties they oblige the state/supranational institution to maintain an environment within which human rights would be properly realized, which means particularly obligation of a state/supranational institution to ensure independence and objectivity of its authorities and especially judicial organs.¹¹ Therefore as a justification for law they restraint the power.

Another implication of the self-definition of every human being suggests that we already have conceptions of ourselves prior to entering into social relations disregarding others. Human rights are built upon this idea and they reflect it in a sense that they are inherent to every individual and therefore inalienable. Human rights are not constituted through some social relations; they are not product of social cooperation. Therefore,

⁷ See KOSKENNIEMI, Martti. The Effect of Rights on Political Culture. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 99-116, at p. 114.

⁸ See *ibid* at 116.

⁹ See KENNEDY, Duncan. *A critique of adjudication: fin de siècle*. Cambridge, Mass.: Harvard University Press, 1997, 424 pp. ISBN 0-674-17759-2, at p. 305.

¹⁰ See *ibid* at p. 305.

¹¹ BLAHOŽ, Josef. *Sjednocující se Evropa a lidská a občanská práva*. 1. vyd. Praha: ASPI Publishing, 2005, 259 s. ISBN 80-7357-073-4, at p. 21.

human rights have individual nature and the right has priority over the good that is the outcome of social agreement.

Following these ideas we may sum up that a great appeal for human rights in recent time rests in a fact that they (i) express values of humanity vested within each of us and which may not be compromised and (ii) limit the power. Such ideas presuppose the clear distinction between law and politics. Human rights are seen as foundational in two ways. First as a higher norm the public authorities must adhere to and secondly as the foundation for exerting public authority.¹²

2.2.CRITIQUE OF RIGHTS AND RIGHTS LANGUAGE

As already suggested above, the many strands of the CLS movement are interlinked by the connection between law and power, which in view of the CLS do not stand in the mutual opposition but are rather interconnected. The CLS explains how “*legal meaning reflects and reproduces the ideology of the subject*”¹³. Duncan Kennedy provides us with a very sophisticated critique of rights, which I will briefly outline here. The critique points to the presuppositions of the liberal discourse of human rights that human rights exist outside the law and are independent upon the political power and that the language of rights mediates between law (legal arguments, inside perspective of rights) and values (policy arguments, outside perspective of rights). Kennedy at first builds his critique upon the inside rights reasoning, showing that legal rights arguments reduce to policy arguments being open to ideology. The many ways, in which legal reasoning reflects politics lead Kennedy to a conclusion that inside rights do not bear any independent meaning that would determine the way in which they are applied and that the meaning of legal human rights is dependent rather upon perception of collective good that prevails within the society. Similarly as the inside rights reasoning also the liberal perception of the outside rights reasoning is untenable. Meaning of human rights may exist outside the law however; the outside rights reasoning shows that it has not any ultimate normative source and that the distinction between facts and values diminishes and therefore the outside rights reasoning is more subjective than it is

¹² See BESSELINK, Leonard. F.M. Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union. *35 Common market Law Review*, 1998, Issue 3, pp. 629-680, at p. 668. Therefore human rights establish not merely moral ground for justification of laws but also actual criteria for protection of citizens against public authorities.

¹³ MINDA, Gary. *Postmodern legal movements: law and jurisprudence at century's end*. New York: New York University Press, c1995, xii, 350 pp. ISBN 0-8147-5510-0, at P. 125.

envisaged by the liberal theory. Therefore, also the language of human rights does not bear the mediating power. Human rights are results of a “*struggle and compromise between alternative views about what a good society would be like*”¹⁴. The meaning of human rights is not established within any pre-given set of values but within the context.

Experiences of manipulation with legal reasoning lead to a loss of faith.¹⁵ Loss of faith in rights and rights rhetoric is not about making a new theory of rights, but rather about invalidating existing claims; it is “*not about the question of how we ought to define rights but rather about how we should feel about the discourse in which we claim them*”¹⁶. As Duncan Kennedy explains, critique of rights is not about challenging the need of legislation or adjudication, but it contests “*rational procedure through which legislators, adjudicators, and enforcers elaborate gaps, conflicts, and ambiguities in the “text” of inside or outside rights*”¹⁷. Similarly, perceiving rights language as a mere rhetoric in some situations does not prejudice the useful or meaningful character of such language in other situations. Human rights language, as Martti Koskenniemi warns us, is yet the only language, which expresses the experience of exclusion and oppression, language through which we give the particular historical experience a voice that everybody has to listen to.¹⁸ It is the rights language bearing positive identification that forms a group of the same consciousness that a particular right shall be articulated through the language of rights.¹⁹ Even though it is the only language addressing claims of exclusion, the power of the language is constantly under suspicion. It is precisely because of the experience that human rights constantly defer to politics. Therefore, also the language of rights fails to address the claims of apolitical absoluteness (the power that is ascribed to the language by the liberal discourse on

¹⁴ KOSKENNIEMI, Martti. The Effect of Rights on Political Culture. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 99-116, at p. 105.

¹⁵ See KENNEDY, Duncan. *A critique of adjudication: fin de siècle*. Cambridge, Mass.: Harvard University Press, 1997, 424 pp. ISBN 0-674-17759-2, at p. 313.

¹⁶ KENNEDY, Duncan. *A critique of adjudication: fin de siècle*. Cambridge, Mass.: Harvard University Press, 1997, 424 pp. ISBN 0-674-17759-2, at p. 334.

¹⁷ KENNEDY, Duncan. The Critique of Rights in Critical Legal Studies. In *Left Legalism/Left Critique*. Eds. Brown, Wendy & Halley, Janet. Duke University Press, Durham & London, 2002, pp. 178-228, at p. 213.

¹⁸ See GÜNTHER, Klaus. The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture, In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 117-144, at pp. 134-140.

¹⁹ See KENNEDY, Duncan. The Critique of Rights in Critical Legal Studies. In *Left Legalism/Left Critique*. Eds. Brown, Wendy & Halley, Janet. Duke University Press, Durham & London, 2002, pp. 178-228, at p. 188.

rights). The experience of the many contexts, in which human rights language is used, leave us uncertain about its exclusionary nature of addressing claims of suffering and suspicious that it will not be used by the power of majority against those in weaker positions.

The critique developed by Koskenniemi also points to dangers of human rights mainstreaming. When human rights are institutionalized and subjected to every day compromising, the transformative character, that they are able to address, is lost. The revolution, which the language addresses, ends with legalization of a particular human right. It is because human rights are then formulated in concrete cases through their application by state or supranational authorities. Therefore, the original direct call is within the process of at first legalization and second application reformulated. Human rights being part of the broader political discourse are within the reformulation, carried out by a particular institution, constantly evaluated through lenses of a policy of the institution. In words of Duncan Kennedy “*question involved cannot be resolved without resort to policy, which in turn makes the resolution open to ideological influence*”²⁰. In such way human rights become to mean whatever the policy of the institution enforcing or applying them is.

Briefly considering the basic arguments that the critique poses to the discourse about human rights, I will develop the detailed arguments within the following sections. It should be also again reiterated that to engage in a critique of rights and language of rights does not mean to give up on rights but rather the opposite. We engage in rights critique because we have not given up on rights. Human rights language as portraying injustice is the only language in which the pain of the excluded may be formulated in universal terms as an injustice that nobody should be subjected to and thus may lead to revolution by means of challenging existing hierarchies and exclusions.²¹ And it is precisely for that reason that the critique points out situations, where the rights language fails to address the exclusion and becomes to be rather the language of power.

²⁰ Ibid at p. 198.

²¹ „*Human rights are strong in weighing hegemonic struggles, weak in maintaining hegemonic positions.*“ See: KOSKENNIEMI, Martti. Human Rights, Politics, and Love, *Mennesker & rettigheter* (4/2001) 33-45, at p. 93.

3. HUMAN RIGHTS LANGUAGE AND THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

3.1. THE PERIOD OF NEGLECT

In *Stork*²² as an answer to objection of an applicant that the High Authority failed to respect fundamental human rights that were part of Grundgesetz and that limited the area of application of the Treaty establishing the European Coal and Steel Community (1951) the ECJ refused to take into account provisions of national law and to accept that they (particularly those of human rights) had any effect on the Community law pronouncing that, “*the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law.*”²³ To put the decision into the context, even though that during the 1950s there had been political efforts to include human rights protection into the treaties framework²⁴ at the end functionalist approach prevailed.²⁵ The framework of the Rome treaties was hence silent on the protection of human rights.²⁶ The Community was based upon a traditional multilateral treaty giving rise to peculiar form of international organization.²⁷ The decision of the ECJ, not to rule on human rights, perfectly fits in an arrangement of the Community being international organisation with delimited powers and accompanied with a court, with limited jurisdiction to review the treaty, upon which the Community exercised its powers. “*The Court’s task was to protect the separation of the Coal and Steel Community and the Member States and to defend the High Authority’s*

²² Case 1/58 *Stork v High Authority* [1959] ECR 17.

²³ *Ibid* at para. 26.

²⁴ Article 2 and 3 of the Draft Treaty embodying the Statute of the European Community adopted by the Ad Hoc Assembly, in Strasbourg on 10 March 1953. See: http://www.cvce.eu/obj/press_release_issued_by_the_paris_summit_10_and_11_february_1961-en-12a9fdc6-a14e-426c-90eb-548eb571806a.html.

²⁵ See DE BÚRCA, Gráinne. The Road Not Taken: The EU as a Global Human Rights Actor, *American Journal of International Law*. 2011, Vol 105, at pp. 17-18.

²⁶ Despite efforts of Germany to limit the Communities in their powers. See: ZULEEG, Manfred. Fundamental Rights and the Law of the European Communities. 8 *Common market Law Review*, 1971, Issue 4, pp. 446–461, at p. 446.

²⁷ See MANCINI, G. Federico, The Making of A Constitution For Europe. 26 *Common market Law Review*. 1989. Issue 4, pp. 595–614, at p. 595.

*independence vis-a-vis national governments*²⁸. In that perspective ruling on national standards of protection of human rights would constitute an exercise that would rather undermine the independence of the Community as an international organization.

In *Geitling*²⁹ the ECJ moved forward from a position that it was not required to rule on provisions of national law to a position that neither it was obliged “*to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected*”³⁰ nor it was required to protect human rights since “*Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights*”³¹. Human rights were, pursuant to the statement of the ECJ, closely or rather exclusively connected with national law, review of which limited jurisdiction of the ECJ. In line with the previous cases the ECJ in *Sgarlata*³² rejected any influence of national fundamental principles on the Community law, pronouncing that fundamental principles of national law that protected individual “*cannot be allowed to override the clearly restrictive wording of Article 173, which it is the Court's task to apply*”³³.

3.2. THE EVOLUTION OF HUMAN RIGHTS BEING PART OF THE GENERAL PRINCIPLES OF COMMUNITY LAW

It took only about five years from the above mentioned decisions and the ECJ turned over from the neglect to an acknowledgment of human rights within the legal framework of the Community. The way in which the ECJ established that human rights were in fact part of the Community law was a well known story of three landmark decisions of the ECJ that has paved the way for recognition of human rights in the Community legal order.

The story has begun already with *Van Gend and Loos*³⁴ and *Costa*³⁵ decisions. The ECJ took its role and pronounced that Community law formed “*new legal order of*

²⁸ WEILER, Joseph. H.H. Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities (1986) 61 *Wash. L. Rev.* 110, at p. 7.

²⁹ Joint cases 36,37,38 and 40/59, *Geitling v High Authority*. [1960] E.C.R. 423.

³⁰ *Ibid* at p. 438.

³¹ *Ibid*, at p. 439.

³² Case 40/64, *Sgarlata and others v Commission*. [1965] E.C.R. 215, [1966] C.M.L.R. 314.

³³ *Ibid*, at p. 227.

³⁴ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. [1963] E.C.R. 2.

³⁵ Case 6/64, *Flaminio Costa v ENEL*. [1964] E.C.R. 585.

international law”³⁶ and followed that it constituted “*independent source of law, that could not, because of its special and original nature, be overridden by domestic legal provisions.*”³⁷ Hand in hand with the doctrine of the direct effect, supremacy and implied powers, the doctrine of human rights strengthened the process of constitutionalization³⁸ of the Community legal order. Observing decisions of national constitutional courts, especially the German one,³⁹ it is said that the ECJ had no other option than to pronounce the Community to be bound by human rights. Such position is also apparent from opinion of the Advocate General Roemer to *Stauder*, who was of the thought that “*the view taken by many writers that general qualitative concepts of national constitutional law, in particular fundamental rights recognized by national law, must be ascertained by means of a comparative evaluation of laws, and that such concepts, which form an unwritten constituent part of Community law, must be observed in making secondary Community law*”⁴⁰. Extensive literature⁴¹ on European law agrees that the ECJ has begun to use human rights language and has developed the protection of fundamental rights being part of the general principles of Community law within the sovereignty discourse as a response to the threats posed by national constitutional courts that were ready to pronounce Community acts invalid, when violating national human

³⁶ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. [1963] E.C.R. 2, at p. 12.

³⁷ Case 6/64, *Flaminio Costa v ENEL*. [1964] E.C.R. 585, at 594.

³⁸ See MANCINI, G. Federico. The Making of A Constitution For Europe. 26 *Common market Law Review*. 1989. Issue 4, pp. 595–614, at p. 595. See also: WEILER, Joseph H.H. *The constitution of Europe: "Do the new clothes have an Emperor?" and other essays on European integration*. Cambridge: Cambridge University Press, 1999, 364 pp. ISBN 0-521-58567-8. At 295. WEILER, Joseph H.H. The transformation of Europe, 100 *Yale L.J.* 2403, pp. 2413 – 2419.

³⁹ The Federal Court of Justice of Germany conditioned transfer of sovereign powers on the Community organs only if they were bound by human rights. See BVerfGE 22, 293 1 BvR 248/63 and 216/67 European Community regulations Art. 24 GG.

⁴⁰ Opinion of Advocate General Roemer to Case 29/69, *Erich Stauder v City of Ulm – Sozialamt*. [1969] E.C.R. 419, at p. 428.

⁴¹ See WEILER, Joseph. H.H. Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities (1986) 61 *Wash. L. Rev.* 110. DE BÚRCA, Gráinne. The Road Not Taken: The EU as a Global Human Rights Actor, *American Journal of International Law*. 2011, Vol 105. DE WITTE, Bruno. The Past and Future Role of the European Court of Justice in the Protection of Human Rights. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 859-897. The sovereignty and legitimacy cornerstone as a trigger for declaration of principle of the Community being bound by fundamental rights has been recognized also by the European Parliament as inevitable for preservation of the independent Community legal order: “*The cession of sovereign powers to any body unable or unwilling to guarantee fundamental rights to the same extent as the Federation would be tantamount to a denial of those basic rights; it would thus be impossible for the Federation to do this. Sovereign powers can therefore only be transferred to bodies vested with powers that recognize fundamental and human rights and are ready to protect the freedom of the individual, the family and property.*” Report drawn up on behalf of the Legal Committee the Paramuncy of Community Law over the Laws of Member States, p. 18.

rights standards. Besides the sovereignty discourse, on one hand decline in the accountability of the Community and incline of human rights awareness and recognition of new human rights instruments in the world on the other hand might have as well as Community policies spilling over to areas that were not initially meant to be governed by Community law also contributed to a greater awareness of the ECJ about human rights.⁴²

The ECJ announced that it actually protected human rights for the first time in *Stauder*.⁴³ Who expected the ECJ to provide an analysis of how it reached its conclusion had been disappointed. Regarding protection of fundamental rights, the ECJ restrained itself to a brief sentence at the end of the decision, where it recognized that fundamental rights were “*enshrined in the general principles of Community law and protected by the Court*”⁴⁴ – a little less explanation for such a radical turnover. The ECJ avoided evaluation of the particular fundamental right in question by interpreting the respective Community measure in a way that did not conflict with the recognized fundamental right. Even though, the ECJ has refuted itself a continuance with its previous decisions (*Stork*, *Sgarlata*) may be detected at least to the extent that the ECJ had no intent to declare itself to be bound by national provisions on human rights.

Being silent in *Stauder* about the origin of fundamental rights within the Community legal order, the ECJ in following decisions *InternationaleHandelsgesellschaft*⁴⁵ and *Nold*⁴⁶ explained that when finding particular fundamental right in the Community legal order it drew inspiration from common constitutional traditions of the Member States as well as from international treaties for protection of human rights on which the Member States had collaborated or parties to which they were. The ECJ further observed that fundamental rights, being part of general principles of law, were independent upon concepts of human rights enshrined in national legal systems from which the ECJ drew only an inspiration.⁴⁷ The decision in

⁴² See WEILER, Joseph. H.H. Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities (1986) 61 *Wash. L. Rev.* 110, at 117. WEILER, Joseph. H.H, LOCKHART, Nicolas J.S. “Taking rights seriously” seriously: The European Court and its fundamental rights jurisprudence – part I. 32 *Common market Law Review*, 1995. Issue 1, at p. 70.

⁴³ Case 29/69, *Erich Stauder v City of Ulm – Sozialamt*. [1969] E.C.R. 419, at p. 425.

⁴⁴ *Ibid*, at p. 425.

⁴⁵ Case 11/70, *Internationale Handelsgesellschaft v Einfuhr und Vorratstele für Getreide und Futtermittel*. [1970] E.C.R. 1125.

⁴⁶ Case 4/73, *Nold v Commission*, [1974] E.C.R. 419, at p. 507.

⁴⁷ „*Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy*

InternationaleHandelsgesellschaft is pervaded by the language of supremacy and autonomy of the Community law with protection of fundamental rights to be viewed as genuinely European⁴⁸ and with the ECJ being the sole competent body to judge on fundamental rights of the Community. Role of the ECJ had shifted from “an international tribunal determined to preserve the autonomy of the system it oversaw” to “a constitutional court of a supranational order determined to preserve the integrity, unity and uniformity of the system it had evolved”⁴⁹.

Even though the ECJ recognized fundamental rights to be part of the Community law in neither of the cases above, it was prepared to actually afford such protection. Therefore, it was certainly not concerns about the individual that have led the ECJ to engage in protection of fundamental rights. In this respect, in spite of the fact that the ECJ has been praised for establishing the human rights doctrine for those advocating the anthropocentric conception of human rights that put the individual into the centre, the context and the way in which the ECJ established fundamental rights must be rather disappointing. The reason for which the ECJ has begun to use the fundamental rights language must be found somewhere else than in the inherent value of humanity vested in every individual. Use of the language of fundamental rights was rather a “defensive”⁵⁰ move aiming to uphold legitimacy of the Community and justification of the Community legal order. Indeed, many contributors to the debate about European law acknowledge that protection of fundamental rights was not, at least at the outset, the end in itself.⁵¹ However, some authors⁵² argue that we must not forget that whatever the outset motif of the ECJ for protection of fundamental rights might be,

of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.” Case 11/70, *Internationale Handelsgesellschaft v Einfuhr und Vorratstele für Getreide und Futtermittel*. [1970] E.C.R. 1125, at para. 1134.

⁴⁸ See DE BÚRCA, Gráinne. The Road Not Taken: The EU as a Global Human Rights Actor, *American Journal of International Law*. 2011, Vol 105, at p. 23.

⁴⁹ WEILER, Joseph. H.H. Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities (1986) 61 *Wash. L. Rev.* 110, at p. 9.

⁵⁰ COPPEL, Jason. and O'NEILL, Aidan. The European Court of Justice: taking rights seriously?. *Legal Studies*. 1992. 12, pp. 227–239.

⁵¹ See DOGAN, Yaşar. The Fundamental Rights Jurisprudence of the European Court of Justice: Protection for Human Rights within the European Union Legal Order. *Ankara Law Review*. 2009. Volume 6. No. 1, pp. 53-81, at 59.

⁵² See DE BÚRCA, Gráinne. *The Language of Rights and European Integration*. http://aei.pitt.edu/6920/1/de_b%C3%BArca_gr%C3%A1inne.pdf.

it does not tell us anything about its future decision making in the field of fundamental rights. In Weilers' words "*even if the Court was, in the language of Mancini, "forced" into its human rights jurisprudence, it does not necessarily follow that the Court will not husband the new case law seriously*"⁵³. However, knowing that evolution of fundamental rights was connected with efforts to increase legitimacy of European institutions and their policies, we are convinced now that fundamental rights language may be quite easily deployed for the purpose of strengthening hegemonic positions within the discourse of power. Even though we may hope that the ECJ will take its marriage to human rights seriously with the knowledge that human rights language may well serve in the power game, we are suspicious about the ECJ taking advantage of the marriage as well. And as I will develop in the following sections the subsequent case law of the ECJ leaves us suspicious that fundamental rights resonate mainly within the discourse of power, of jurisdiction to the detriment of their benefit of bringing the excluded into realm of political discourse.

It is precisely the conception of human rights performing as an apolitical absoluteness exempt from compromise, which results in colonization of politics by empty human rights language in a meaning that political decisions are meant to be taken seriously and justified only if they are dressed into the human rights language.⁵⁴ The language of human rights in such situations colonizes politics, exempting interests hidden behind the human rights language from a political deliberation and contestation. The Community certainly has its own legitimate policies and unified application of the Community law certainly is important for proper functioning of the common market. However, hiding Community politics behind human rights language goes to the detriment of both, the language and the politics as well.

4. SOURCES OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Presupposition of the liberal human rights discourse is that rights operate both as inside rights (in form of a legal enactment, as a positive law) and outside rights (as a

⁵³ WEILER, Joseph. H.H, LOCKHART, Nicolas J.S. "Taking rights seriously" seriously: The European Court and its fundamental rights jurisprudence – part I. 32 *Common market Law Review*, 1995. Issue 1, at 71.

⁵⁴ See KOSKENNIEMI, Martti. The Effect of Rights on Political Culture. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 99-116, at p. 99.

reason for such enactment based upon normative set of values) and therefore the language of rights mediates both between fact and value, legal argument (based upon legal texts and various forms of legal interpretation) and legislative argument (based on expression of the political values of a particular community).⁵⁵ Legalization of human rights then only brings the outside perspective of human rights into the inside perspective. The process of legalization usually takes part within the regular political bargaining on the ground of the respective body endowed with legislative power. Human rights as legal enactments are then subject to regular legal reasoning and interpretation within judicial application.

In this respect the way in which the ECJ has invented fundamental rights to be part of the Community law diverges from the liberal pattern. The ECJ took a dress of the Community legislator and without any express provision on protection of human rights to be included in the Treaties it was able to infer existence of fundamental rights within the Community legal order. Within this section I will aim at the process of recognition of fundamental rights as well as at sources and scope of the actually protected fundamental rights. I will argue that within the “*field constitution*”⁵⁶ (process within which certain aspect of reality becomes to be characterized in human rights language) the differences between facts and values, legal and legislative arguments diminish and human rights defer to politics, not the other way around (policy defer to human rights) as it is presupposed by the mainstream human rights discourse.

4.1.PROCESS OF RECOGNITION OF FUNDAMENTAL RIGHTS

4.1.1.INSIDE PERSPECTIVE OF FUNDAMENTAL RIGHTS

As it was already written above fundamental rights, until the Lisbon treaty came into force, had for a long time existed only within the case law of the ECJ. The ECJ prior to recognition of a particular fundamental right looked at constitutional traditions of the Member States as well as at international treaties on protection of human rights to which the Member States were signatories. As these were the mere source of inspiration they did not constitute a binding source to which the ECJ would adhere to. However, inspired by the above mentioned traditions and international treaties, the ECJ then in a

⁵⁵ See KENNEDY, Duncan. The Critique of Rights in Critical Legal Studies. In *Left Legalism/Left Critique*. Eds. Brown, Wendy & Halley, Janet. Duke University Press, Durham & London, 2002, pp. 178-228, at p. 187.

⁵⁶ KOSKENNIEMI, Martti. Human Rights, Politics, and Love, *Mennesker & rettigheter* (4/2001) 33-45, at p. 35.

rather mysterious way, concluded about the existence of the particular right within the Community legal order. The way was rather mysterious because the ECJ only rarely gave an explanation (on the basis of legal analysis) of how it did infer a particular fundamental right⁵⁷ from the constitutional traditions that were perceived to be distinct rather than common. In this respect the ECJ came in for a critique that the fundamental rights doctrine is rather mythical in nature.⁵⁸

I will start the analysis with *Hoechst*.⁵⁹ The ECJ's task was to decide about the right to inviolability of home and whether such right extends to legal persons. At the outset of its reasoning the ECJ observed with certainty that the existence of the right to inviolability of home is in principle recognized within the Community as a principle common to the laws of the Member States.⁶⁰ Difficulties suddenly came up when the ECJ had to change its vocabulary from "*in principle*" (in a meaning of generally recognized right) to "*in particular*" (in a meaning of whether also legal persons are covered by the right to inviolability of home). The ECJ carried out comparative analysis of whether legal persons may invoke right to inviolability of home within legal orders of the Member States. Results of the analysis were mixed and could not confirm the prevailing practice between the Member States. Under such circumstances the ECJ has decided that the right to inviolability of home did not extend to legal persons arguing that there were not "*inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.*"⁶¹ To sum up, the ECJ started the reasoning with an assertion that the Community legal order protected the right to inviolability of home. In a second step the ECJ began to ascertain whether the right included also protection of legal persons. This move was an application of the generally recognized right to inviolability of home. After completing the comparative analysis the ECJ concluded that the right to inviolability of home did not (at the Community level)

⁵⁷ See and its fundamental rights jurisprudence – part I. 32 *Common market Law Review*, 1995. Issue 1, at p. 73.

⁵⁷ See also CRAIG, Paul P., DE BÚRCA, Gráiné. *EU law: text, cases, and materials*. 5th ed. Oxford: Oxford University Press, c2011, clvii, 1155 s. ISBN 978-0-19-957699-9 at 369 "*while occasionally the advocate general has conducted a brief survey of national constitutional provisions, the Court has much more rarely cited any constitutional provision.*"

⁵⁸ SMISMANS, Stijn. The European Union's Fundamental Rights Myth. *JCMS*. 2010 Volume 48. Number 1. pp. 45–66, at p. 49.

⁵⁹ Joined cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, [1989] E.C.R. 02859. See also Case 85/87, *Dow Benelux NV v Commission of the European Communities*. [1989] E.C.R. 03137

⁶⁰ See *ibid* at para. 17

⁶¹ *Ibid* at para. 17.

extend to legal persons. To support its decision, the ECJ pointed to legal arguments (based upon the comparative study) that there existed considerable divergences between the Member States as to the nature and degree of protection of legal persons.

However, as it is apparent from the Advocate General's Mischo opinion to *Hoechst*,⁶² recognition of right to inviolability of home of legal persons was in certain Member States a common practice. The ECJ does not treat common constitutional traditions as a unified source of inspiration and it does not hesitate to establish a fundamental right from constitutional traditions that are common to only part of the Member States.⁶³ If it was not so the ECJ could not decide about any fundamental right since the constitutional traditions, serving as an inspiration, differ from state to state from right to right. Therefore condition of general and unanimous constitutional consensus is not an obstacle that would hinder the ECJ from invention of fundamental rights. Common constitutional traditions of certain Member States might have equally inspired the ECJ to include protection of legal persons under the right to inviolability of home.

In this respect the ECJ does not have any problem to recognize human rights “*in principle*.” As it is precisely the general formulation of human rights, that enables the ECJ to circumvent contradictions arising from the fact that human rights as a product of particular social and historical context, are deeply contingent upon conceptions of prevailing common good that differs from one society to another. Further, the general formulation enables us to deploy various techniques of interpretation that hide the policy arguments awakening the feeling that the ECJ is merely applying the law using legal arguments. After considering national traditions the ECJ turned its attention to the ECHR observing that the Article 8 (without being able to find the relevant case law of the ECtHR) ensuring for everyone the right to respect private and family life, home and correspondence precludes the undertakings to claim protection under it, since the provision protects only private dwellings of natural persons. Actually, the ECtHR has decided that the Article 8 extends to business premises.⁶⁴

That it is sometimes hard to give proper legal reasoning why a particular right shall be recognized within the Community as a fundamental right was proved by the

⁶² Opinion of the Advocate General Mischo to Joined cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*. [1989] E.C.R. 02859.

⁶³ Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] E.C.R. I-09609. Case 168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*. [1993] E.C.R. I-01191. AM

⁶⁴ *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251 B, p. 34, § 30.

Advocate General Jacobs in his opinion to *Konstantinidis*⁶⁵ that regarded allegedly violated right to name and personal identity of Mr. Konstantinidis. The Advocate General was at first astonished that he could not find in the ECHR neither the specific right nor a generally formulated right to respect for human dignity and moral integrity of an individual. He then turned his attention to constitutional traditions of the Member States that compensated for the “*omission*”⁶⁶ of the ECHR. In this respect it is interesting that the Advocate General called the failure of the ECHR to protect the specific right as the omission, which suggest that there is the permanent normative outside source of human rights that the international instruments only translate into positive law. However, failure of translation of the respective right by no means envisages that it does not exist, in view of the Advocate General “*I do not think that it would be right to say that the German authorities’ treatment of Mr Konstantinidis is necessarily consistent with the European convention on Human Rights simply because the Convention does not contain express provisions recognizing the individual’s right to his name or protecting his moral integrity. On the contrary, I consider that it ought to be possible, by means of a broad interpretation of Article 8 of the Convention, to arrive at the view that the Convention does indeed protect the individual’s right to oppose unjustified interference with his name.*”⁶⁷ It was rather a persuasion than legal analysis that has led the Advocate General to conclude about the existence of such fundamental right.⁶⁸ We see how manipulative human rights reasoning may be. In a moment when the Advocate General was not able to find any express right protecting name of an individual, he recast the interest into terms of more general right to respect for private and family life. In words of the Advocate General “*broad interpretation*” and indeterminacy of the right to respect for private and family life enabled him to subordinate the interest he wished to be protected under the existing right. As we see, it is the open ended human rights language that allows us to deploy various techniques of legal argumentation (such as broad interpretation, teleological interpretation and others) that at the end support our own perception of which reality deserves to be protected or not. Legal argumentation is in such cases hostage to policy arguments. We manipulate

⁶⁵ Case 168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*. [1993] E.C.R. I-01191.

⁶⁶ Opinion of Advocate General Jacobs to the Case 168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*. [1993] E.C.R. I-01191, at para 36.

⁶⁷ *Ibid*, at para. 41.

⁶⁸ In this respect it must be said that the way in which the Advocate General inferred existence of such right from common constitutional provisions was no more convincing.

the legal reasoning to support our claim.⁶⁹ It is because “*law is like a language delimiting only how arguments should be made, not which arguments may be made.*”⁷⁰ The Advocate General could have also concluded the other way around about the existence of right to a name using restrictive or literal interpretation of the Article 8 of the ECHR. In his argumentation, we cannot find any precise chain of legal arguments that would lead him to conclude that even though the ECHR does not contain the specific right it nevertheless protects it. Observing the ways in which legal argumentation reflects policy conviction, the liberal separation of legal and legislative arguments is hardly justifiable. Therefore, even though the ECJ tries to support invention of fundamental rights into the Community legal order by references to common constitutional traditions and international treaties, such legal argumentation is under suspicion that it justifies policy preferences of the ECJ that handles the sources of inspiration in a way that supports his interests. It is therefore the ECJ’s own perspective of what should be recognized as human rights than inspiration from the common constitutional traditions. Such traditions are pointed out *ex post* after the ECJ is already decided about which fundamental right shall be recognized and which not. If it was not so and they would indeed serve as an inspiration the ECJ would have to pay them greater attention and in every particular case reason why they served as an inspiration.

4.1.2. OUTSIDE PERSPECTIVE OF FUNDAMENTAL RIGHTS

It may seem that the inside rights legal reasoning being untenable, does not necessarily assume also the outside rights reasoning to be mere policy one. The liberal human rights discourse presupposes some normative set of values existing outside the law which are only translated into law or legal arguments. It is based on a vision “*defending the paramountcy of human beings as persons, which is considered the cardinal value, all of which finds expression in the creation of, first, a liberal and then a democratic State in the service of its citizens.*”⁷¹ To demonstrate the point on *Omega*, the Advocate General Mrs. Stix-Hackl perceived human dignity to be “*an expression of the respect and value to be attributed to each human being on account of his or her*

⁶⁹ By the way of argumentation suggested above, human rights expand into fields that they were at the outset not intended to cover. Further, as it may be seen on the right to life (*Grogan*) we may easily deploy two contradictory interests under the same right to life.

⁷⁰ BECKETT, A. Jason. Rebel Witout a Cause? Martti Koskenniemi and the Critical Legal Project. (2006) *German Law Journal*, vol. 07 no. 12, at p. 1051.

⁷¹ LEBEN, Charles, A European Approach to Human Rights? In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 69-98, at 73.

humanity. It concerns the protection of and respect for the essence or nature of the human being per se – that is to say, the “substance” of mankind.”⁷² In liberal view it would be the intrinsic value of humanity, as expressed in the quotation above, that stand behind the appeal for the constitutionally recognized human right to human dignity. However, as Stéphanie Vauchez argues there is nothing intrinsic in human dignity per se and human dignity as such does not bear any positive connotations.⁷³ Legal formalization of human dignity after the Second World War has not been a reaction to any value of human dignity that it would bear *ab initio*; it has been rather a reaction to the particular social and historical context that lend human dignity the positive connotation.⁷⁴ Similarly, the value of human rights does not rest in an inherent nature of being humans but in a particular social context. Such stance does not deny value of human rights. Human rights are value based but the value we prescribe to them is dependent upon the particular experience of injustices. It is precisely for that reason that e.g. freedom of expression may have different connotations in the United States and Europe as regards the hatred speech. The same goes with language of human right, which may prove valuable again only within context of particular historical experience of injustice.

Translation of historical experience of pain into human rights language necessarily brings the abstraction of such experience. But once the experience is expressed in abstract and general terms of a human right after a time the respective human right becomes to lose reflection of the experience,⁷⁵ being an abstract term that may cover everything. In *Omega* protection of human dignity was recognized to be a legitimate aim that may justify restrictions imposed upon a game the object of which was to fire a laser beam on human targets (game of similar purpose as paintball or dodgeball, which we certainly perceive as an innocent game). On the other hand in *Netherlands v. Parliament and Council*,⁷⁶ where the dispute concerned whether right to

⁷² Opinion of Advocate General Stix-Hackl to case Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECR I-09609, at para 75.

⁷³ VAUCHEZ, Stéphanie Henette. When Ambivalent Principles Prevail. Leads for Explaining Western Legal Orders? Infatuation with Human Dignity Principle. *EUI Working Paper LAW*. 2007/37, at p. 4.

⁷⁴ *Ibid* at p. 4.

⁷⁵ This may be well seen on the attitude of the ECtHR right to freedom of expression connected with hatred speech, when in the early case law such as *Lehideoux, Isorni v. France* the ECtHR did not afford protection to hatred speech to turn its attitude in *Jersild v. Denmark*, where risks associated with hatred speech won.

⁷⁶ Case 377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] E.C.R. I-07079

human dignity prevents patentability of an element isolated from human body, the ECJ was not convinced that human dignity would be sufficiently strong argument to prevail over the purpose of the Community legislation standing behind the patentability. The fact that in the former case human dignity was sufficient enough to restrict Community policy whereas in the latter was not supports the claim that human dignity does not have any intrinsic value and that the value is formed in each particular case as an outcome of conflict with other interests. The particular historical experience standing behind human dignity may have universal aspiration (meaning that everyone in the same position under the same circumstance should have the same right) but such aspiration is never reached and once enacted, the outside perspective is equally as the inside perspective dependent upon policy reasoning.

Fundamental rights are prior to their establishment treated as interests (*Konstantinidis*), which means that already within their recognition the universal terms of the right are filled by particular meaning arising from the fact that within the Community realm human rights need to be reconciled with the Community interests. In *Omega* the ECJ had troubles to recognize human dignity as an independent fundamental right stating that “*the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.*”⁷⁷ It was not the legal status of human dignity in Germany that persuaded the ECJ about desirability of similar status within the Community legal order. Standing for the strong conception of human dignity would probably hinder Community policies (*Netherlands v. Parliament and Council*) and therefore the decision about whether human dignity should have the same status as in Germany or a more tenuous one entailed weighing of interests. The extralegal impetus of the individual endowed with humanity that is the normative basis for recognition of human rights has no space in the weighing of interests. Fundamental rights are tailored to fit the needs of the Community and that is the reason why common constitutional traditions of the Member States and international treaties serve only as a source of inspiration. Such stance in words of Advocate General Van Gerven in his opinion to *Grogan* “*enables the Court, in establishing general principles in the*

⁷⁷ Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] E.C.R. I-09609, at para 34.

particular (socio-economic) context of Community law, also to take into account the imperatives of the fundamental freedoms and of the Community market organizations, which are intended to bring about the integration of the market.”⁷⁸ In this respect some authors conclude from the case law of the ECJ that the ECJ recognizes rights to be fundamental provided that, “*the fundamental right does not contradict the goals of the Community and does not prevent the realization of the Community politics.*”⁷⁹ Under the circumstances described above, the outside normative perspective of human rights from which the ECJ would draw an inspiration in the process of recognition of fundamental rights is a myth developed by the liberal theory.

4.2.FUNDAMENTAL RIGHTS RECOGNIZED TO BE PART OF THE GENERAL PRINCIPLES OF LAW

The ECJ has so far recognized wide range of fundamental rights to be part of general principles of the Community law, among others: the right to property,⁸⁰ the freedom to pursue trade or business,⁸¹ the right to privacy, family life, and the protection of the home,⁸² group of rights commonly called as “rights to defence”,⁸³ freedom of expression,⁸⁴ freedom of association,⁸⁵ freedom of religion,⁸⁶ various

⁷⁸ Opinion of the Advocate General Van Gerven to Case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. [1991] E.C.R. I-04685, at para. 30. The ECJ’s case law reflects „*other important functions than the protection of fundamental rights per se, such as the promotion of European integration and safeguarding the supremacy of EC law.*“ DE WITTE, Bruno. *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 859-897, at p. 869.

⁷⁹ ŠÍŠKOVÁ, Naděžda. *Ochrana lidských práv jako součást procesu konstitucionalizace EU*. *Právní obor*, 87, 2004, no. 2, pp. 150 – 160, at p. 152.

⁸⁰ Case 4/73, *Nold v Commission*, [1974] E.C.R. 419, at 507. Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*. [1979] E. Comm. Ct. J. Rep. 3727.

⁸¹ Case 4/73, *Nold v Commission*, [1974] E.C.R. 419, at 507. Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*. [1979] E. Comm. Ct. J. Rep. 3727.

⁸² Case 249/86, *Commission of the European Communities v Federal Republic of Germany* [1989] E.C.R. 01263, Case 404/92, *X v Commission of the European Communities* [1994] E.C.R. I-04737P, Joined cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, [1989] E.C.R. 02859, Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] E.C.R. 01575.

⁸³ Case 374/87, *Orkem v Commission of the European Communities*, [1989] E.C.R. 03283.

⁸⁴ Case 260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] E.C.R. I-02925.

⁸⁵ 415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] E.C.R. I-04921, Case 112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] E.C.R. I-05659.

⁸⁶ Case 130/75, *Vivien Prais v Council of the European Communities* [1976] E.C.R. 01589

procedural right with regard to due process⁸⁷ but also right to take collective action and right to strike.⁸⁸ De Búrca provides division of these recognized Community fundamental rights into several categories such as economic and property rights, rights of defence, traditional civil and political liberties, social rights and rights created by Community legislation.⁸⁹

However, certain rights, which may be in the Member States perceived as human rights have not yet gained status of fundamental rights within vocabulary of the ECJ. This is the case of, among others, minority, cultural and language rights. Even though the ECJ has already dealt with situations in which language and connected cultural rights formed the factual background (*Groener*,⁹⁰ *Mutsch*⁹¹ and *Bickel and Franz*,⁹²) the ECJ did not avail the opportunity to ascertain whether the Community strives to protect not only individual rights but collective rights as well. In *Groener* the ECJ held that, “[t]he EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States.”⁹³ The ECJ treated protection and promotion of the language as a policy even though the official character of the language was enshrined in the Irish constitution expressing national identity and culture. In *Mutsch* the ECJ called the minority language as a social advantage.⁹⁴ The language of fundamental rights is very individualistic in nature and when it comes to group rights based upon recognition of common identity

⁸⁷ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] E.C.R. 01651,

⁸⁸ Case 438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eest* [2007] E.C.R. I-10779, Case 341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] E.C.R. 11767.

⁸⁹ See DE BÚRCA, Gráinne. *The Language of Rights and European Integration*. http://aei.pitt.edu/6920/1/de_b%20Arca_gr%20Alinne.pdf, pp. 2-3.

⁹⁰ Case 379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] E.C.R. 03967.

⁹¹ Case 137/84, *Criminal proceedings against Robert Heinrich Maria Mutsch* [1985] E.C.R. 02681.

⁹² Case 274/96, *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] E.C.R. 07637.

⁹³ Case 379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] E.C.R. 03967, at para 19.

⁹⁴ See Case 137/84, *Criminal proceedings against Robert Heinrich Maria Mutsch* [1985] E.C.R. 02681, at para 9.

the ECJ is using rather the language of policies and advantages. The language radically differs. Whereas the rights language presupposes the collerative obligation of those that are not right's holders, the language of social advantages does not presuppose any such obligation. Another difference is that speaking in terms of right is to claim something more than your own interest (it is to claim demands covering all in the comparable positions) whereas speaking in words of an advantage is to ask for a privilege, granting of which heavily depends upon social and economic situation in a society. Social advantage connotes a discretion vested in those who decide about the advantage. Within realm of the European Union it may be understandable why the ECJ did not use the strong language of rights and instead left the Member States with discretion concealed behind notion of social policy. Again, selection of the relevant language in which the ECJ addressed the conflict is an outcome of politics.

Another point to be made in connection with minority, language and cultural rights is that, in cases, where the ECJ perceives them as human rights, it uses the language of individual rights, equality and non-discrimination.⁹⁵ The ECJ has so far refused to use reference to group or minority rights and instead treated them as individual rights within which “*the significance of cultural identity is given little weight.*”⁹⁶ Furthermore, individual rights as such cannot address the disparity between the oppressed minority and the dominant culture. In this respect the ECJ has already have an opportunity to express its opinion to affirmative actions taken to support women in sectors in which they were under-represented. The ECJ ruled on non-compatibility of such positive measures solely on the ground of belonging to a certain sex with the promotion of equal opportunities in *Kalanke*,⁹⁷ *Abrahamsson*⁹⁸ and *Anderson*.⁹⁹ On one hand the positive action as argued by national courts was aimed to enhance equality between men and women and to overcome disadvantages that women had to face. On the other hand it was also promotion of equality between men and women that at the end led the ECJ to rule on the positive measures to be inconsistent with the Community law. However, the promoted conception of equality of men and women before law cannot grasp the social meaning behind positive actions, which is to

⁹⁵ CARTABIA, Marta. Europe and rights: taking dialogue seriously. *E.C.L. Review*. 2009, 5(1), pp. 5-31, at p. 28.

⁹⁶ O'NIONS, Helen. *Minority rights protection in international law: the Roma of Europe*. Aldershot, England: Ashgate, c2007, 331 p., at p. 95.

⁹⁷ Case 450/93, *Eckhard Kalanke proti Freie Hansestadt Bremen* [1995] E.C.R. 06051.

⁹⁸ Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] E.C.R. 05539.

⁹⁹ Case 407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] E.C.R. I-05539.

overcome past injustices. The value of such positive action cannot be expressed in terms of equality, non-discrimination and more generally individual rights. Some authors conclude that the ECJ supports the rights, developing on the ground of non-discrimination and self-determination principle in order to buttress economic integration that prevails over national policies.¹⁰⁰

Similarly, as minority, language and cultural rights, little protection is given to social rights even though that recently the ECJ has recognized right to take collective action and right to strike.¹⁰¹ On the other hand the ECJ has also accorded the fundamental status to common market freedoms. The ECJ in *ADBHU*¹⁰² stated that “*free movement of goods and freedom of competition together with freedom of trade as fundamental rights, are general principles of law.*”¹⁰³ The ECJ not always expresses economic freedoms in terms of fundamental right; however, it assigns them the fundamental character (*Heylens*¹⁰⁴, *Anker and Others*¹⁰⁵, *Schmidberger*¹⁰⁶, *Aladzhev*.¹⁰⁷) Equalisation of the four economic freedoms with fundamental rights means that the ECJ gives both the same weight. And indeed, the ECJ has in its judgements stressed that fundamental economic freedoms are of fundamental nature since they pursue objective of the common market, one of the main objectives of the Community. Maduro argues that by giving a fundamental character to the free movement provisions the ECJ granted them “*a status similar to that of fundamental rights in national constitutions.*”¹⁰⁸ He follows arguing that by granting new rights to individuals (in this case of economic

¹⁰⁰ See SHIECK, Dagmar. ECJ Fundamental Rights jurisprudence between Member States’ prerogatives and citizens’ autonomy. Forthcoming in Witte, B. de & Micklitz, Hans (eds), *The European Court of Justice and the autonomy of the member states*, Intersentia.

¹⁰¹ See also O’GORMAN, Roderic. The ECHR, the EU and the weakness of social rights protection at the European level. 12 *GermanL.J.* 1833.

¹⁰² Case 240/83, *Procureur de la République v Association de défense des brûleurs d’huiles usagées (ADBHU)* [1985] E.C.R. 00531.

¹⁰³ *Ibid.*, at para.9.

¹⁰⁴ Case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] E.C.R. 04097.

¹⁰⁵ Case 47/02, *Albert Anker, Klaas Ras and Albertus Snoek v Bundesrepublik Deutschland* [2003] E.C.R. I-10447.

¹⁰⁶ Case 112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*. [2003] E.C.R. I-05659.

¹⁰⁷ Case 434/10, *Petar Aladzhev v Zamestnik director na Stolichna direksia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti* [2011] E.C.R. 00000.

¹⁰⁸ MADURO, Miguel, Poiarés. Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 4449-472, at p. 452.

nature) the ECJ furthered the process of integration of the common market.¹⁰⁹ But it must not be forgotten that within the process of proliferation of human rights when new aspects of reality are constantly recognized and formulated in terms of fundamental or human rights, human rights are receding from the core and the differences between human rights and other aspects of reality diminishes as to the point where their connotation will not have any special significance.

Further, the Community legal order gives expression to rights that go beyond the protection afforded on national level or by the ECHR, such as confidentiality between lawyer and his client¹¹⁰ and data protection.¹¹¹ The problem that arises, when fundamental rights of the Community are not protected within the Member States, is apparent. Human rights express basic values and visions of common good around which the society is put together (*Hauer, Grogan, Omega, Viking, Laval*). They articulate moral choices of the society. The question is whether fundamental rights of the Community are similarly as national ones supported by any moral background. Of course, fundamental rights are influenced by the political context within which the European institutions operate however; it seems that any deeper moral foundation is missing as may be shown in *Omega*. The case regarded prohibition of laser games in Germany on the basis of their contradiction with German constitutional right to human dignity. Such prohibition was deemed to be contrary with common market freedoms, particularly the freedom to provide services. In its decision, the ECJ deferred to the national legislation and upheld that protection of human dignity as performed by the German authorities justified restriction on the freedom to provide services. As already written above, the ECJ construed that the Community strived to protect human dignity forming general principles of law, even though it remained silent on whether it formed the separate right. Contrary to opinion of the Advocate General Stix-Hackel the ECJ failed to further explain meaning of human dignity and managed with leaving the scope of its protection upon national authorities. In this sense serious doubts arise as to whether the decision actually contributes to protection of fundamental rights within the Community. As Stephanie-Vauchez argues, human dignity principle does not have any

¹⁰⁹ For similarity of fundamental freedoms with fundamental rights see. SKOURIS, Vassilios. *Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance*. [http://193.146.160.29/gtb/sod/usu/\\$UBUG/repositorio/10271465_Skouris.pdf](http://193.146.160.29/gtb/sod/usu/$UBUG/repositorio/10271465_Skouris.pdf).

¹¹⁰ Case 550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*. [2010] E.C.R. I-08237. Case 155/79, *AM & S Europe Limited v Commission of the European Communities*. [1982] E.C.R. 08301.

¹¹¹ Case 28/08P, *European Commission v The Bavarian Lager Co. Ltd*. [2010] E.C.R. I-06055

intrinsic value. Therefore the mere declaration of protection of human dignity may seem empty. Not addressing the issue of content of human dignity principle, the ECJ only sanctioned particular situation in which application of human dignity did not infringe the Community law. However, as the decision relates only to specific circumstances, it cannot give any precedent as to the future. Thus the particular context will always be decisive for determination of the scope of a particular human right. The ECJ did not avail the option to positively contribute to determination of European values upon which (other than economic) the European Union would ground its legitimacy.¹¹² This goes with a stark contrast with the ECJ's insistence upon autonomous legal order of the Community to which fundamental rights are part of. For the legal order to be autonomous it is not only necessary that it has its own legal hierarchy but it is also indispensable that it is built upon shared values that underpin its legitimacy. The fundamental rights language in *Omega* does not seem to have any other than formal value or symbolic value, being an empty bottle filled with whatever the institution applying it decides to. The ECJ within legalization of the human dignity principle utilized the universal aspiration of morality lying behind the principle in the particular Member State (Germany). However at the end it left the morality aside and used only the universal terms. The law was left without any content, legitimately rising a question of why human rights need to be under such circumstances framed in legal concepts.

4.3.CONCLUSION

Recognition of human rights is usually based on a democratic process of political deliberation within the representative bodies endowed with the legislative power or within the international realm upon bargaining within political decision making.¹¹³ The process of recognition of fundamental rights within the European Union had not until recently fit the pattern. The ECJ took the leading role and it invented fundamental rights to be part of the Community legal order without any imperative of the outside normative source or the authorization of the Treaty that would justify such action. In this respect fundamental rights cannot be seen as an expression of common values of shared by the Member States but rather as an expression of what the ECJ thinks that the common values are, taking into account also common market freedoms.

¹¹² I will develop later that to base the legitimacy claims solely upon the value of protection of human rights actually does not contribute to the expected results.

¹¹³ Such as is the case of the origin of the ECHR.

In this respect we would expect rather a political than judicial attempt to bring up the question of protection of human rights within the Community. It is because only through such political bargaining of national representatives the core constitutional values may fully be included in the political contestation about the prevailing conception of good.¹¹⁴ The process of legalization of human rights is a political struggle of give-and-take, striving for inclusion of those who were for the time being excluded. In the context of the Community the political struggle changed its expression. Human rights coming from inside the society came up from inside the ECJ and were imposed against the Member States and their own recognized human rights.

Liberal presuppositions do not stand the ECJ's practice of recognition of fundamental rights. Even though that the ECJ or advocates generals were tempted to refer to human rights for their attributes of being universal at the end they had to cope with problems of diverging standards of protection between the Member States (*Grogan, Omega*). In a moment that the ECJ evaluates concrete right claim it is apparent that the universal terms of the language do not stand application of human rights, while the abstract terms become meaningless and in a moment we try to determine their content, they become deeply contextual. Invention of fundamental rights within the Community legal order is an example of colonization of politics by human rights language. Human rights were incorporated into Community legal order to buttress political interests of the Community. Similarly, the way of labelling the interests into rights terms reflects political priorities and it is without any surprise that economic priorities of the Community are termed in human rights language.

5. HUMAN RIGHTS LIMITING THE POWER

It is envisaged that “[h]uman rights were gradually introduced as limits to the discretion of the supranational institutions,”¹¹⁵ that they serve as a shield used by

¹¹⁴ In respect to the compromises regarding cases *Viking* and *Laval* see NOVITZ, Tonia. European and social rights in conflict: political and judicial approach to their reconciliation. 3. *E. L. Rev.*, 2008, 33 (3), 411 – 426, at p. 425. In respect to the compromises regarding cases *Viking* and *Laval*.

¹¹⁵ BOGDANDY, Armin, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common market Law Review*, Issue 6, pp. 1307–1338, at 1308. Similarly See WEILER, Joseph. H.H. Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities (1986) 61 *Wash. L. Rev.* 110, at 1108. ANDERSON Q.C., David, MURPHY, Cian, C. The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe, *EUI Working Paper*, 2011/08, p. 1-2. <http://hdl.handle.net/1814/17597>, at 1-2. SHUIBHNE, Niamh, Nic. Margins of appreciation: national values, fundamental rights and EC free movement law. *E.L. Rev.* 2009, 34(2), 230-256, at p. 232.

individuals against powerful sword of the institutions endowed with power. Weiler writes that, “[t]he other root for the great appeal of rights, and part of the justification even if counter majoritarian, looks to them as an instrument for the promotion of the *per se* value of putting constraints on power.”¹¹⁶ Necessary precondition for human rights performing as limits to the power is that they exist outside the administrative power of the particular institution performing an absolute boundary, which the institution may not within its discretionary powers overstep, “they impose constraints that are immune to majoritarian pressure, cost-benefit analyses, and abridgment in exchange for improvements in economic conditions.”¹¹⁷ At the outset the ECJ has developed doctrine of the Community being bound by fundamental rights answering to greater concerns about increasing executive power of the Community.¹¹⁸ As Weiler points out, since the Member States are more frequently acting as the executive branch of the Community¹¹⁹ the ECJ has gradually applied fundamental rights to Member State actions as well; firstly, when a Member States is implementing a Community measure (*Wachauf line*) and secondly when it is derogating from common market freedoms (*ERT line*). Therefore the aim of this section is first to elaborate the steps taken by the ECJ when considering validity of Community actions in light of fundamental rights and secondly to elaborate the same from the perspective of Member States actions.

5.1.FUNDAMENTAL RIGHTS AS LIMITS TO COMMUNITY’S ACTIONS

Pursuant to classification developed by De Búrca, cases concerning human rights challenges to Community’s actions regard at first cases, where human rights are invoked against Community legislation and secondly against administrative actions of the Community bodies that include mainly staff cases and competition proceedings.¹²⁰ However, for purposes of this section I will not distinguish between these two different

¹¹⁶ WEILER, Joseph H.H. *The constitution of Europe: "Do the new clothes have an Emperor?" and other essays on European integration*. Cambridge: Cambridge University Press, 1999, 364 pp. ISBN 0-521-58567-8, at p. 103

¹¹⁷ MAHONEY, Jon. Liberalism and the moral basis for human rights, *Law & Phil.* 2008, 27(2), 151-19, at p. 153.

¹¹⁸ See BINDER, Darcy, S. The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action. Jean Monnet Working Paper 4/95. <http://centers.law.nyu.edu/jeanmonnet/archive/papers/95/9504ind.html>, at p. 4.

¹¹⁹ See WEILER, Joseph. H.H, LOCKHART, Nicolas J.S. “Taking rights seriously” seriously: The European Court and its fundamental rights jurisprudence – part I. 32 *Common market Law Review*, 1995. Issue 1, at p. 73.

¹²⁰ See CRAIG, Paul P., DE BÚRCA, Gráiné. *EU law: text, cases, and materials*. 5th ed. Oxford: Oxford University Press, c2011, clvii, 1155 s. ISBN 978-0-19-957699-9.

categories. It is because the legislation comes to life through its application by administrative bodies either of a Member State or the Community and it is particularly at this stage that the legislation in question may interfere with human rights.

I will develop the analysis on the early decision of the ECJ in *Hauer*¹²¹ for that this decision established the pattern of proportionality test at the Community level that have since then been applied in long series of cases.¹²² The case regarded right to property protected under the Grundgesetz. The applicant complained that by a Community regulation on measures designed to adjust wine-growing potential to market requirements she was deprived to grow wine on her plot of land since the plot of land had not been considered suitable for wine growing. Under such circumstances she claimed her right to property and right freely to pursue a trade or profession to be violated by the Community regulation. The ECJ having declared that the right to property is guaranteed in the Community legal order moved immediately to the possible restriction to the right for which it founded source in the ECHR¹²³ as well as national constitutions.¹²⁴

It is generally accepted that even though human rights put restraints on power they may be restricted, provided that the restriction stems either from the nature of a human right itself or from necessity of protection of legitimate legal institutes.¹²⁵ The ECJ in *Hauer* observed that national constitutions allowed restriction of the ownership right on the ground of common good, social justice and social function and concluded that similarly it was possible to restrict the Community fundamental right to property on the basis of common organization of the market and for the purposes of a structural policy.¹²⁶ Secondly, the ECJ conditioned the restriction of fundamental right to property upon two requirements (i) the restriction must follow objectives of general interest pursued by the Community and (ii) the restriction must be proportionate as to the aim pursued and may not cause intolerable interference with the respective fundamental

¹²¹ Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*. [1979] E. Comm. Ct. J. Rep. 3727.

¹²² C-22/94, C-248/95 and C-249/95, C-368/96, C-293/97, C-104/97, C-7/98 (regarding right of every person charged with an offence to be effectively defended by a lawyer), C-37/02 and C-38/02, C-210/03, C-92/09 and C-93/09 (regarding right to the protection of personal data). It shall be noted that most of these cases involve economic rights such as freedom to pursue trade or profession, freedom to pursue economic activity and right to property.

¹²³ See Article 1 of the first Protocol to the ECHR.

¹²⁴ See particularly the German, Italian and Irish Constitutions.

¹²⁵ TICHÝ, Luboš, Rainer ARNOLD, Jiří ZEMÁNEK, Richard KRÁL a Tomáš DUMBROVSKÝ. *Evropské právo*. 4. reprint. Praha: C.H. Beck, 2011, 953 pp. ISBN 978-80-7400-333-2.

¹²⁶ Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*. [1979] E. Comm. Ct. J. Rep. 3727., at para. 23.

right.¹²⁷ Arguing that the respective regulation pursued improvement in wine growing market, aiming at establishment of fair prices at the wine market and obtaining of improvement in the quality of wines, the ECJ concluded that the restriction of the right fulfilled the above mentioned test and therefore it did not find any violation hereof. The ECJ particularly held, “[i]ndeed, the cultivation of new vineyards in a situation of continuous over-production would not have any effect, from the economic point of view, apart from increasing the volume of the surpluses; further, such an extension at that stage would entail the risk of making more difficult the implementation of a structural policy at the Community level in the event of such a policy resting on the application of criteria more stringent than the current provisions of national legislation concerning the selection of land accepted for wine-growing.”¹²⁸ The way in which the ECJ reasoned the judgement is very interesting. Instead of elaborating the right to property its function and scope of protection, the ECJ paid almost all its attention to the respective regulation justifying its aims within the Community. In this respect the ECJ reiterated that the regulation “fulfils a double function: on the one hand, it must enable an immediate brake to be put on the continued increase in the surpluses; on the other hand, it must win for the Community institutions the time necessary for the implementation of a structural policy designed to encourage high-quality production, whilst respecting the individual characteristics and needs of the different wine-producing regions of the Community, through the selection of land for grape growing and the selection of grape varieties, and through the regulation of production methods.”¹²⁹ Since the regulation was aimed to react immediately on the situation of surplus of production and to prepare ground for permanent structural measures, it was not deemed to put an undue limitation on the right to property. From the reasoning we see that it is Community policies and Community interests that are the decisive yardstick against which other rights and interests are measured. The ECJ did not pay any attention to clarification of the right and its possible intrinsic limits and from its reasoning it is apparent that it is not the Community being limited by the right to property but rather the other way around the right to property being limited by Community policies. In this respect the statement that the boundaries of a particular right stem from the right itself is misleading (the boundary rather stems from the importance of the Community policy in question). Protection of

¹²⁷ See *ibid* at para. 23.

¹²⁸ *Ibid* at para. 29.

¹²⁹ *Ibid* at para. 27.

the right to property and a stricter review of its restriction would in the opinion of the ECJ be of no effect when compared to the economic goals of the Community. What then is the boundary that stems from the right to property as such and that enables on one hand to justifiably restrict the right and on the other to invalidate the restriction for overstepping the boundaries? We cannot infer from the right itself any clue that would explain why the ECJ did not find any violation of the fundamental right to property. The clue may be found only within the context of other Community policies.

Pursuant to the liberal theory of human rights, it is the notion of “right” (something more than policy, something absolute) that trumps the policy and in such cases the policy should always defer to rights. Advocates of the liberal position may argue that the conditions that limit use of the restriction only upon cases where it is necessary to pursue objectives of general interests and moreover where it is proportionate impose firm boundaries for interference into the respective fundamental right. The respective institution may then move only within the borders of necessity and proportionality. On the other hand, even though the conditions of necessity and proportionality are supposed to put the ambit of the restriction into clear borders, the terms such as general interest, proportionality and intolerable interference as such do not elucidate where exactly the borders are. These terms are so abstract that they do not provide us with any concrete legal steps necessary for their assessment in concrete situations. It is therefore the administrative body and finally the ECJ that determines where exactly the proportionality lies in every particular case with the ground for such decision to be found in some extralegal source.

As there is no exact legal rule that would guide the ECJ in assessing the proportionality, there is similarly no legal rule that would lead the ECJ to use either the right or the exception to it. Priority of the restriction over the right or the other way around is decided within a balancing test under which fundamental rights are reconciled with Community policies; depending on the outcome of weighing of the interests, the ECJ then decides whether to lean towards the right or the exception. Within the process of balancing it is no more the right itself that is measured against a Community policy. In *Hauer* the ECJ evaluated on one hand interest of the applicant to grow wine on her plot of land and on the other hand interest of the Community to prevent additional surplus and to establish long-lasting structural policy. The right is reduced to policy so that two different interests clash together and therefore “*balancing itself cannot be framed in terms of rights application because its very point is to determine the*

applicability (and thus the limit) of particular rights in particular circumstances.”¹³⁰

Right does not override a policy due to its higher position in the normative hierarchy. Instead, two interests are compared and one is given more weight over the other.

Balancing thus brings flexibility into adjudication rather than constraints. Fundamental rights are compromised every time they stand before the ECJ. There is no fix boundary to be struck into the balancing process and fundamental rights adjudication bears in itself arbitrariness that human rights were supposed to brave. Deformalization¹³¹ of the process of decision making about human rights through the notions such as general interest of the Community, necessity and proportionality, brings human rights to be decided by executive and administrative authorities representing power of the majority.¹³² It is hard then to think of usefulness and specificity of human rights as the one that are able to limit the authorities in their decision making, when at the same time they are within application of proportionality left with wide margins of appreciation; in words of the ECJ, “*since the Commission alone is in a position constantly to keep a close watch on agricultural market trends and to act quickly when necessary, the Council may confer on it wide powers of discretion and action in this sphere. When it does so, the limits of those powers must be determined in the light of the essential general aims of the market organization.*”¹³³ The quotation regards a case, where the ECJ was called upon to decide about on one hand validity of a Community rule concerning imposition of a levy on importation of untreated oil from a non-member state, by means of tendering procedure, against a claim that such rule infringes fundamental right to carry on economic activities freely. The ECJ concluded that following the wide discretionary powers that had been conferred upon the Commission to attain the objective of stability on the common market, the measure in question could not be regarded as a disproportionate interference impinging upon the substance of the

¹³⁰ KOSKENNIEMI, Martti. Human Rights Mainstreaming as a Strategy for Institutional Power, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, Fall 2010 Volume 1, Number 1, pp. 47-58, at 51

¹³¹ Ibid at 86. Also see: Koskenniemi, KOSKENNIEMI, Martti. Human Rights Mainstreaming as a Strategy for Institutional Power, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, Fall 2010 Volume 1, Number 1, pp. 47-58.

¹³² The political power is thus removed from a legislative body and is left to administration. As Koskenniemi argues, such deformalization is a fits within the project of post-liberal ideas about human rights, where rights are no more at the same time over-inclusive as well as under-inclusive but for their flexibility ensured by notions such as proportionality, rights may adequately react to particular situations. KOSKENNIEMI, Martti. Human Rights Mainstreaming as a Strategy for Institutional Power, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, Fall 2010 Volume 1, Number 1, pp. 47-58.

¹³³ Case 359/89, *SAFA Srl v Amministrazione delle finanze dello Stato*. [1991] E.C.R. I-01677, at para. 16.

right. It is interesting that in view of the ECJ it was not the fundamental right serving as a guideline for exercise of the discretionary powers. It was rather the general aim of the market organization that led the ECJ to decide whether the discretionary powers were overstepped or not.

Such broad discretionary powers of the Community institutions are also apparent from the surface of “*Banana*” decision.¹³⁴ When it came to a question of the fundamental right to property and to pursue a trade or business the ECJ first acknowledged that both rights were part of general principles of Community law but added that they were not absolute.¹³⁵ Regarding right to property the ECJ was of that opinion that there existed no right to property in a market share arguing that market share established only an economic position. The ECJ followed its reasoning asserting that, “[n]or can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power will be maintained (...), especially if the existing situation is contrary to the rules of the common market.”¹³⁶ As follows from opinion of the Advocate General Mrs. Stix-Hackl to *Omega* the ECJ “interprets the aforementioned restrictions on fundamental rights, in substance, in a particular manner tailored to the needs of the Community”¹³⁷ and it may be added that when these restrictions regard proper functioning of the common market the ECJ does not hesitate to defer to broad discretionary powers of the Commission. Tailoring fundamental rights to needs of Community policies does not come up the value of putting restraints on power of the Community.

In case law of the ECJ we may detect cases, where Community legislation is questioned to be incompatible with human rights and the discretion serves as a tool for escaping the review. This is the case of *Stauder*, where the ECJ assessed validity of the Community legislation circumventing the review by pointing out to the discretion that was left by the respective provision to state authorities. The discretion of the provision (enabling to construe the provision in compliance with fundamental rights) therefore excluded the provision from the review. The Community legislation is safe transferring

¹³⁴ Case 280/93, *Federal Republic of Germany v Council of the European Union* [1994] E.C.R. I-04973

¹³⁵ *Ibid* at para 78.

¹³⁶ *Ibid* at para 30.

¹³⁷ Opinion of Advocate General Stix-Hackl to case Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECR I-09609.

the burden upon national legislation. In *Wachauf*¹³⁸ the ECJ dealt with a German legislation implementing Community regulations on milk production quotas under which Mr. Wachauf was deprived of compensation for discontinuance of milk production due to lack of consent of the lessor. The ECJ reiterated that protection of fundamental rights formed part of general principles of the Community law and further noted that the Member States are obliged to implement the Community law as far as possible in accordance with fundamental rights. The ECJ concluded that the respective Community regulations left the national authorities wide margins of appreciation to implement the Community law in accordance with fundamental rights by either “*giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively.*”¹³⁹ Therefore the Community regulations themselves were relieved and it was for the national authority to bring the implementing legislation into conformity with fundamental rights.

5.2.FUNDAMENTAL RIGHTS AS LIMITS TO MEMBER STATES’ ACTIONS

Fundamental rights were at the outset invented “*in order to ensure that those fundamental rights are complied with by the Community institutions in the exercise of their powers under the Treaties.*”¹⁴⁰ Human rights being reflection of political priorities of a certain society were in their form of fundamental rights of the Community less suited for application against Member States’ actions, when the abstraction from common constitutional traditions turned out to be a problem of diverging standards of protection.¹⁴¹ It was therefore inevitable to develop the doctrine of margins of appreciation that would leave a room for these diverging standards of protection. In *Grogan* the Advocate General Van Gerven, when deciding the question of the room for national policy that shall be left to a Member State, referred to case law of the ECtHR and European Commission on Human Rights. Following its well established principle

¹³⁸Case 5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] E.C.R. 02609, at para. 19.

¹³⁹ *Ibid* at para. 22.

¹⁴⁰ Opinion of Advocate General Gulmann to case 2/92, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*. [1992] E.C.R. I-00955, at para.30.

¹⁴¹ See also Opinion of Advocate General Stix-Hackl to case Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECR I-09609.

¹⁴¹ Opinion of Advocate General Gulmann to case 2/92, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*. [1992] E.C.R. I-00955, at para.33.

of that where there is no uniform European conception of morals states should be given wide margins of appreciation the Advocate General Van Gerven stated, “[a]s far as the protection of unborn life is concerned, such a uniform moral conception is lacking (except as regards respect for the mother's right to life), as between the Member States and within each Member State, as regards the conditions under which abortion is or should be permitted...”¹⁴² The Advocate General then continued, assessing the proportionality principle making references to the case law of the ECtHR, which inspired him to leave the national authorities wide margins of appreciation since, as he concluded, there was a lack of uniform conception of morals and therefore “by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in better position than the international judge to give an opinion on the exact content of these requirements (...) as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.”¹⁴³ As we see, human rights lacking any moral definition in itself are left to be defined by local authorities, which are of better knowledge of the context. In this respect it is interesting that it was the opinion of majority that prevailed over the individual autonomy. Therefore deferring to national authorities for that they are in a better position to evaluate the case may not actually contribute to protection of individual autonomy, if such national authority promotes will of the majority that may repress autonomy of an individual.

In *Karner*¹⁴⁴ the ECJ added that, “[i]t is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the above mentioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference.” Conception of margin of appreciation therefore on one hand limits the scope of review of a Member State measure regarding compliance with fundamental rights and on the other hand allows a Member States to carry out policy that it deem necessary. Human rights are defined rather through their constant

¹⁴² Opinion of the Advocate General Van Gerven to Case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. [1991] E.C.R. I-04685.

¹⁴³ *Ibid* at para. 37.

¹⁴⁴ Case C - 71/02, *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*. [2004] E.C.R. I-03025.

evaluation with other legitimate policies. Human rights are not limits to policies but an outcome of such policies.

The ECJ had to deal with a delicate issue in *Bostock*¹⁴⁵ where it, similarly as in *Wachauf*, dealt with compensation for reverted quotas to a lessor. Contrary to *Wachauf* British law did not provide for any compensation and naturally the question raised this time was whether the Community legislation required a Member State to provide for the compensation. The ECJ was very brief in considering the matter but lot of interesting remarks may be found in the Advocate General's Gulmann opinion. He built his reasoning upon an assumption that the Member States are left with wide margins of appreciation, since the respective regulations did not provide for general duty to compensate tenants in relation to milk quotas. In this respect the Advocate General considered "*neither necessary nor correct to hold in this context that the Member States must respect the fundamental rights applying in the Community legal order.*"¹⁴⁶ He suggested that in situations where wide margin of discretion was left to the Member States it was national concept of protection of human rights that should prevail over the Community one. The ECJ added that "*the right to property safeguarded by the Community legal order does not include the right to dispose, for profit, of an advantage, such as the reference quantities allocated in the context of the common organization of a market, which does not derive from the assets or occupational activity of the person concerned.*"¹⁴⁷ Compared to *Wachauf* the ECJ on one hand conditioned validity of the Community legislation by a sympathetic interpretation with fundamental rights and on the other hand denied fundamental rights to have any effect in situation where Community legislation is implemented by the Member States that are allowed in this respect to move within wide margins of discretion. The decision in *Bostok*, if read together with *Wachauf*, has the effect that when a Member State decides to provide compensation for discontinuance of milk production it must comply with the fundamental rights. On the other hand when a Member State does not provide for any compensation application of fundamental rights is excluded and even if it might have applied, it would not have lead to the same result as in *Wachauf* for that the ECJ expressly denied that right to property covers economic interests such as the one in question. In such situation national conception of protection of human rights shall apply.

¹⁴⁵ Case 2/92, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*. [1992] E.C.R. I-00955.

¹⁴⁶ *Ibid* at para. 33.

¹⁴⁷ *Ibid* at para. 19.

The *Bostock* decision legitimately causes questions of human rights politics – too deferential approach to politically delicate issues.¹⁴⁸ The more politically significant the policy is the more margins of appreciation are left to the Member States since “*the protection of the fundamental rights presents the core of the social value choices about the balance between the individual’s freedom and collective interest, it speaks for a higher degree of the regulatory autonomy to be granted to the state.*”¹⁴⁹ But where is the autonomy of an individual the borders of which may not be overstepped when a Member State is granted a leave to interfere with individual’s autonomy. There is a paradox in defending autonomy of a human being and at the same time witnessing that such autonomy is compromised in order to enable a Member State or a Community institution to pursue its own policy.

5.3.CONCLUSION

From the cases discussed above, it is obvious that the intensity of proportionality test differs in situation where the Community or the Member States are endowed with discretionary powers whereas the scope of discretion left to the respective institution depends on the Community level upon importance of the policy in question, and on the Member State level upon the uniform standards of morals. The more important the goal of the Community and the more diverging standard of morals is the more discretion is left and the less intensive the scrutiny of proportionality is.

The mainstream liberal movement perceives human rights in a sense that they put constraints on exercise of power, which equals to an allegation “*speaking law to power.*”¹⁵⁰ Such assertion presupposes law and power to be in a stark opposition. However, within the balancing test the clear boundaries between law and power melts and law may become the language of power. Once human rights (or their outside perspective) are enacted into law they become to be the act of power (the power to define). They again become to be the act of power within application through the balancing procedure. Notions such as margins of discretion, general interest and proportionality slightly open door to power. The abstract terms of human rights, their

¹⁴⁸ WEILER, Joseph. H.H, LOCKHART, Nicolas J.S. “Taking rights seriously” seriously: the European Court and its fundamental rights jurisprudence – part II. 32 *Common market Law Review*, 1995, Issue 2, pp. 579–627, at p. 617.

¹⁴⁹ AVBELJ, Matej. European Court of Justice and the Question of Value Choices: Fundamental human rights as an exception to the freedom of movement of goods Jean Monnet Working Paper 06/04, at p. 63.

¹⁵⁰ KENNEDY, David. Speaking law to power: international law and foreign policy closing remarks.(2005) 23 *Wis. Int’l L.J.* 173, at p. 2.

overinclusive and at the same time underinclusive character, cannot otherwise but be handled through exceptions, balancing and cost-benefit analysis “*the kind of bureaucratic calculation against which rights were conceived in the first place.*”¹⁵¹. Human rights do not impose limits on politics but are the outcome of politics often used in the battle over the power to decide. In this respect the ECJ has been accused that use of the proportionality criteria creates double standard “*a tight control of Member State measures ... a lenient control of acts of the EU institutions.*”¹⁵² Whatever shift we may detect in recent years (with the special regard to anti-terrorist case law), the critique of the ECJ precisely points to the danger of deformatization of human rights through the proportionality or margin of discretion criteria. Even though exceptions to rights are inevitable and balancing of interest necessary there is no clash ensuring that the proportionality criteria will not be misused in the power game.

6. HUMAN RIGHTS AND COMMON MARKET

Human rights are within the liberal human rights discourse perceived to be foundational for their ultimate normative claims that trump politics. As suggested above, for their nature of being overinclusive and underinclusive at the same time, human rights constantly conflict not only one with another but also (and within the realm of the European Union more often) with other interests that has been recently expressed in terms of fundamental economic freedoms of the Community. They are termed in the language of fundamental freedoms because they embody “*the economic vales of unhampered trade between the Member States, or in a wider context: a value of creation of a veritable common marketplace.*”¹⁵³ Purpose of this section is to elaborate how human rights and common market freedoms intertwine within the balancing test in situations when (i) a Member State derogates from Treaty provisions and human rights are asserted by the Member States as a justification for such action and (ii) Community institutions measure validity of the Member States’ derogations from the Treaty through lenses of fundamental rights.

¹⁵¹ KOSKENNIEMI, Martti. *Human Rights Mainstreaming as a Project of Power*. <http://www.iilj.org/courses/documents/Koskenniemi.pdf>, at p. 53.

¹⁵² BOGDANDY, Armin, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common market Law Review*, Issue 6, pp. 1307–1338, at p. 1321.

¹⁵³ AVBELJ, Matej. European Court of Justice and the Question of Value Choices: Fundamental human rights as an exception to the freedom of movement of goods *Jean Monnet Working Paper 06/04*, at p. 12.

The main attention will therefore be afforded to the balancing of competing values through the test of proportionality, which is generally described as a tool in which a balance is struck between individual and group interests on one hand and public interest on the other hand.¹⁵⁴ However, in the landscape of the Community, the principle of proportionality must be understood also as “*a counterbalance to justifiable national restrictions*”¹⁵⁵ that requires the restriction to be in compliance with common market freedoms.

6.1.FUNDAMENTAL RIGHTS AS JUSTIFICATION FOR DEROGATION FROM THE TREATY

Cases that I will elaborate below regard situations where a Member State is using human rights as a ground for justification of its derogation from common market freedoms. These cases involve the direct conflict of values, where on one hand national values of human rights and on the other hand Community values of protection of common market freedoms are at stake.

I will start the analysis with *Familiapress*.¹⁵⁶ The dispute related to a prohibition of offering game prizes in newspapers pursuant to Austrian law that was claimed to be in breach with the Community law, in particular with article 30 of the Treaty that prohibits quantitative restrictions on the intra Community trade and any other measures having equivalent effect. It was acknowledged by the ECJ that such prohibition maintained press diversity and thus helped to safeguard human right to freedom of expression. The ECJ therefore had to at first ascertain whether the national provision may fall within the prohibited restriction to the Community trade. The ECJ concluded that the Austrian measure hindered free movement of goods and therefore constituted a measure having equivalent effect pursuant to the article 30 of the Treaty. The ECJ's consideration then led to an assessment of whether the press diversity may be regarded as an overriding requirement that would justify the restriction. The ECJ noted that, “*where a Member State relies on overriding requirements to justify rules which are*

¹⁵⁴ REICH, Norbert. *How proportionate is the proportionality principle?*. <http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/speakers-papers/norbert-reich.pdf>, at p. 10.

¹⁵⁵ O'LEARY, Siofra. Freedom of establishment and freedom to provide services: the Court of Justice as a reluctant constitutional adjudicator: an examination of the abortion information case. *E.L. Rev.* 1992. 17(2), pp. 138-157, at p. 7.

¹⁵⁶ Case 368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*. [1997] E.C.R. I-03689.

*likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights.*¹⁵⁷ The case is interesting from the human rights review already at this point. The starting point of all the ECJ's consideration is free movement of goods and prohibition of restrictions on the Community trade. Free movement of goods is the base line against which all other considerations are measured. It is not the protection of fundamental rights that concerns the ECJ at the first place. Fundamental rights come into play only when it is established that a Member State's measure constitutes overriding requirement to the restriction like it is also confirmed in words of the Advocate General Tesouro "*[i] feel the issue of the compatibility of the national provision under discussion with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (...), merits a response on the part of the Court. That is, of course, if the Court comes to the conclusion that the provision in question can be justified on the basis of the mandatory requirements discussed above.*"¹⁵⁸ The trigger of fundamental rights review is conditioned by national policy limiting common market freedoms. Another point to be made already here is that the ECJ, similarly as the Advocate General Tesouro, did not address the conflict in terms of human rights (freedom of expression) but rather relied on mandatory requirements that justify the restriction. On one hand human rights are treated as any other policy that may justify the restriction and on the other hand they are treated as the ultimate source of values with which the overriding requirement must comply.

After the ECJ ascertained that maintenance of press diversity and therefore maintenance of freedom of expression¹⁵⁹ constitutes mandatory requirements it moved forward and assessed whether such provisions intended for protection of human right of freedom of expression were in compliance with fundamental rights of the Community, namely the freedom of expression. Paradox arising from such review is obvious, expressed in words of the Advocate General "*in the present case two rights both protected by the same provision are to be considered: on the one hand, freedom of the press to be accorded to every trader in the sector, as a general principle, together with*

¹⁵⁷ Case 368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*. [1997] E.C.R. I-03689 at para. 24.

¹⁵⁸ Advocate General Tesouro to case 368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*. [1997] E.C.R. I-03689, at para. 26.

¹⁵⁹ The ECJ expressed in Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069 at para. 30, that "the maintenance of ... pluralism (...) is connected with freedom of expression, as protected by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

*the highly important and correlative right of the public to receive every kind of information and ideas; on the other hand, the maintenance of media diversity in a democratic society. Consequently, Article 10 of the Convention requires the reconciliation, as far as possible, of two interests as diverse as freedom of the press and the safeguarding of pluralism (...).*¹⁶⁰ The ECJ followed that prohibition of selling periodicals which offered to take part in prize competitions (that in fact maintains freedom of expression) constituted a permissible derogation from freedom of expression, provided that it was “*proportionate to the aim of maintaining press diversity and ... that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.*”¹⁶¹ The ECJ concluded the case that Article 30 of the Treaty did not prohibit measures prohibiting advertising of prize competitions and aiming at preservation of press diversity provided that they were proportionate to the aim of maintenance of press diversity and they could not be achieved by less restrictive means. The final consideration of whether such conditions were fulfilled was left upon the national court. But again the conclusion of the ECJ is not termed in human rights language but in words of compliance with the Treaty. The approach of the ECJ is not much human rights friendly. Human rights are rather paying lip service to protection of the common market freedoms and intra-Community trade and from the language of the ECJ as well as the Advocate General it is apparent that for the time being the default language is that of common market freedoms.

To further develop the analysis I will elaborate Advocate General’s Van Gerven opinion to *Grogan*. To shortly introduce the case, Ireland and its harsh abortion legislation provided that no information about abortions carried out abroad may be disseminated. In Ireland the constitution expressly recognizes right of the unborn child to life, which pursuant to Irish courts prohibits information about locations of clinics where the abortions are carried out, even though they are abroad. The Advocate General began the review (leaving the question of abortions as services now aside) again with a

¹⁶⁰ Advocate General Tesouro to case 368/95, *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*. [1997] E.C.R. I-03689, at para. para. 27. At first the Advocate General considers conflict of two rights under the single provision of freedom of expression, on one hand freedom of press and on the other hand maintenance of media diversity. However, after that the Advocate General changed his language and referred to the above mentioned rights as to interests that need to be reconciled. It is clear that the language of rights does not fit in such situations, since the nature of right make it possible to choose only from options apply/not to apply the respective right. Rights, however, cannot be reconciled. As we see, reference to a mere right would not resolve the question of weighing of interests.

¹⁶¹ Case 368/95, *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*. [1997] E.C.R. I-03689, at para. 27.

consideration that provisions prohibiting disseminating of information about abortions constitute obstacle to the freedom to provide services within the scope of Articles 59 and 60 of the Treaty. In his opinion “*two rules which stem from fundamental rights come into conflict in this case: the freedom of the defendants in the main proceedings to distribute information, which I have accepted as being the corollary of the Community freedom to provide services vested in the actual providers of the services ... and the prohibition to assist pregnant women, by providing information, which, according to the Irish Supreme Court, results from the constitutional protection of unborn life.*”¹⁶² When considering whether the objective may justify the restriction, the Advocate General held that “*such an objective is justified under Community law, since it relates to a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States.*”¹⁶³ However, the test is not complete without proportionality to be ascertained. Relying on broad discretionary powers of the Member State, the Advocate General observed that prohibition of dissemination of information about abortions carried out abroad satisfied the test of proportionality, adding that “*ban on pregnant women going abroad or a rule under which they would be subjected to unsolicited examinations upon their return from abroad*”¹⁶⁴ would already transgress limits of proportionality. However, the same as in the previous case, it remained for the Advocate General to ascertain compliance of the prohibition with fundamental rights. They were used again as a mean of last resort an additional ground for review. The Advocate General balanced two fundamental rights: human right of the unborn child to life against fundamental right of freedom of expression. He adopted a stance within which he treated constitutionally enacted value judgement of the majority as a derogation to the fundamental right of the Community observing: “*first, is the aim pursued by the national rule, that is to say the promotion of an ethical value-judgment relating to the protection of unborn life ... compatible with the said general principles; secondly, is the freedom of expression ... restricted impermissibly by the national rule at issue.*”¹⁶⁵ First point to be made here is that such conflict cannot be solved by mere reference to rights. As the Advocate General admitted, the Irish wide reach of prohibition of abortions hidden behind the right to life of the unborn was an expression

¹⁶² Opinion of the Advocate General Van Gerven to case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. [1991] E.C.R. I-04685, at para. 25.

¹⁶³ Ibid at 26.

¹⁶⁴ Ibid at para. 29.

¹⁶⁵ Ibid at para. 32.

of ethical value judgement. On the other hand freedom of expression is no more than an expression of value judgement as well, however, the value judgement of human pragmatism. Leaving the Member State wide discretion within margins of appreciation the Advocate General proposed that the ECJ should deal only with question whether prohibition of information about abortions was necessary and was not disproportionate restriction to the freedom of expression. Again within such assessment a due regard should be paid to the fact that protection of unborn child forms a core value of Irish constitutional system. Therefore the Advocate General concluded that “*national authorities are entitled to consider that a prohibition on the provision of information by way of assistance is necessary in order to effectuate the value-judgment contained in the Constitution with regard to need to protect unborn life.*”¹⁶⁶ As we can see, there is nothing inherent to the notion of right to life or freedom of expression that would determine the way of interpretation of the rights and would solve their conflict. Wording of rights itself does not bear any normative content “*rights alone can mean anything and that when embedded in a particular institutional context (...) they come to mean whatever the policy of the institution is.*”¹⁶⁷ In this respect it is interesting that the Advocate General subordinated national provisions supporting the constitutionally recognized right of the unborn to live under the fundamental rights of the Community. Again we see that within human rights adjudication the perspective from which they are considered (whether the national or community one) is of a great importance.

Avoiding the conflict of constitutional values with Community law in *Grogan*, the ECJ took a step forward in its *Krejl*¹⁶⁸ decision, in which it was called upon to decide about compatibility of German constitutional rule prohibiting women from performing in armed forces with fundamental right to equal treatment. The ECJ turned to principle of proportionality which in this particular case meant that, “*derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public security which determine the context in which the activities in question are to be performed.*”¹⁶⁹ The ECJ concluded that the national provisions adopting general position of excluding women from armed services (even

¹⁶⁶ Ibid at para. 38.

¹⁶⁷ PETMAN, Jarna. Human Rights Democracy and the Left. <http://www.law.harvard.edu/students/orgs/unbound/articles/2UNB063-Petman.pdf>, at p. 16.

¹⁶⁸ Case 285/98, *Tanja Kreil v Bundesrepublik Deutschland*, [2000] E.C.R. I-00069.

¹⁶⁹ Ibid at para. 23.

though that they are in compliance with the constitutional rule prohibiting women from armed services) contravened the principle of proportionality and therefore breached the fundamental right of equal treatment. Quite opposite to the Opinion of the Advocate General to *Grogan*, where he regarded “values which, in view of their incorporation in the Constitution, number among the fundamental values to which a nation solemnly declares that it adheres fall within the sphere in which each Member State possesses an area of discretion in accordance with its own scale of values and in the form selected by it,”¹⁷⁰ the ECJ overstepped the national values replacing them with the Community conception of equal treatment. In connection with the above mentioned assumption that provisions on equal treatment and non discrimination buttress the economic interests of the Community and common market freedoms we may ask a question whether it was concerns about the equal treatment per se that persuaded the ECJ to decide in favour of the Community fundamental rights even though that the national provisions in question supported the same fundamental values for which the Advocate General in *Grogan* decided to take fundamental rights off and leave the Member State to follow its own policy.

With respect to armed forces the ECJ in *Sirdar*¹⁷¹ had to deal with total exclusion of women from the British army unit of Royale Marines. The ECJ, again reviewing the proportionality principle, decided that exclusion of women from the army unit is perfectly in compliance with the Community law, owing to the fact that since services within Royale Mariners required the soldiers to be in the front line, it justified total exclusion of women from such unit. As we see, the principle of equality of men and women is not absolute and when it regards position endangering life, the Member States may legitimately discriminate between men and women and thus justifiable enforce their constitutional provisions protecting women from army.

In recent years the ECJ has been praised for its decisions in *Omega* and *Schmidberger*¹⁷² for paying attention to national values that has overridden common market policies. In *Schmidberger* the ECJ was placed before a situation in which exercise of freedom of expression and freedom of assembly hindered the fundamental freedom of movement of goods recognized by the Community law. Task of the ECJ was

¹⁷⁰ Opinion of the Advocate General Van Gerven to case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. [1991] E.C.R. I-04685, at para. 26.

¹⁷¹ Case 273/97, *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, [1999] E.C.R. I-07403.

¹⁷² Case 112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*. [2003] E.C.R. I-05659.

to “reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty.”¹⁷³ The first point to be made is that the ECJ expressly recognized fundamental rights to be an additional source of justification to derogations from common market freedoms besides those established in the Treaty.¹⁷⁴ The ECJ thus avoided installing the respective human right into a policy the purpose of which justified derogation from the common market freedoms. There are few consequences arising from such an approach. First, when considering public policy exceptions (under which the ECJ has normally treated human rights) the ECJ stated, that the idea standing behind it was not necessary to be shared by all the Member States as regards the “*precise way in which the fundamental right or legitimate interest in question is to be protected.*”¹⁷⁵ However, turning into human rights being the sole ground for derogation the position shall change for the idea of common constitutional traditions and universality through which they are perceived by the ECJ. The margins of appreciation allowed when a Member State relies on such ground for derogation should therefore be narrower. It seems that to consider fundamental rights under public policy exception leave the Member States greater room within which they may apply their own national conceptions about the particular human rights, whereas fundamental right of the Community presupposes common constitutional standard and therefore rather uniform way of protection of human rights.

From the language used in *Schmidberger* (and from opinion of the Advocate General to *Grogan* as well) it is apparent that the ECJ operates with fundamental rights as a single category that may have different sources – the general principles of the Community as developed by the ECJ and the fundamental freedoms enshrined in the Treaties.¹⁷⁶ The way, in which the ECJ subordinated human rights under the derogations from the Treaty as well as establishing the common market freedoms as fundamental

¹⁷³ Ibid at para 77.

¹⁷⁴ It is argued that fundamental rights recognized as a separate justification for derogation may justify even measures that are applied with distinctions whereas treating derogations based on fundamental rights as a mere mandatory requirement may justify only non-discriminatory measures. See. TRIDIMAS, Takis. *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=490603. However, subsequently in *Omega* the ECJ turned back to treating derogations based on claims of human rights as a public policy exception.

¹⁷⁵ Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECR I-09609, at para 37.

¹⁷⁶ „The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly (...) and of free movement of goods (...)“ Case 112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*. [2003] E.C.R. I-05659, at para 77.

freedoms, has evoked large debate about the normative hierarchy of fundamental rights and fundamental freedoms within the Community legal order. The ECJ was accused that it ascribed “*as much importance to the freedoms of assembly and expression as to the free movement of goods viewing the two folds as being of equal ranking.*”¹⁷⁷ The ECJ treated fundamental rights as only one objective among others of the Community. Fundamental rights thus lose their specificity of being a higher law. The call for normative hierarchy stems exactly from the view that human rights are norms of higher values, being entrenched into the positive law but still existing prior to their enactment in an apolitical absoluteness. In this context it is interesting to read the opinion of the Advocate General Stix-Hackl to *Omega*. In her eyes the balancing test of fundamental rights and fundamental freedoms might indicate fundamental rights as being negotiable and she continued that “*it is also necessary to examine the extent to which the fundamental rights concerned admit of restrictions. The provision on the fundamental freedom concerned, and particularly the circumstances in which exceptions are permissible, must then be construed as far as possible in such a way as to preclude measures that exceed allowable impingement on the fundamental rights concerned and hence to preclude those measures that are not reconcilable with fundamental rights.*”¹⁷⁸ In her eyes it is exactly the shift of preferences, where fundamental rights should serve as the default setting and any exceptions to fundamental freedoms shall be construed not as against the fundamental freedom but rather against the fundamental right. Pursuant to some authors, subordination of fundamental rights protection under the restriction to the fundamental freedoms “*gives a clear priority to the interests of free trade over those of fundamental rights*”.¹⁷⁹ Therefore the call for bringing hierarchy into protection of fundamental rights has begun to emerge.¹⁸⁰ Primarily it is a state that refers to the exception (or derogation) to the rule to justify violation of human rights. In the European context, however, the Member States are using human rights to justify

¹⁷⁷ TRIDIMAS, Takis. *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=490603, at p. 35.

¹⁷⁸ Opinion of Mrs. Stix-Hackl to case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECR I-09609.

¹⁷⁹ ALEMANNI, Alberto. Fundamental common market freedoms v fundamental individual rights in the EU: what role for the ECJ after *Omega*? *EU Focus* 2005, 165, 2-5, at 4. See also TRIDIMAS, Takis. *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=490603. KOMBOS Costas. Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity. *European Public Law*. 2006. Vol. 12, No. 3. DOGAN, Yaşar. The Fundamental Rights Jurisprudence of the European Court of Justice: Protection for Human Rights within the European Union Legal Order. *Ankara Law Review*. 2009. Volume 6. No. 1, pp. 53-81.

¹⁸⁰ See fn. 159.

violations of fundamental economic freedoms. The language of rights is used in defensive way and the language no longer seems to be that powerful.

I will now turn to judgements of the ECJ in *Viking*¹⁸¹ and *Laval*¹⁸² which are interesting for several reasons. First they regarded right to take collective action and thus protection of social rights within the Community legal order in respect of which the ECJ had been up till then silent. Secondly they concerned horizontal application of Community law (against trade unions). Promoting Community economic freedoms the ECJ inevitably get into conflict with protection of national social rights which are naturally obstacles to free movement provisions. “*The balance between economic freedom and social rights in the European Economic Constitution has largely been defined by the balance between market integration and national social rights,*”¹⁸³ and the market integration in cases of *Viking* and *Laval* was given priority to. *Viking* concerned dispute between seaman’s union and the Viking ferry company that intended to reflag from a Finland seat to an Estonian one. The ECJ recognized the right to take collective actions, including right to strike but it further dealt only with legitimate justification of such collective action that was protection of rights of workers. Changing its opinion in *Schmidberger* the ECJ now again¹⁸⁴ required reconciling the purpose of the collective action with Community interests. In words of the Advocate General Maduro blocking or the threatening of blocking “*through collective action, an undertaking established in one Member State from lawfully providing its services in another Member State is essentially the type of trade barrier that the Court held to be incompatible with the Treaty in Commission v France, since it entirely negates the rationale of the common market (...)*”¹⁸⁵ It is not the collective action itself that is acknowledged to have relevance in the Community law, it is the purpose, that if impairs fundamental economic freedoms cannot be upheld. Having declared that the Community has also different than economic interests and that provisions on basic

¹⁸¹ Case 438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eest* [2007] E.C.R. I-10779.

¹⁸² Case 341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] E.C.R. I-11767.

¹⁸³ MADURO, Miguel, Poiares. Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 4449-472, at p. 451.

¹⁸⁴ As well as in case 265/95, *Commission of the European Communities v French Republic* [1997] E.C.R. I-06959.

¹⁸⁵ Opinion of Advocate General Maduro to case 438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eest* [2007] E.C.R. I-10779, at para. 68.

economic freedoms must be balanced against social policy of the Community,¹⁸⁶ the ECJ then left the decision about proportionality of the seamen's union action upon the Member States' court. However, the ECJ did not forget to provide the national court with guidance as to whether the action may be deemed proportionate following that the proportionality test would be fulfilled only if the least restrictive measure was taken meaning that "*the union will only have a chance of satisfying the proportionality test where the industrial action renders the exercise of a free movement right less attractive and not where the action prevents the exercise of that right altogether.*"¹⁸⁷ The ECJ took the view that collective action may legitimately protect the workers interests as long as it is not established that the jobs in question were not jeopardized or under serious threat.¹⁸⁸ The ECJ then referred to collective negotiation as the best way that may protect workers interests.¹⁸⁹

In *Laval*, prior to assessing the compliance of the collective action taken by the trade union with the freedom to provide services the ECJ had to deal with objection of the national governments (particularly the Swedish and Danish) that right to take collective action falls outside the Community law. The ECJ took the opposite stance referring to its ruling in *Schmidberger* and *Omega* where it held that it is essential for the case to "*reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty.*"¹⁹⁰ The ECJ did not reconcile the national conception of human rights with common market freedoms. It transformed human rights into fundamental rights of the Community to establish its jurisdiction over the case.

Further, after reaffirming that article 49 of the Treaty had horizontal effect, the ECJ considered whether the right to take collective action, as exercised by the Swedish trade union, restricted freedom to provide services and possibly whether it might be justified by a legitimate objective and did not go beyond what is necessary in order to

¹⁸⁶Case 438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eest* [2007] E.C.R. I-10779, at para.79.

¹⁸⁷ DAVIES, A.C.L. One Step Forward, Two Steps Back? The Viking and Laval Case in the ECJ. 2008. 37 *Indus. L.J.* 126, at p. 143.

¹⁸⁸ Case 438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eest* [2007] E.C.R. I-10779, at para. 81.

¹⁸⁹ Even though the ECJ left the decision upon the national court, the judgement of the ECJ nevertheless led some authors to criticize the ECJ for inadmissible interference with autonomy of the unions under the right to take collective actions. See REICH, Norbert. *How proportionate is the proportionality principle?* <http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/speakers-papers/norbert-reich.pdf>, at p. 20.

¹⁹⁰ Case 112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] E.C.R. I-05659, at para. 77.

accomplish the aim pursued.¹⁹¹ The Advocate General Mengozzi in his opinion to *Laval* dealt similarly as the ECJ in *Viking* not with the right to take collective action per se or with the aim of Swedish authorities in permitting/not permitting it, but he rather considered it more appropriate to review the aim pursued by the trade union. Review of purpose with which private persons exercise their human rights guaranteed by national constitutions goes against the spirit of human rights protecting autonomy of individuals, within which individuals are deemed to be free in their exercise of human rights. The ECJ is also extending its review and application of the Community law to cover also autonomy that is by constitution left to private persons within the right to take collective actions.

In assessing legitimacy and proportionality of the aim the Advocate General considered first that, “[i]n general, it is important to bear in mind that Article 49 EC cannot impose obligations on trade unions which might impair the very substance of the right to take collective action.”¹⁹² What might seem for the first glance as a change of the normative field of the language of the ECJ with human rights being the default point, was, nevertheless later refuted by assessing proportionality of the collective action against the freedom to provide services. The ECJ, even though that it found the aim of protection of workers legitimate, it nevertheless held that the means through which it was supposed to be achieved were disproportionate. The ECJ reviewed proportionality of action of private persons exercising their fundamental rights. Such test diverges in comparison to the regular standard, where it is the state that has to prove proportionality of its interference into human rights. Now it is the rights holders that have to defend proportionality of exercise of their rights against the freedom to provide services.

Balancing test serves as a tool for resolving conflicts. As there is no legal hierarchy between fundamental rights as part of general principles of the Community law being equated with the Treaty provisions on free movement there is no formal way how to resolve their conflict. However, the conflict in principle is not between two legal

¹⁹¹ „It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community ... a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest“ See Case 341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] E.C.R. 11767, at para. 101.

¹⁹² Opinion of Advocate General Mengozzi to Case 341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] E.C.R. 11767, at para. 251.

rights but instead between two different interests that may be translated into the rights language. Balancing then is the method for managing the conflicts and reaching the compromise. Within the balancing, rights do not resist the cost-benefit analyses. Human rights are constantly evaluated against policies and when we do not want to let the policy down and at the same time preserve human right, we simply turn to the proportionality test. There is no precise way to determine the outcome of the balancing test. There is no correct or incorrect way of balancing. Once it may be fundamental rights that are given priority to, next time other policies prevail. Therefore it is rather the balancing than anything other, which determines the meaning of human rights. In this respect it must be said, that human rights become to be human rights of procedure in a sense that it is rather the procedure than any substantive normative claim that define their meaning within the “*constant struggle about where to draw the line*”¹⁹³ between two competing interests. Drawing the line is not a matter of the substance (quality) but exactly the procedure (quantity), where no one’s right is recognized to the full extent but depends upon fairly struck balance.¹⁹⁴ To relate it to the Member States – Community relation, under the balancing test the task of the ECJ is how much of the particular right a Member State may grant to be still in compliance with the duties arising from the Treaty.¹⁹⁵ As it is apparent from the cases above once it is front line of the army, next it is demonstration that could not be achieved by measures less restrictive (meaning that all other measures would cause greater harm to Community trade), and then the need of jobs to be jeopardized and finally it is games involving simulation of acts of homicide. From these examples, we cannot, however, make any abstract conclusion about the quality of the rights in question. In other words, we cannot precisely define their meaning, the only thing we may is to enumerate situations in which the particular right does not conflict with the Community law and in which it does.

Further, the method deployed by the ECJ when deciding about competing national and Community interest rests in at first establishment whether the national

¹⁹³ KOSKENNIEMI, Martti. The Effect of Rights on Political Culture. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 99-116, at p. 102.

¹⁹⁴ See KENNEDY, Duncan. The Critique of Rights in Critical Legal Studies. In *Left Legalism/Left Critique*. Eds. Brown, Wendy & Halley, Janet. Duke University Press, Durham & London, 2002, pp. 178-228, at p. 201.

¹⁹⁵ See AVBELJ, Matej. European Court of Justice and the Question of Value Choices: Fundamental human rights as an exception to the freedom of movement of goods *Jean Monnet Working Paper 06/04*, at p. 34.

measure constitutes a restriction to the fundamental economic freedom of the Community. When it is set that, indeed, the national action constitutes a restriction the ECJ turns to its possible justification on grounds listed in the Treaty (possibly on the fundamental rights as a sole ground for the restriction). That implies that in view of the ECJ human rights relied on by a Member State when it is derogating from a fundamental economic freedom basically forms a breach of the Treaty.¹⁹⁶ They are perceived as something wrong from the point of view of the Community legal order, something that must be justified. However, from the national perspective it may be the Community measure that restricts the human right it seeks to protect. Thus the fact which institution is authorized to carry out the test is crucial for determination of the meaning of human rights. Herein the question of power comes to play for it is the particular institutional and socio-economic context within which the institution operates that delimits meaning of human rights. It therefore depends solely upon the institution in which language it addresses the conflict. Whereas it would be in terms of human rights on a Member State level it would be in terms of fundamental freedoms on the Community level. Therefore it is the power that shapes human rights adjudication. The power rests first in the way of addressing the conflict and secondly in translation of the universal terms of human rights into particular context.¹⁹⁷ The substance of protection goes aside and the power over jurisdiction arises in words of Advocate General to *Bostock* “[t]he issue is of fundamental significance because it is determinative for the division of powers between the Court of Justice and national courts as regards the protection of basic rights and the question is a difficult one to answer.”¹⁹⁸ The ECJ then in *Bosman* held that, “the principle of subsidiarity, as interpreted by the German Government to the effect that intervention by public authorities, and particularly Community authorities, in the area in question must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the

¹⁹⁶ As it is expressed in opinion of the Advocate General Jacobs to the case 112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] E.C.R. I-05659, at para. 85.

¹⁹⁷ KOSKENNIEMI, Martti. The Effect of Rights on Political Culture. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 99-116, at p. 114

¹⁹⁸ Opinion of Advocate General Gulmann to case 2/92, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*. [1992] E.C.R. I-00955, at para. 972

Treaty.”¹⁹⁹ In this respect we may mention *Omega* or *Grogan* (with respect to the opinion of the Advocate General), where leaving a Member State with margins of appreciation led exactly to restriction of rights conferred on individuals by the Treaty. It shall be also remarked that when the ECJ is giving all the interpretation needed for domestic courts to apply the case put before the ECJ within preliminary ruling procedure, the ECJ is not hesitant to tie the national court with very concrete legal assessment of the case. Instead of leaving the national court to assess the case in light of the ECJ’s findings it sometimes (*Viking*, *Laval*) leave the national courts only to translate its judgements. Together with ruling on purely national matters this stance of the ECJ may cause decline in justifiability of its decisions.

The above mentioned context in which human rights restrict the Treaty freedoms radically differs from the traditional one of human rights being the standard, the deviation of which must be justified by the proportionality principle. It is the notion of right that overrides interests and therefore the interest must be in compliance with it. In *Schmidberger*, *Viking* and *Laval* it is the fundamental right that is reviewed as to the compliance with Community policy. Moreover, viewing fundamental rights as justification for derogation shifts the position of those who claim protection by human rights. Human rights asserted by individuals as trump cards presuppose the other party to bring a justification for its action. Now the burden of proof shifts and the party asserting protection of human rights must prove justification for such protection. Even though neither the fundamental economic freedoms nor fundamental rights are absolute, it is always fundamental right that must satisfy the condition of proportionality. In this respect voices calling for hierarchical order with fundamental rights being at the top of the hierarchy have arisen. However the new hierarchical arrangement would not change much of the pattern. It is because it is always reduction of a right to an interest and then balancing of two interests that determines the outcome, not the legal argument stemming from legal force of the respective provisions. Fundamental rights always come with an exception and the result of bringing fundamental rights up to the peak of the hierarchy would only mean extension of restrictions to fundamental rights. The form would change but the substance would remain the same.

¹⁹⁹ 415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] E.C.R. I-04921, at para 81.

6.2.FUNDAMENTAL RIGHTS APPLIED TO MEMBER STATES' ACTIONS WHEN THEY DEROGATE FROM THE TREATY

The series of cases begin with *Rutili*.²⁰⁰ The case concerned measure prohibiting Mr. Rutili (Italian national) from residence in certain departments of France. The ECJ had to resolve whether such measure prohibiting Mr. Rutili from a residence in certain departments of a Member State (as a violation of the freedom of movement of workers) may be justified by a public policy exception. Admitting that it was primarily a Member State that determined the scope of a public policy justification the ECJ then followed that such justification had to be interpreted strictly and could not be determined unilaterally by a Member State without control of Community institutions. At the end the ECJ added that, “no restrictions in the interests of national security or public safety shall be placed on the rights [meaning those enshrined in Articles 8, 9, 10 and 11 of the Convention] (...) other than such as are necessary for the protection of those interests “in a democratic society”.”²⁰¹ The ECJ’s mention about fundamental rights without them being even applied provoked a critique of that fundamental rights only justify the ECJ’s interpretation of Community instruments.²⁰² Later the Advocate General Trabucchi in *Watson and Bellman*²⁰³ followed the ECJ’s considerations in *Rutili* stating that the ECJ should review a Member State measure “at least to the extent to which the fundamental right alleged to have been infringed may involve the protection of an economic right which is among the specific objects of the Treaty.”²⁰⁴ The trigger for fundamental rights review is pursuant to view of the Advocate General protection of the economic right of the Treaty. The ECJ, however, did not identified with the opinion and within its decision it did not raise the issue of fundamental rights. Another opportunity to review a Member State measure from fundamental rights point that the ECJ did not avail came up in *Cinetheque*.²⁰⁵ The case regarded dispute about validity of an initial period of one year under which any cinematographic work could not be exploited in

²⁰⁰ Case 36/75, *Roland Rutili v Ministre de l'intérieur* [1975] E.C.R. 01219.

²⁰¹ *Ibid* at para. 32.

²⁰² See COPPEL, Jason. and O'NEILL, Aidan. The European Court of Justice: taking rights seriously?. *Legal Studies*. 1992. 12: 227–239, at 674. HELISKOSKI, Joni. Fundamental Rights Versus Economic Freedoms in the European Union: Which Paradigm. In *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*. (Eds.) PETMAN, Jarna, KLABBERS, Jan. 531p. Boston: Martinus Nijhoff Publishers, 2003, at p. 424.

²⁰³ Case 118/75, *Lynne Watson and Alessandro Belmann* [1976] E.C.R. 01185.

²⁰⁴ *Ibid* at para. 4.

²⁰⁵ Joint cases 60 and 61/84, *Cinéthèque SA and others v Fédération nationale des cinémas français* [1985] E.C.R. 02605.

form of recordings intended to sale. Even though the ECJ considered that the measure put barriers on intra-Community trade and that it should be assessed by principle of necessity it nevertheless finally ascertained that even though it was true that it was the duty of the ECJ to ensure observance of “*fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.*”²⁰⁶ Compared with the ECJ’s willingness to review a Member State measure against fundamental rights in the previous decision *Rutili* the ECJ clearly took a step back.²⁰⁷

The ECJ admitted for the first time that a Member State measure might be reviewed as to the compliance with fundamental rights in *ERT*.²⁰⁸ The ECJ held that generally it had no power to review national measures outside of the Community law with fundamental rights, however, once the measure fell within the scope of the Community law the ECJ had to assess the measure from fundamental rights view and “*it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures.*”²⁰⁹ The yardstick whether a measure falls within ambit of the Community law or not seems, in view of the ECJ, to be a situation when a Member State derogates from a common market freedom.²¹⁰ In opinion of the Advocate General to *Grogan* fundamental rights review should be widened to all situation, where a national rule involved “*has effects in an area covered by Community law (...) and which, in order to be permissible, must be able to be justified under Community law, then the appraisal of that national rule no longer falls within the exclusive jurisdiction of the national legislature.*”²¹¹ An area covered by the Community law is broader than an area of derogations from the Community law. Even though the ECJ finally dismissed its jurisdiction for too tenuous link of the national measure with Community law, the

²⁰⁶ Ibid at para. 22.

²⁰⁷ For the critique see. HELISKOSKI, Joni. Fundamental Rights Versus Economic Freedoms in the European Union: Which Paradigm. In *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*. (Eds.) PETMAN, Jarna, KLABBERS, Jan. 531p. Boston: Martinus Nijhoff Publishers, 2003.

²⁰⁸ Case 260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*. [1991] E.C.R. I-02925.

²⁰⁹ Ibid at para. 42.

²¹⁰ Public, policy, public security and public health restrictions to the Treaty provisions must therefore be appraised in light of the fundamental freedoms.

²¹¹ Opinion of Advocate General to case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. [1991] E.C.R. I-04685, at para 31.

opinion of the Advocate General nevertheless foreshadowed future decisions of the ECJ, where it has not been hesitant to apply fundamental rights standard to situations that fall neither to the *Wachauf* nor to the *ERT* line.

In *Konstantinidis* the Advocate General Jacobs confirmed the ECJ's approach established in *ERT* and repeated that national rules could fall within the exceptions to the fundamental freedoms of the Treaty only if they were in compliance with fundamental rights.²¹² It followed that would the treatment of Mr. Konstantinidis by German authorities constitute discrimination prohibited by the Treaty then "*there can be no question of its being justified on grounds of public policy under Article 56(1) if it infringes his fundamental rights.*"²¹³ In view of the Advocate General the trigger for fundamental rights review is not the Member State's derogation from the Treaty but already an exercise of freedom of movement. Further, opinion of the Advocate General Jacobs illustrates the normative hierarchy of legal rules within the Community legal order with fundamental rights being at the peak of the normative hierarchy,²¹⁴ the use of which moreover seem not to be conditioned by any other ground (such as necessity of a derogation).²¹⁵ Such reasoning goes against the one used e.g. in *Familiapress*, where the ECJ first assessed justification of a Member State's measure with the Treaty provisions and only then, even though that a measure might be justified, reviewed the measure from fundamental rights point. In reasoning of the Advocate General Jacobs it would be on the other hand impossible that a national measure would be perfectly in compliance with the Treaty but would contradict fundamental rights.

From reasoning of the cases illustrated above it is apparent that the fundamental rights review of a Member State measure requires some connection with the Community law. For purposes of whether any particular situation falls within the ambit of the Community law, the ECJ has developed the test of sufficiently strong link. That means that the ECJ will review action of a Member State from the fundamental rights view only if it has sufficiently strong link with the Community law. However, legal

²¹² Opinion of Advocate General Jacobs to the case 168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*. [1993] E.C.R. I-01191, at para. 43.

²¹³ *Ibid* at para. 44.

²¹⁴ This led some authors to criticize the ECJ for one hand upholding the importance of fundamental rights in the *ERT* type of cases and on the other hand subjecting them to Community economic freedoms in *Wachauf*. See: COPPEL, Jason. and O'NEILL, Aidan. *The European Court of Justice: taking rights seriously?.* *Legal Studies*. 1992. 12: 227–239, at 684.

²¹⁵ For detail analysis see BINDER, Darcy, S. *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Deveelopments and Future Possibilites in Expanding Fundamental Rights Review to Member State Action.* *Jean Monnet Working Paper 4/95.* <http://centers.law.nyu.edu/jeanmonnet/archive/papers/95/9504ind.html>.

concept of the strong link that would establish jurisdiction of the ECJ is susceptible to ideological influence in the same way as the legal concept of proportionality. In *Grogan* the Advocate General came into a conclusion that the ECJ would have jurisdiction over the case. On the other hand the ECJ pointed out that the link between students' activities in question and medical termination of pregnancies carried out in a different Member State was too tenuous to establish the ECJ's jurisdiction. The ECJ did not provide us with any legal argument that would explain its conclusion. Similarly as in the case of proportionality there does not exist any legal rule that would guide the ECJ whether the link is already sufficiently strong or rather too tenuous. It is obvious (again similarly as within the proportionality test) that the more politically delicate the issue is the alluring for the ECJ it may be to escape it through the doctrine of sufficient link. Having in mind that the test of sufficiently strong link is of such indeterminacy that leaves open doors for policy and ideological influence it is only the ECJ that defines when its jurisdiction is established. Furthermore, by developing sufficient link for a case to come under the Community law it cannot be predicted with sufficient certainty which cases fall within the scope of the Community law and which not. The situation in *Kremzow* decision concerned Austrian national who was sentenced to prison contrary to principles of the ECtHR. In the following proceedings before national courts a question of whether the national courts are under the Community law bound by the decision of the ECtHR came at stake. The ECJ held that, "*whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, the Court has held that a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions.*"²¹⁶ On the other hand the ECJ did not hesitate to establish its jurisdiction in cases where a connection with the Community law was at least of the same weakness.²¹⁷ The way in which "*sufficient link*" is used determines, which situations will be described in fundamental rights language.

The ECJ pointed out already in *Cinetheque* or *Demirel*²¹⁸ that where a national measure lies outside the Community law it has no power to review such measure. In this

²¹⁶ Case 299/95, *Friedrich Kremzow v Republik Österreich* [1997] E.C.R. I-02629.

²¹⁷ Case 117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] E.C.R. I-00541. Case 423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] E.C.R. I-03585. Case 267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] E.C.R. I-1757.

²¹⁸ Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987], E.C.R. 03719.

respect the ECJ in *Carpenter*²¹⁹ extended the view of what may be regarded as falling within the Community law. The case concerned freedom to provide services that Mr. Carpenter claimed to be violated by a leave order addressed to his wife who exceeded the time limit allowing her to stay in Britain. Mr. Carpenter argued that he was required to travel for purpose of providing services in other Member States. His wife by way of upbringing their children claimed to have a considerable part of success on her husband's business. Therefore the leave order was in the eyes of Mr. Carpenter capable to infringe his freedom to provide services. When it came to a question of fundamental rights, the ECJ held that, "*the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty.*"²²⁰ Protection of fundamental rights is seen as a precondition for proper exercise of fundamental freedoms under the Treaty and a Member State may in this sense invoke public interest exception in order to derogate from freedom to provide services only if it fulfils fundamental rights requirements. The ECJ applied the *ERT* reasoning in a case where the link with Community law certainly was not based upon derogation from the Treaty. Cases where the ECJ overstepped the link with Community law and ruled on situations that did not exceeded national borders include *Zambrano*,²²¹ *Akrich*,²²² *K.B.*, *Richards* and *Maruko*. The ECJ overstepped its own doctrine of review of the Member States measures when they either incorporate the Community law or derogate from it. All the cases concerned purely national situation, which nevertheless in *K.B.* did not prevent the ECJ from claiming its jurisdiction stating that, "*although it (the respective national measure) does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right.*"²²³ Such approach was not left unnoticed leaving criticism towards extending of the ECJ's jurisdiction over policies that are purely national. Concerns about such judicial activism relate mainly to disturbance of constitutional equilibrium both jurisdictional and substantive between the Community and the Member States.²²⁴ Human rights serve as

²¹⁹ Case 60/00 *Mary Carpenter v Secretary of State for the Home Department*. [2002], E.C.R. I-06279.

²²⁰ *Ibid* at para. 38.

²²¹ Case 34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*. [2011] E.C.R. I-01177.

²²² Case 109/01, *Secretary of State for the Home Department v Hacene Akrich*. [2003] E.C.R. I-09607.

²²³ Case 117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] E.C.R. I-00541, at para 30.

²²⁴ CARTABIA, Marta. Europe and rights: taking dialogue seriously. *E.C.L. Review*. 2009, 5(1), pp. 5-31.

justification for judicial decisions and extension of jurisdiction just for the capacity of human rights language translating particular claims in universal language.

All the above mentioned decisions evoked discussion about overstepping allowed limits of incorporation. It is asserted that derogation itself should by definition bring the matter outside the scope of Community law and therefore human rights review should be left solely upon the Member States.²²⁵ Some authors²²⁶ see the limits of the ECJ's jurisdiction further away, when the situation has a purely domestic character such as in *K.B.* However concern remains the same. The incorporation of review of purely domestic situation through lenses of fundamental rights may bring constitutional conflict among the Member States and homogenisation of European constitutional richness into a constitutional monologue.²²⁷ Human rights language is seized in concerns about constitutional hierarchies. Pursuant to the *ERT* line of cases, scope of application of fundamental freedoms was dependent upon scope of application of the Community law. However, in the line of *Carpenter* and following decisions the scope of application of fundamental rights exceeds the scope of application of the Community law. Fundamental rights may therefore be viewed as a tool for extension of the ECJ's competences and its jurisdiction over matters that are purely internal. It may be concerns about unit application of the Community law that has lead to extension of jurisdiction of the ECJ. On the other hand the search for unity intervenes into national identities.

6.3.CONCLUSION

In this respect, when balancing national constitutional values with common market values the ECJ has been accused of political bias in favour of Community policies²²⁸ and criticized for too modest application of fundamental rights regarding Community actions enhancing a “*hands off approach in matters of economic regulation*,”²²⁹ whereas the ECJ was not always that keen to follow its hands off

²²⁵See JACOBS, Francis G. Human rights in the European Union: the role of the Court of Justice. *E.L. Rev.* 2001, 26(4), pp. 331-341.

²²⁶ CARTABIA, Marta. Europe and rights: taking dialogue seriously. *E.C.L. Review.* 2009, 5(1), pp. 5-31.

²²⁷ *Ibid* at. 12.

²²⁸ „It has been repeatedly highlighted that the Court of Justice has exploited the rhetoric of human rights aiming not so much at the protection of some basic values in themselves, as ether at strenghtening economic integration.“ CARTABIA, Marta. Europe and rights: taking dialogue seriously. *E.C.L. Review.* 2009, 5(1), pp. 5-31, at p. 9.

²²⁹ BOGDANDY, Armin, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common market Law Review*, Issue 6, pp. 1307–1338 DE

approach when it came to a question of reviewing Member State's actions.²³⁰ Some authors argue that the step regarding review of the Member State's actions was for the ECJ inevitable as the different standards of human rights would impair the unity of the Community law.²³¹ Fundamental rights in such view serve for ensuring of unit application of the Community law and they have no more than instrumental value.

In cases, where a Member State invokes human rights as a justification of derogation from the Treaty, the ECJ has to face the direct conflict of values: national constitutional ones and the Community ones since national values of human rights hinder the intra Community trade. Even though human rights express core ethical value judgements the ECJ treat them equally as other interests of the Community and moreover it perceives them as an exception rather than modification.²³² Human rights thus lose their specificity compared to the second strand, where they are deemed to be at the top of normative hierarchy.

On the other hand when it comes to the second strand of the decisions, where the Community uses fundamental rights to review Member State's derogation from the Treaty, fundamental rights seem to be an "*additional hurdle for the Member State in trying to justify a measure which is, at the same time, a derogation from one of the common market freedoms.*"²³³ Firstly, only when sufficiently strong link with Community law is established, the ECJ reviews fundamental rights. Application of fundamental rights had therefore been until recently dependent upon fundamental economic freedoms.²³⁴ The Member States must not only comply with national standards of protection of human rights but with the Community standards as well and only if they comply with the Community standard the particular action may be upheld. This led some authors to conclusion that protection of human rights involves also "*the*

WITTE, Bruno. The Past and Future Role of the European Court of Justice in the Protection of Human Rights. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 859-897, at p. 880.

²³⁰ BOGDANDY, Armin, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review*, Issue 6, pp. 1307-1338, at 1324. The critique points to that the ECJ does not effectively protect individual since it does not take into account another alternatives that are less detrimental for the individual. See *Ibid* at pp. 1320-1321.

²³¹ See SHIEK, Dagmar. *ECJ Fundamental Rights Jurisprudence between Member States' prerogatives and citizens' autonomy*. <http://ssrn.com/abstract=1877326>, at p. 6.

²³² See PHELAN, Rossa, D. Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union. 55 *Mod. L. Rev.* 658. 1992, at p. 681.

²³³ DE WITTE, Bruno. The Past and Future Role of the European Court of Justice in the Protection of Human Rights. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 859-897, at p. 872.

²³⁴ However, in this respect the ECJ in *K.B., Richards* and *Maruko*, even though criticized for those decisions from many angles, brought a strand of light. It decided solely upon human rights basis that seem not to be conditional upon any fundamental freedom prerequisite.

protection of one or more of the fundamental economic freedoms.”²³⁵ The language of fundamental economic freedoms resonates within the language of fundamental rights since it is the language through which the ECJ establishes its jurisdiction. The ECJ does not decide the conflict of fundamental rights and fundamental freedoms, as in the first strand; rather the other way around, both are standing at the same side being imposed against a Member State’s policy. In this respect the ECJ is talking in the language of fundamental freedoms that is only supported by the language of fundamental rights.

Both of the strands of review touch issues of national identities. Within application of fundamental rights the ECJ on one hand gives the Member States chance to make their own ethical value judgements (when it decides to leave them margins of appreciation) and on the other hand by a strict application of fundamental rights it diminishes differences between national conceptions of common good. The diversity of values on one hand contravenes with homogenization of values on the other hand. These two radically different perceptions constantly project within case law of the ECJ. The question is not only about jurisdiction but also about the substance of protection of human rights where national identities would remain alongside the Community one. In words of Weiler it is about finding fundamental boundaries, where “*autonomy and self-determination of communities*”²³⁶ would be preserved. Cartabia argues that application of fundamental freedoms beyond the limit of incorporation risks sacrificing national values in name of hegemonic strategy of the Community.²³⁷ We must realize that even though the language of human rights speaks of universal values it nevertheless endorses only a particular interpretation subjected to the institutional bias. Imposing the particular positions about human rights developed by the ECJ upon the Member States may evoke the conflict of constitutional balance. It is a search for hegemony (even though it may be driven by concerns about unity of and effective functioning of the common market) that leads to imposition of Community human rights standard upon the Member States. But as we may detect from the debates such imposition raises concerns about legitimacy of the Community law. The debate about imposition of human rights standard of protection thus often leaves the substance behind, in words of Bogdandy “*determination*

²³⁵ HELISKOSKI, Joni. Fundamental Rights Versus Economic Freedoms in the European Union: Which Paradigm. In *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*. (Eds.) PETMAN, Jarna, KLABBERS, Jan. 531p. Boston: Martinus Nijhoff Publishers, 2003, at p. 429.

²³⁶ WEILER, Joseph H.H. *The constitution of Europe: "Do the new clothes have an Emperor?" and other essays on European integration*. Cambridge: Cambridge University Press, 1999, 364 pp. ISBN 0-521-58567-8, at p.104.

²³⁷ CARTABIA, Marta. Europe and rights: taking dialogue seriously. *E.C.L. Review*. 2009, 5(1), pp. 5-31, at p. 19.

of the adequate level of protection is to a lesser extent methodological, to a larger extent a division of power question.”²³⁸ Human rights should be rather subjected to a process of political deliberation, within which they would be subject to dialogue about the political priorities, dialogue that would hear all the parties.

7. HUMAN RIGHTS, INTEGRATION AND JUSTIFICATION

It has been claimed that the language of human rights has a strong force of integration and justification.²³⁹ Such presupposition is based upon the strong term of “right” as an uncompromising truth, which lends the language of human rights special character. It is the apolitical absoluteness, within which human rights are deemed to exist, that makes human rights’ language strong and powerful. Indeed, to translate an interest into term of human right makes the interest out of the political contestation and rather a sacred notion. The term of human rights as such seems to non-negotiable, giving the human rights discourse absolute nature. Nevertheless, as Martti Koskeniemi points out, the absolute nature of the discourse does not stem from rights itself, it is rather the liberal theory justification of rights within which such absolute discourse is possible.²⁴⁰ That the uncompromising nature is untenable within rights application is obvious. The ECJ leaves the term “right” aside and further considers only values behind the rights, as may be well shown on the Opinion of Mr. Van Gerven in *Grogan*. Assessing the necessity of the restriction in a democratic society he concluded that the “*relevant national authorities are entitled to consider that a prohibition on the provision of information by way of assistance is necessary in order to effectuate the value-judgment contained in the Constitution with regard to the need to protect unborn life.*”²⁴¹ Rights may be applied or not applied, but they cannot be reconciled. Therefore the critique of rights contests the power of human rights language that they are claimed to have by the liberal discourse of human rights.

²³⁸ BOGDANDY, Armin, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common market Law Review*, Issue 6, pp. 1307–1338, at p. 1324.

²³⁹ DE BÚRCA, Gráinne. *The Language of Rights and European Integration*. http://aei.pitt.edu/6920/1/de_b%C3%BArca_gr%C3%A1inne.pdf. See also WILLIAMS, Andrew. *EU human rights policies: a study in irony*. Oxford: Oxford University Press, 2004, xix, 219 s. ISBN 0199268967.

²⁴⁰ See KOSKENIEMI, Martti. The Effect of Rights on Political Culture. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, pp. 99-116, at p. 114.

²⁴¹ Opinion of the Advocate General Van Gerven to Case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. [1991] E.C.R. I-04685, at, p. I – 4729.

7.1. HUMAN RIGHTS SERVING AS A LEGITIMATION

It has been already pointed out in the previous sections that the human rights jurisprudence of the ECJ did not fall out of the blue sky and that the threats to uniformity of European law posed by domestic constitutional courts, growing international recognition of human rights as well as a spill over effect of European policies into new areas touching national sovereignty issues might have been a trigger for the consciousness of the ECJ about necessity of human rights protection within the Community legal order. It is asserted that development of human rights within the Community legal order is “*one of the greatest contributions that the Court has made to democratic legitimacy in the Community.*”²⁴² It is the liberal idea of law restraining the power and human rights restraining the power of European institution standing behind invention of human rights into the general principles of law. Translation of human rights, as a religion of modernity, into law – a “*surface over which political opponents engage in hegemonic practices,*”²⁴³ may be deemed as to strengthen position of the Community legal order over the national ones. It is because rather than speaking law to power the law may well serve as a proper language of power.²⁴⁴ The case law of the ECJ shows that the ECJ treats fundamental rights far from being absolute. It shall be also noticed that rather than collision of two fundamental rights the conflict is largely between fundamental right and a Community’s or a Member State’s policy. Even though the ECJ deploys language of fundamental rights, the reasoning of its judgements pays much more attention to the possible justification of exceptions to rights rather than to rights itself. The ECJ may still operate within the language of fundamental rights even though it endorses economic goals through the notions of proportionality and necessity. The result is that the European Union satisfies the requirements on protection of human rights without European policies being under a constant of being illegitimate. The same goes with extension of jurisdiction of the ECJ into pure domestic matters through the human rights language. It is the universal nature that we tend to prescribe to human rights that justifies extension of their application into national legal systems. It would be unthinkable to extend application of European law into the domestic legal

²⁴² MANCINI, G. Federico , KEELING, T. David. *Democracy and the European Court of Justice.* , The Modern Law Review, 1994, Vol. 57(2), at p. 187.

²⁴³ KOSKENNIEMI, Martti. International law and hegemony: a reconfiguration. <http://www.helsinki.fi/eci/Publications/Koskenniemi/MHegemony.pdf>, at p. 4.

²⁴⁴ See KENNEDY, David. Speaking law to power: international law and foreign policy closing remarks.(2005) 23 *Wis. Int'l L.J.* 173.

orders simply by assertion that it is due to the nature of the law by being European. European law has its clear borders which are allowed to be overstepped in name of human rights as their universal nature transgresses the jurisdiction.

The invention of fundamental rights law into the European law speaks about the power, about strengthening of positions of superiority. The universality of the language that has been proposed as a necessary consequence of the moral justification of human rights, lying in each individual as a human being has been used within the European discourse as a language of “*hegemonic strategy*”.²⁴⁵ In this sense the language of human rights is of nothing but instrumental use. Human rights function within the policy, which is not in itself a bad thing; they are part of the policy. However, the good about human rights strongly depends upon how the politics are being applied.²⁴⁶ The language of human rights is used in a bad faith²⁴⁷ when on one hand we use the positive attributes connected to them by the liberal theory (such as universality) and on the other hand we treat them like policy pretending that they are absolute. In such a use the language loses its exclusivity of being the only language capable of addressing claims of oppression.

7.2.HUMAN RIGHTS AS AN INTEGRATING FORCE

It is generally deemed that the integration was buttressed when the ECJ constituted fundamental rights being inspired by common constitutional traditions of the Member States. Acknowledging also international treaties as a source of inspiration the ECJ has embedded fundamental rights jurisprudence into international context legitimizing thus European legal order not only internally but externally as well. The universal terms of human rights may serve well for the purpose of integration for their perception as bearing a per se value of protection of an individual. For the ECJ, when finding a fundamental right, it has been quite easy to constitute it as a general principle of the Community law. There were no doubts that the right to property or inviolability of home shall be protected. We have also seen that when constituting a new fundamental right into the Community legal order the ECJ rarely gave a detailed explanation and justification for such decision. It is precisely because of that the value

²⁴⁵ KOSKENNIEMI, Martti. International law and hegemony: a reconfiguration. <http://www.helsinki.fi/eci/Publications/Koskenniemi/MHegemony.pdf>, at p. 6.

²⁴⁶ SANDBERG, P. Leino. Particularity as Universality: the politics of human rights in the European Union. *The Erik Castrén Institute Research Reports* 15/2005. ISBN 952-10-2388-0, at p. 54.

²⁴⁷ See KENNEDY, Duncan. *A critique of adjudication: fin de siècle*. Cambridge, Mass.: Harvard University Press, 1997, 424 pp. ISBN 0-674-17759-2.

of human rights rests not in rights themselves but in the values we prescribe to them. Values are the basis of rights discourse²⁴⁸ and it is often hard to find common values under the general terms of human rights. One of the ways of constructing a new right may rest in generalization of our interests. The more general the terms of the right are, the more acceptable the right is within particular legal orders. The agreement on general terms of rights, as we may detect in jurisprudence of the ECJ, is untenable when it comes to their application, the stage where values come into play again. There appear to be contradictions in the practice of the ECJ. On one hand the ECJ, when constituting fundamental rights, seems to be satisfied with the value of protection of human rights per se. When we look at the practice of the ECJ it has no trouble with recognizing human rights even though it is not ready to afford them the real protection whatever the reasons may be. That it is the per se value of protection of human rights, that legitimize the Community legal order, may be identified in De Búrca's statement that, "*the very use of the language of rights denotes a certain moral content to Community laws and policies*"²⁴⁹ endorsing status of the Community both within national legal orders and internationally as well. Therefore, it may be argued, that the ECJ does not pay much attention to the proper reasoning of establishing new rights within the Community legal order. The integration is based upon legal integration in the practice of the ECJ through general terms of law.²⁵⁰

The legitimacy power of human rights language that the ECJ availed to strengthen the position of the Community law at the outset of the fundamental rights jurisprudence has turned against the ECJ at the moment when the ECJ overstepped the boundaries and applied fundamental rights standards vis-a-vis Member States' actions. The language met with the principle of subsidiarity and fundamental rights jurisprudence has become to be criticized for that it overstepped the boundary of Community law interfering with primary domestic situations, where there are no imprints of Community dimension that would justify application of the Community law including fundamental rights. If reading of fundamental rights into the Community legal order is "*one of the greatest contributions that the Court has made to democratic*

²⁴⁸ SANDBERG, P. Leino "A European Approach to Human Rights? Universalism Explored", 71(4) *Nordic Journal of International Law* (2002), 455-495, at p. 457.

²⁴⁹See DE BÚRCA, Gráinne. *The Language of Rights and European Integration*. http://aei.pitt.edu/6920/1/de_b%C3%BArca_gr%C3%A1inne.pdf, at 4.

²⁵⁰ SANDBERG, P. Leino "A European Approach to Human Rights? Universalism Explored", 71(4) *Nordic Journal of International Law* (2002), 455-495, at p. 457.

legitimacy in the Community”²⁵¹ then the application of fundamental rights coupled with extension of the ECJ’s jurisdiction over the national measures has certainly undermined the legitimacy of the Community being subjected to critique of using the fundamental rights rhetoric to expand its jurisdiction beyond the reach of European legal order.²⁵² The fundamental rights language has in this respect also a centralising effect when the conflicts, in compliance with the requirement of uniform application of Community law, are more gradually solved on the level of European Union by the ECJ.²⁵³

The case law of the ECJ has shown that when the ECJ had to deal with substantive review of human rights it was in some cases hard to reach consensus and the unity turned out to be only ideal state of affairs and that behind the generally formulated rights there are hidden unreconcilable divergences. Pursuant to Weilers’ words “*human rights constitute, thus, both a source of, and index for, cross-national differentiation and not only cross-national assimilation.*”²⁵⁴ Also, when the Member States assert human rights to derogate from Treaty provisions, human rights serve instead of a unifying force rather as a justification for preservation of national policies that diverge from the Community standard.²⁵⁵ The quest for unity is lost. On one hand constitutional traditions are a source of inspiration for the fundamental rights jurisprudence of the ECJ; on the other hand they seem to be an obstacle in finding common standard of protection. For the reason that, as well as human rights do not bear any independent meaning from the context, the language of human rights either does not have any intrinsic set of values,²⁵⁶ the language itself cannot lead to moral integration of the European Union.²⁵⁷ Therefore, the invention of fundamental rights into the European Union and even the following adjudication on human rights may not be sufficient for the legitimacy of the European Union without real values standing behind the language.

²⁵¹ MANCINI, G. Federico, KEELING, T. David. *Democracy and the European Court of Justice*. , The Modern Law Review, 1994, Vol. 57(2), at p. 187.

²⁵² See MICKLITZ, Hans. The ECJ between the individual citizen and member states: A plea for judge-made European law on remedies. *EUI working papers law 2011/15*, at p. 2.

²⁵³ See CARTABIA, Marta. Europe and rights: taking dialogue seriously. *E.C.L. Review*. 2009, 5(1), pp. 5-31, at P. 17.

²⁵⁴ WEILER, Joseph H.H. *The constitution of Europe: "Do the new clothes have an Emperor?" and other essays on European integration*. Cambridge: Cambridge University Press, 1999, 364 pp. ISBN 0-521-58567-8, at p.

²⁵⁵ See DOUGHLAS-SCOTT, Sionaidh. The European Union and Human Rights after the Treaty of Lisbon. *11 Hum. Rts. L. Rev.* 645. 2011, at p. 670.

²⁵⁶ See SANDBERG, P. Leino “A European Approach to Human Rights? Universalism Explored”, 71(4) *Nordic Journal of International Law* (2002), 455-495, at p. 489.

²⁵⁷ „*In a curious way, then, the concept of European integration is itself a paradox, suggesting as it does integration towards a vanishing point of disintegration, or complete assimilation. This then leads to the next question: is European integration the study of differentness or sameness?*“ WARD, Ian. In Search of a European Identity. (1994) *The Modern Law Review*, vol. 57, at p. 321.

Another issue arising from the value based human rights is that even though the ECJ draws from the constitutional traditions of the Member States it has not developed meaning of human rights that would prescribe to them European values. How then may the protection of fundamental rights be a tool for integration when we do not know any exact meaning of the fundamental rights within the European context? In *Omega* the ECJ had the opportunity to answer a question what was the meaning of human dignity in European context. Failure to avail such opportunity left us only with an empty phrases acknowledging importance of protection of human rights without any value. Human rights in such situations become again only mere rhetoric.

Since the ECJ has gradually reviewed Member States' action as to the compliance with fundamental rights, the use of human rights language has been more and more problematic. As described above, on one hand the language was asserted by national authorities to exclude application of the Community law and on the other hand it was used by the European Union enhancing the applicability of the Community law within the Member States. The legitimacy power as well as the integrating power of human rights language in such situations becomes to be only a wish. More importantly the language of human rights does not contribute to liberation but is used as a tool for achievement of other political goals. In that respect the language is not that powerful as the liberal theory assume to be, even though we use the alleged power to reach our goals. To base the legitimacy and integration of the European Union upon the force of the human rights language is a paradox in itself because the legal integration is not underpinned by integration of values.

8. CONCLUSION

Purpose of this thesis was to elaborate case law of the ECJ from a critical perspective. The case law I have elaborated does not represent a coherent set of cases. I have chosen the cases naturally, as it was appropriate to the particular sections of the thesis.

I must admit that at the outset of the writing I was afraid whether my intention will be possible to prove. The human rights case law of the ECJ has been elaborated from many angles producing different conclusions, but the critical perspective was missing. By writing "*critical*" I do not mean critical in a bad/good use of human rights but the perspective of critique of rights. This thesis therefore aimed to contribute to the

European human rights discourse by a new perspective that is at least within environment of my faculty isolated. One of the aims why I have chosen the theme was to bring a new perspective into the discourse about human rights developed at the faculty. I hope that such aim was fulfilled.

Further, as suggested in the introduction, I have pointed out situations, where human rights defer to politics undermining the current mainstream perception of human rights. Purpose of this thesis was not to come up with a project of reconstruction or a new ontological theory of human rights. I followed the view that human rights are valuable not for their absolute nature but because of that they react on particular situation of injustices. They are the most effective response to threats and various forms of oppression from the side of a state/supranational institution. Also behind the critique of human rights, as they appear in the case law of the ECJ, lies the argument of preservation of their performative power that penetrates throughout this thesis. The critique of rights is worthy of doing precisely because it points to the fact that by ascribing to human rights assumptions supported by the mainstream discourse their performative character fade away. I hope that it was apparent that I do not advocate any position that equals to nihilism or destruction. Rather the other way around. Showing that human rights are politics we do not end up on giving up on rights but we shall think about how human rights may be used within the political culture not as an empty language but valuable language. The first step seems to be for the political culture to stop to use the language in a bad faith, which means to stop speaking in a particular ideology exploiting the universal language of human rights.

Překlad vybraných tezí diplomové práce

4. PRAMENY ZÁKLADNÍCH LIDSKÝCH PRÁV EVROPSKÉ UNIE

Předpokladem liberálního lidsko-právního diskursu je, že lidská práva existují v podobě „vnitřních práv“ (ve formě zákona jako pozitivní právo) a „vnějších práv“ (jakožto důvod pro uzákonění) a v důsledku toho jazyk lidských práv funguje jakožto zprostředkovatel mezi objektivní pravdou/subjektivními hodnotami a právními argumenty (založenými na právních textech a zavedených formách právní argumentace)/hodnotovými argumenty (založenými na politických hodnotách dané společnosti).²⁵⁸ Uzákoněním lidských práv se, dle výše uvedených předpokladů, vnější perspektiva lidských práv (absolutní hodnotové východisko lidských práv) přeměňuje ve vnitřní perspektivu. Proces uzákonění se obvykle odehrává v rámci politických vyjednávání na půdě příslušného orgánu, který je nadán zákonodárnou pravomocí. Poté co jsou lidská práva uzákoněna, jsou předmětem obvyklé právní aplikace a argumentace v rámci mezí soudcovské aplikace práva.

Způsob jakým ESD proklamoval, že základní lidská práva tvoří součást komunitárního práva, se ve značné míře odchyluje od výše popsaného tradičního liberálního lidsko-právního modelu. ESD se vžil do role komunitárního zákonodárce a bez jakéhokoliv ustanovení o ochraně lidských práv v zakládacích smlouvách, byl schopen dovést existenci základních lidských práv v komunitárním právu. V rámci této kapitoly se proto budu zabývat procesem, v jehož rámci jsou základní lidská práva uznávána ESD, dále poté prameny základních lidských práv a vlastním rozsahem jejich ochrany. Hlavní tezí je, že v rámci „*field constitution*“ (procesu, v jehož rámci jsou určité aspekty reality charakterizovány v jazyku základních lidských práv) se rozdíl mezi fakty a hodnotami, právními a hodnotovými argumenty (na jejich oddělenosti stojí liberální diskurs) stírají a lidská práva ustupují politice, nikoli opačně (politika ustupuje lidskými právy) tak jak je předpokladem liberálního lidsko-právního diskursu.

²⁵⁸ Viz KENNEDY, Duncan. The Critique of Rights in Critical Legal Studies. In *Left Legalism/Left Critique*. Eds. Brown, Wendy & Halley, Janet. Duke University Press, Durham & London, 2002, str. 178-228, str. 187.

4.1. PROCES UZNÁNÍ ZÁKLADNÍCH LIDSKÝCH PRÁV

4.1.1. VNITŘNÍ PERSPEKTIVA ZÁKLADNÍCH LIDSKÝCH PRÁV

Základní lidská práva, do doby než vstoupila v platnost Lisabonská smlouva, existovala pouze v rámci judikatury ESD. ESD před tím, než uznal konkrétní základní lidské právo za součást komunitárního práva, čerpal inspiraci ze společných ústavních tradic členských států, jakož i z mezinárodních smluv na ochranu lidských práv, jejichž jsou členské státy signatáři. Nicméně jako pouhý zdroj inspirace, společné ústavní tradice ani mezinárodní smlouvy na ochranu lidských práv, nejsou pro ESD závazným zdrojem práva. Proces uznání základních lidských práv ESD je proto spíše záhadným procesem. Záhadným proto, že ESD pouze občas vysvětlil, jakým způsobem dovedl existenci konkrétního práva. V této souvislosti byl ESD kritizován za to, že doktrína základních lidských práv je v podstatě založena na mýtu.²⁵⁹

V případě *Hoechst*²⁶⁰ ESD rozhodoval o právu na nedotknutelnost obydlí v souvislosti s tím, jestli se ochrana vztahuje také na právnické osoby. Na začátku rozhodnutí ESD s naprostou samozřejmostí konstatoval existenci práva na nedotknutelnost obydlí v rámci komunitárního práva jakožto zásadu společnou ústavním tradicím členských států EU. Nicméně, ESD se ocitl v komplikacích ve chvíli, kdy přešel z obecného konstatování, že určité právo v zásadě na úrovni Unie existuje, ke konkrétnímu konstatování zda se vztahuje také na právnické osoby. Po provedení srovnávací analýzy ohledně úrovně ochrany právnických osob v jednotlivých členských státech, jejíž výsledky byly nejednoznačné, ESD rozhodl, že právo na nedotknutelnost obydlí se na právnické osoby nevztahuje v důsledku „*nezanedbatelných odlišností mezi právními řády členských států s ohledem na povahu a stupeň ochrany přiznané obchodním prostorám proti zásahu do nich orgány veřejné správy.*“²⁶¹ ESD tedy nejprve konstatoval, že komunitární právní řád poskytuje ochranu právu na nedotknutelnost obydlí. V dalším kroku, v rámci aplikace již existujícího práva, pak ESD posuzoval, zda se takto formulované právo vztahuje také na právnické osoby. Po provedení srovnávací analýzy ESD dospěl k závěru, že nikoli a na podporu svých

²⁵⁹ SMISMANS, Stijn. The European Union's Fundamental Rights Myth. *JCMS*. 2010 Volume 48. Number 1. str. 45–66, str. 49.

²⁶⁰ Rozhodnutí ESD 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, [1989] E.C.R. 02859. Viz také Rozhodnutí ESD 85/87, *Dow Benelux NV v Commission of the European Communities*. [1989] E.C.R. 03137

²⁶¹ Rozhodnutí ESD 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*. [1989] E.C.R. 02859, odst. 17.

tvrzení odkázal na právní argument ohledně nejednoznačnosti praxe mezi členskými státy.

Nicméně, jak je patrné z posudku generálního advokáta Mischa, v několika členských státech byla právnických osobám přiznána ochrana na základě práva na nedotknutelnost soukromí. ESD nezachází se společnými ústavními tradicemi jakožto jednotným zdrojem inspirace a neváhá prohlásit základním lidským právem Společenství takové právo, které vyplývá z ústavních tradic pouze části členských států.²⁶² Kdyby tomu tak nebylo, nemohl by ESD rozhodnout o existenci žádného základního lidského práva, jelikož ústavní tradice se liší stát od státu, právo od práva. Proto také podmínka obecného a jednotného ústavního konsensu nebrání ESD v uznání základních lidských práv. Společné ústavní tradice pouze některých členských států tedy mohly stejně dobře inspirovat ESD k tomu, aby zahrnul ochranu právnických osob pod právo na nedotknutelnost obydlí.

V této souvislosti ESD nemá žádné problémy uznat základní lidské právo v jeho zásadě. Je tomu tak právě v důsledku obecné terminologie lidských práv, která ESD umožňuje obejít rozpory vznikající ze skutečnosti, že lidská práva jsou produktem určitého historického a společenského kontextu a proto jsou hluboce zakořeněna v představách o převažujícím prospěchu, které se liší společnost od společnosti. Navíc, obecná formulace lidských práv nám umožňuje rozvinout různorodé techniky právní interpretace, které zakrývají politické argumenty a vzbuzují dojem, že ESD pouze aplikuje právo užívaje právních argumentů. Poté, co ESD posoudil společné ústavní tradice členských států, obrátil svou pozornost na Úmluvu, konkrétně pak na článek 8, dle kterého má každý právo na respektování svého soukromého, rodinného života, obydlí a korespondence. ESD z textu Úmluvy, poukazujíc na neexistující judikaturu Evropského soudu pro lidská práva, dovodil, že článek 8 se na právnické osoby nevztahuje. Ve skutečnosti Evropský soud pro lidská práva v rámci své rozhodovací praxe takovou ochranu dovodil.

Že je někdy složité řádně právně odůvodnit, proč by dané právo mělo být uznáno za základní lidské právo Společenství je patrné z posudku generálního advokáta Jacobse k případu *Konstantinidis*,²⁶³ který se týkal údajně porušeného práva na jméno a osobní

²⁶² Rozhodnutí 36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn. [2004] E.C.R. I-09609. Case 168/91, Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt. [1993] E.C.R. I-01191.

²⁶³ Rozhodnutí ESD 168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*. [1993] E.C.R. I-01191.

identitu pana Konstantinidise. Generální advokát se nejprve pozastavil nad tím, že Úmluva takové právo neobsahuje, jakož ani obecněji formulované právo na respektování lidské důstojnosti a morální integrity jednotlivce. Po takovém zjištění obrátil svou pozornost na společné ústavní tradice členských států, které kompenzovaly „opomenutí“²⁶⁴ Úmluvy. Je zajímavé, že generální advokát považoval nezahrnutí práva na jméno a osobní identitu do textu Úmluvy jako opomenutí, předpokládajíc, že takové právo má svůj původ ve vnějším trvalém a neměnném zdroji, z něhož je pouze přeloženo do pozitivního práva. Proto opominutí takového práva v textu Úmluvy nemá za následek to, že by neexistovalo: „*Myslím, že by nebylo správné říci, že způsob, kterým německé úřady zacházejí s panem Konstantinidisem, je v souladu s Evropskou úmluvou o lidských právech pouze proto, že Úmluva neobsahuje výslovné ustanovení uznávající právo jednotlivce na jméno nebo ochraňující jeho morální integritu. Na druhou stranu, myslím, že by mělo být možné, prostředky extenzivní argumentace článku 8 Úmluvy dospět k názoru, že Úmluva ve skutečnosti chrání právo jedince odporovat neoprávněnému zásahu do jeho jména.*“²⁶⁵ Z citace je zřejmé, že šlo spíše o vlastní přesvědčení generálního advokáta než právní analýzu, která by ho dovedla k závěru o existenci práva na ochranu jména jakožto základního lidského práva Společenství. Je zřejmé, jak snadno lze manipulovat lidsko-právními argumenty. Ve chvíli, kdy generální advokát nebyl schopen najít výslovně zakotvené právo na ochranu jména jednotlivce, přejmenoval ochranu jména jednotlivce do podoby obecněji formulovaného práva na respektování soukromí a rodinného života. „Extenzivní interpretace“ a neurčitost formulace práva na respektování soukromého a rodinného života umožnily generálnímu advokátovi podřadit daný zájem na ochraně jména pod takto obecně formulované právo. Právě široce a neurčitě formulovaná lidská práva umožňují použití nejrůznějších metod právní argumentace (jako extenzivní výklad, restriktivní výklad, teologický výklad), které podporují naši vlastní vizi ohledně toho, jaké aspekty společenské reality by měly být formulovány v jazyce lidských práv. Právní argumentace je v takových případech rukojmí politických argumentů, v jejichž prospěch manipulujeme s pomocí interpretace právními ustanoveními.²⁶⁶ Je to proto, že „*právo je jako jazyk, ohraničuje pouze jakým způsobem a formou lze předkládat argumenty, nikoli*

²⁶⁴ Posudek generálního advokáta k rozhodnutí ESD 168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*. [1993] E.C.R. I-01191, odst. 36.

²⁶⁵ Tamtéž v odst. 41.

²⁶⁶ Výše uvedenou argumentací lidská práva pokrývají stále nové nároky, které původně nebyly pod ochranu daného lidského práva zahrnuty. Navíc, jak může být demonstrováno na případě práva na život (Grogan), takto široce formulované právo může zahrnovat dva naprosto odlišné zájmy.

*přímo jaké argumenty by měly být předneseny.*²⁶⁷ Generální advokát mohl svou úvahu uzavřít, za použití restriktivní nebo doslovné interpretace, také zcela opačně, tedy, že právo na jméno není chráněno článkem 8 Úmluvy. Argumentace generálního advokáta neobsahuje žádný podrobný návod užití právní argumentace, který by ho dovedl k přesvědčení, že přestože Úmluva neobsahuje dané právo i přesto ho chrání. Pozorujeme-li způsoby, v rámci nichž právní argumenty odrážejí politické přesvědčení, liberální předpoklad oddělenosti právní a hodnotové argumentace je těžko obhajitelný. Z toho důvodu, i přesto, že se ESD snaží odůvodnit prosazení lidských práv do právního řádu Společenství referencemi na společné ústavní tradice, je taková argumentace podezřelá z toho, že odráží politické přesvědčení ESD který zachází se zdroji základních lidských práv tak aby podporovaly zájmy, za něž se staví. Je to proto především perspektiva samotného ESD, která hraje roli při definování toho, co ESD považuje za společné ústavní tradice. ESD odkazuje na společné ústavní tradice ex post, poté, co již má představu toho, jaká skutečnost by měla být definována v jazyku lidských práv

Stejně jako ve prospěch práva na ochranu jména mohl generální advokát použit restriktivní či doslovný výklad, který by podřazení daného zájmu pod právo na ochranu soukromí a rodinného života vyloučil. Liberální pojetí oddělenosti práva a politiky je neudržitelné ve výše popsaném případě, ze kterého je zřejmá závislost právní argumentace na politickém přesvědčení. Kdyby tomu tak nebylo a ústavní tradice by skutečně sloužily jako zdroj inspirace ESD by jim musel věnovat větší pozornost a v každém konkrétním případě řádně odůvodnit jak konkrétně se jimi nechal inspirovat.

4.1.2. VNĚJŠÍ PERSPEKTIVA LIDSKÝCH PRÁV

Může se zdát, že argumentace postavená na interpretaci právních předpisů nezpochybňuje pravdivost a absolutní povahu „vnějších perspektivy“ lidských práv. Liberální lidsko-právní diskurs předpokládá normativní soubor hodnot existujících vně právní regulace. Je založen na vizi „*obhajující prvořadost lidských bytostí jakožto osob, která je pokládána za základní hodnotu, nacházející vyjádření ve vytvoření, nejprve,*

²⁶⁷ BECKETT, A. Jason. Rebel Witout a Cause? Martti Koskenniemi and the Critical Legal Project. (2006) *German Law Journal*, vol. 07 no. 12, str. 1051.

*liberálního a poté demokratického státu ve službě občanů.*²⁶⁸ Konkrétně generální advokátka Stix-Hackel k případu Omega uvedla, že lidská důstojnost vyjadřuje „hodnotu přičítanou každé lidské bytosti na základě jeho či její humanity. Týká se respektu a ochrany a respektu podstaty lidské bytosti per se – tedy „podstaty“ lidstva.“²⁶⁹ Z liberálního pohledu by to byla vnitřní hodnota humanity, tak jak ji vystihuje výše uvedená citace, která je základem ústavně zakotveného práva na lidskou důstojnost. Nicméně, jak je zřejmé z argumentů Stéphanie Vauchez pojem lidská důstojnost nemá žádnou vnitřní hodnotu, o kterou se opírá liberální teorie, která by byla příčinou jejího pozitivního významu.²⁷⁰ Právní zformalizování práva na lidskou důstojnost po Druhé Světové válce nebylo důsledkem toho, že by v sobě pojem lidské důstojnosti od počátku obsahoval určité neměnné hodnoty. Naopak takové vyjádření lidské důstojnosti bylo společensky a historicky podmíněné.²⁷¹ Obdobně hodnota lidských práv obecně nespočívá ve vlastní hodnotě člověka jako takového, ale je odvislá od společenského kontextu. Takový postoj nepopírá hodnotu lidských práv. Lidská práva jsou hodnotově založená, ale hodnota, kterou jim připisujeme je závislá na konkrétní zkušenosti bezpráví. To je také důvod, proč například svoboda slova může mít v souvislosti s nenávisťnými projevy zcela jiný význam v Americe na rozdíl od Evropy. Proto také jazyk lidských práv může být hodnotný pouze v souvislosti s takovou zkušeností páchané nespravedlnosti.

Překlad historicky podmíněné zkušenosti do jazyku lidských práv s sebou nezbytně nese zobecnění takové zkušenosti. Ale jakmile je jednou taková zkušenost zobecněna v abstraktním jazyku lidských práv, po čase se v něm přestane odrážet a zbudou pouze abstraktní pojmy, jejichž význam může být jakýkoli.²⁷² V případě *Omega* bylo uznáno právo na lidskou důstojnost jako ospravedlnění pro omezení hry, jejímž předmětem bylo simulování zabíjení pomocí laserových paprsků (hra s podobným účelem jako paintball, či vybíjená, kterou považujeme za nevinnou hru). Na druhou

²⁶⁸ LEBEN, Charles, A European Approach to Human Rights? In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, str. 69-98, str. 73.

²⁶⁹ Posudek generální advokátky Stix-Hackel k rozhodnutí ESD 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECR I-09609, odst. 75.

²⁷⁰ VAUCHEZ, Stéphanie Hennette. When Ambivalent Principles Prevail. Leads for Explaining Western Legal Orders' Infatuation with Human Dignity Principle. *EUI Working Paper LAW*. 2007/37, str. 4.

²⁷¹ Tamtéž, str. 4.

²⁷² Jak může být demonstrováno na postoji ESLP ke svobodě slova spojenou s nenávisťnými projevy, když v raných rozhodnutích jako *Lehideoux, Isorny v. France*, kdy ESLP nepřiznal ochranu nenávisťným projevům, aby následně změnil svůj postoj v případě *Jersild v. Denmark*, kde rizika spojená s nenávisťnou řečí převážila ostatní úvahy.

stranu v případě *Netherlands v. Parliament and Council*,²⁷³ který se týkal sporu, zda právo na lidskou důstojnost zabraňuje patentovatelnosti izolovaných částí lidského těla, ESD nebyl přesvědčen, že právo na lidskou důstojnost by mohlo být dostatečně silným argumentem zabraňujícím dané komunitární legislativní úpravě. To, že v prvním případě byl argument lidskou důstojností dostatečně silný k ospravedlnění omezení komunitární politiky, kdežto v druhém případě nikoli, podporuje tvrzení, že lidská důstojnost nemá žádnou vnitřní hodnotu a že hodnota lidské důstojnosti je formulována skrze každý konkrétní případ jakožto výsledek střetu různých zájmů. Konkrétní historická zkušenost ukrytá za lidskou důstojností může mít univerzální aspiraci (ve smyslu, že nikdo by neměl být podroben stejnému bezpráví a tudíž každý by měl mít právo na lidskou důstojnost), které ale není nikdy dosaženo a v momentě zakotvení takové skutečnosti do právního jazyka se vnější stejně jako vnitřní perspektiva lidských práv stane závislou na politice.

Základní lidská práva, ještě před tím, nežli jsou uznána, jsou chápána jako pouhý zájem jednotlivce (*Konstantinidis*). Jsou pouze jedním z naléhavých zájmů Společenství a již v procesu jejich uznání jsou lidská práva přizpůsobena ostatním politikám Společenství. V případě *Omega* měl ESD potíže uznat právo na lidskou důstojnost jakožto samostatné právo prohlašující, že „*Komunitární právní řád beze sporu usiluje o ochranu lidské důstojnosti jakožto obecného principu právního. Nemůže být proto sporu, že účel ochrany lidské důstojnosti je v souladu s komunitárním právem, bez ohledu na to, že v Německu má právo na lidskou důstojnost status samostatného lidského práva.*“²⁷⁴ Nebyl to právní status práva na lidskou důstojnost, který přesvědčil ESD o potřebnosti obdobného statusu v komunitárním právním řádu. Zastání se silného konceptu práva na lidskou důstojnost by pravděpodobně bylo na překážku ostatním komunitárním politikám (*Netherlands v. Parliament and Council*) a proto rozhodnutí o tom, zda by mělo právo na lidskou důstojnost mít stejnou úroveň ochrany jako v Německu nebo slabší, zahrnoval porovnávání jednotlivých zájmů. Mimoprávní příkaz spočívající v jednotlivci nadaném humanitou, který je normativním základem pro uznání lidských práv nemá v rámci porovnávání zájmů své místo. Základní lidská práva jsou ušita na míru komunitárním potřebám a právě proto společné ústavní tradice, stejně jako mezinárodní smlouvy slouží pouze jako zdroj inspirace. Takový postoj, slovy

²⁷³ Rozhodnutí ESD 377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] E.C.R. I-07079.

²⁷⁴ Rozhodnutí ESD 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] E.C.R. I-09609, odst. 34.

generálního advokáta Van Gervena v jeho posudku k případu *Grogan* „umožňuje Soudu, v rámci uznávání obecných právních zásad v rámci konkrétního (socio-ekonomického) kontextu komunitárního práva, vzít na zřetel imperativy vyplývající ze základních svobod společného trhu, které mají za účel sjednotit trh.“²⁷⁵ V této souvislosti někteří autoři z judikatury ESD uzavírají, že ESD uznává právo jakožto základní lidské právo za předpokladu, že „základní lidské právo neodporuje cílům Společenství a nezabraňuje realizaci komunitárních politik.“ Na základě výše uvedených okolností je vnější perspektiva lidských práv jakožto normativního základu, ze které by ESD čerpal inspiraci v procesu uzákonění základních lidských práv mýtus vytvořený liberální doktrínou.

4.2.ZÁVĚR

Proces uznání lidských práv se obvykle odehrává v rámci demokratického procesu politické diskuse na půdě parlamentního orgánu nadaného legislativní pravomocí nebo v rámci mezinárodního prostředí politickým vyjednáváním.²⁷⁶ Proces uznání základních lidských práv Evropské Unie do nedávné doby neodpovídal danému vzorci. ESD na sebe vzal vedoucí úlohu a do právního řádu Společenství vnesl ochranu lidských práv bez jakéhokoli vnějšího imperativu normativního zdroje nebo oprávnění na základě Smlouvy, které by odůvodnily takovou iniciativu ESD. V této souvislosti základní lidská práva nemohou být výrazem společných ústavních hodnot ale spíše toho, co si ESD myslí, že takové hodnoty jsou, za předpokladu, že mohou být sladěna s požadavky společného trhu. V této souvislosti bychom spíše očekávali politický nežli soudní pokus uvést otázku ochrany lidských práv do právního řádu Společenství. Je to právě v důsledku toho, že pouze v rámci procesu politického vyjednávání zástupců jednotlivých států mohou být základní ústavní hodnoty jednotlivých členských států vneseny do politické debaty.²⁷⁷ Proces legalizace lidských práv je politický boj, v němž dochází ke kompromisům, v rámci něhož usilují o účast a zapojení ti, kteří byli do té

²⁷⁵ Posudek generálního advokáta Van Gervena k rozhodnutí ESD 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. [1991] E.C.R. I-04685, odst. 30. Rozhodnutí ESD reflektují „jiné důležité funkce, vedle ochrany základních lidských práv, jako podporu evropské integrace a zabezpečení svrchovanosti komunitárního práva.“ DE WITTE, Bruno. The Past and Future Role of the European Court of Justice in the Protection of Human Rights. In *The EU and Human Rights*. (Eds) ALSTON, Philip, BUSTELO, Mara, HEENAN, James. New York: Oxford University Press 1999, str. 859-897, str. 869.

²⁷⁶ Jak může být demonstrováno na případu přijetí EÚLP.

²⁷⁷ Viz NOVITZ, Tonia. European and social rights in conflict: political and judicial approach to their reconciliation. 3. E. L. Rev., 2008, 33 (3), 411 – 426, at 425, v souvislosti s ústupky v rozhodnutích ESD Viking and Laval.

doby vyloučení. V souvislosti s formulací základních lidských práv Společenství je zajímavé, že politický boj o uznání změnil svůj výraz. Lidská práva vzrůstající zevnitř společnosti se najednou objevila jako výraz vyrůstající zevnitř ESD a začala být ukládána zvenčí členskými státy a jejich vlastním ústavně uznaným právům.

Liberální předpoklady lidských práv nemohou ustát praxi ESD uznávání základních lidských práv. Přestože ESD, jakož i generální advokáti, byli často v pokušení odkazovat na lidská práva pro jejich universalitu (která je jim připisována liberální teorií) nakonec se vždy museli vypořádat s problémy odlišného standardu ochrany mezi členskými státy (*Grogan, Omega*). Ve chvíli, kdy ESD vyhodnocuje konkrétní nároky založené na lidských právech, je patrné, že universální pojmy jazyka lidských práv neudrží aplikaci lidských práv, přičemž v rámci aplikace se abstraktní formulace stávají bezvýznamnými a ve chvíli, kdy se snažíme určit jejich obsah, zjišťujeme, že lidská práva jsou závislá na kontextu, ve kterém se objevují. Zavedení ochrany základních lidských práv do pojmosloví právního řádu Společenství je příkladem kolonizace politiky lidsko-právním jazykem. Lidská práva byla inkorporována do komunitárního právního řádu za účelem podpory politických zájmů Společenství. Obdobně, způsob, kterým ESD rozhoduje o tom, které zájmy budou formulovány v jazyce lidských práv, reflektuje politické priority a je zcela nepřekvapivé, že ekonomické priority Společenství se staly součástí slovníku lidských práv.

5. LIDSKÁ PRÁVA JAKO HRANICE PRO VÝKON MOCI

Liberální lidsko-právní diskurs předpokládá, že „*lidská práva byla postupně zavedena jako hranice diskreční pravomoci supranacionálních institucí.*“²⁷⁸ Lidská práva slouží jakožto ochrana jednotlivců před mocí národních/supranacionálních institucí. Weiler tvrdí, že „*druhým důvodem přitažlivosti lidských práv a část ospravedlnění, i když proti většinové, spočívá v tom, že jsou považována za nástroj,*

²⁷⁸ BOGDANDY, Armin, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common market Law Review*, Issue 6, str. 1307–1338, str. 1308. Obdobně viz WEILER, Joseph. H.H. Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities (1986) 61 *Wash. L. Rev.* 110, str. 1108. ANDERSON Q.C., David, MURPHY, Cian, C. The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe, *EUI Working Paper*, 2011/08, str. 1-2. <http://hdl.handle.net/1814/17597>, str. 1-2. SHUIBHNE, Niamh, Nic. Margins of appreciation: national values, fundamental rights and EC free movement law. *E.L. Rev.* 2009, 34(2), 230-256, str. 232.

*kterým je podporována hodnota omezení moci sama o sobě.*²⁷⁹ Nezbytnou podmínkou proto aby lidská práva mohla být vnímána jako omezení pravomoci veřejných institucí je, že musí existovat vně takové pravomoci, vystupující jakožto absolutní hranice, které daná instituce nemůže v rámci svých diskrečních pravomocí překročit. Lidská práva „ukládají zábrany, které jsou odolné vůči většinovému tlaku, analýze z hlediska nákladů a užitků a zkrácení v důsledku výměny za pokrok v oblasti ekonomiky.“²⁸⁰ Na začátku ESD ustanovil doktrínu Společenství omezené základními lidskými právy jako odpověď na zvýšené obavy ohledně vrůstající výkonnou moc Společenství. Jak podotýká Weiler, jelikož členské státy stoupající měrou vystupovaly z pozice vykonavatelů politik Společenství,²⁸¹ ESD začal postupně aplikovat základní lidská práva také vůči členským státům. Nejprve se tak stalo v případě, kdy členské státy implementovaly komunitární legislativu (*Wachauf*) a poté, kdy členské státy odchyli od svobod společného trhu (*ERT*). Proto také záměr této kapitoly směřuje k prozkoumání kroků ESD při přezkoumávání aktů Společenství ve světle základních lidských práv a také z perspektivy aktů členských států.

5.1.ZÁKLADNÍ LIDSKÁ PRÁVA, JAKOŽTO LIMITY PRO AKTY SPOLEČENSTVÍ

Dle klasifikace provedené De Búrca, případy kdy jsou lidská práva namítána vůči aktům Společenství, se týkají převážně situací, kdy jsou lidská práva namítána vůči komunitární legislativě a vůči správním aktům orgánů Společenství, které zahrnují především zaměstnanecké spory a řízení ve věcech soutěžních.²⁸² Nicméně, pro účely této kapitoly nebudu mezi výše uvedenými kategoriemi rozlišovat z důvodů, že právo přichází v život skrze aplikaci orgány moci výkonné, ať už jde o orgány moci výkonné členských států nebo Společenství. A právě skrze aplikaci práva může daný právní předpis zasáhnout do zaručených lidských práv jednotlivců. Proto se také rozhodnutí ESD, přestože se týkají sporů o platnost komunitárního práva, dotýkají způsobu, jakým později bude dané právo aplikováno.

²⁷⁹ WEILER, Joseph H.H. *The constitution of Europe: "Do the new clothes have an Emperor?" and other essays on European integration*. Cambridge: Cambridge University Press, 1999, 364 pp. ISBN 0-521-58567-8, str. 103.

²⁸⁰ MAHONEY, Jon. Liberalism and the moral basis for human rights, *Law & Phil.* 2008, 27(2), 151-19, str. 153.

²⁸¹ Viz WEILER, Joseph. H.H, LOCKHART, Nicolas J.S. "Taking rights seriously" seriously: The European Court and its fundamental rights jurisprudence – part I. 32 *Common market Law Review*, 1995. Issue 1, str. 73.

²⁸² Viz CRAIG, Paul P.,DE BÚRCA, Gráiné. *EU law: text, cases, and materials*. 5th ed. Oxford: Oxford University Press, c2011, clvii, 1155 s. ISBN 978-0-19-957699-9.

Tuto kapitulu začnu analýzou rozhodnutí ESD v případě *Hauer*²⁸³, jelikož se jedná o rozhodnutí, které založilo vzorec testu proporcionality, který byl poté aplikován v dlouhé řadě rozhodnutí ESD.²⁸⁴ Případ *Hauer* se dotýkal práva na vlastnictví, které je chráněno německým Ústavním zákonem. Stěžovatelka namítala, že komunitární nařízení týkající se opatření, jehož účelem bylo přizpůsobení vinařského potenciálu komunitárním požadavkům, porušilo právo stěžovatelky pěstovat víno na jejím pozemku, jelikož daný pozemek byl shledán jako nevhodný pro pěstování vína. ESD, poté co deklaroval, že právo na vlastnictví je zaručeno komunitárním právem, se ihned obrátil k možným omezením práva na vlastnictví, pro což našel opěru jak v Úmluvě tak ústavách členských států.

Obecně je uznáváno, že přestože lidská práva omezují moc státních/supranacionálních institucí, mohou být nicméně sama omezena za podmínky, že omezení pramení buď z podstaty práva samotného, nebo z nezbytnosti ochrany oprávněných právních institutů.²⁸⁵ ESD v případě *Hauer* podotkl, že ústavy členských států dovolují omezení práva na vlastnictví na základě obecného prospěchu, společenské spravedlnosti a sociální funkce a uzavřel, že obdobně je možné omezit také základní lidské právo Společenství na vlastnictví tentokrát na základě jednotné organizace trhu za účelem strukturální politiky.²⁸⁶ Dále ESD podmínil omezení práva na vlastnictví na splnění dvou podmínek (i) omezení musí sledovat cíl obecného zájmu sledovaného Společenství a (ii) omezení musí být přiměřené ke sledovanému cíli a nesmí ukládat nadměrný zásah do daného základního lidského práva.²⁸⁷ Na základě toho, že dané nařízení sledovalo zlepšení na trhu s vínem, které směřovalo k založení spravedlivých cen na trhu s vínem a dosažení zlepšení v kvalitě vína, ESD uzavřel, že omezení práva na vlastnictví splnilo výše uvedené předpoklady a tudíž nenašel porušení práva na vlastnictví. ESD konkrétně své závěry odůvodnil „skutečně, kultivace nových vinic, za situace nadprodukce by neměla žádný smysl z ekonomického úhlu pohledu kromě zvyšování objemu přebytku; takové zvětšení by zahrnovalo nebezpečí, že

²⁸³ Rozhodnutí ESD 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*. [1979] E. Comm. Ct. J. Rep. 3727

²⁸⁴ Rozhodnutí ESD C-22/94, C-248/95 and C-249/95, C-368/96, C-293/97, C-104/97, C-7/98 (týkající se práva každé obviněné osoby na efektivní obhajobu advokátem), C-37/02 a C-38/02, C-210/03, C-92/09 and C-93/09 (regarding right to the protection of personal data). Většina z těchto případů zahrnuje ekonomická práva jako svobodu uskutečňovat obchod či profesi, svobodu uskutečňovat ekonomickou aktivitu a právo na vlastnictví.

²⁸⁵ TICHÝ, Luboš, ARNOLD Rainer, ZEMÁNEK Jiří, KRÁL Richard a DUMBROVSKÝ Tomáš. *Evropské právo*. 4. reprint. Praha: C.H. Beck, 2011, 953 pp. ISBN 978-80-7400-333-2.

²⁸⁶ Rozhodnutí ESD 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*. [1979] E. Comm. Ct. J. Rep. 3727., odst. 23.

²⁸⁷ Tamtéž str. 23.

strukturální politiky Společenství by byly hůře implementované za předpokladu, že by došlo k aplikaci kritérií přísnějších než těch, která jsou obsažená v národních právních řádech týkajících se výběru půdy uznané pro vinařství.²⁸⁸ Způsob, jakým ESD odůvodnil své rozhodnutí je velmi zajímavý z několika důvodů. Namísto toho, aby se ESD ve svém odůvodnění věnoval právu na vlastnictví, jeho funkci a účelu, ESD věnoval téměř veškerou svou pozornost danému nařízení a ospravedlňoval jeho cíle v rámci Společenství. V této souvislosti ESD připomněl, že nařízení „splňuje dvojité účel: na jedné straně musí okamžitě zastavit dosavadní zvyšování nadprodukcce, na druhé straně musí institucím Společenství poskytnout čas nezbytný pro implementaci strukturální politiky, zaměřené na podporu produkce vysoké kvality, a zároveň respektující individuální potřeby různých vinařských regionů Společenství skrze výběr půdy pro vinařství a výběr různorodých hroznů a skrze regulaci výrobních metod.“²⁸⁹ Jelikož účelem nařízení bylo okamžitě reagovat na situaci nadvýroby a připravit půdu pro stálá opatření, ESD neshledal, že by nařízení ukládalo nepřiměřené omezení právu na vlastnictví. Z odůvodnění je patrné, že to jsou právě komunitární politiky a zájmy Společenství, které jsou rozhodujícím měřítkem ostatních zájmů. ESD nevěnoval žádnou pozornost objasnění práva na vlastnictví a jeho možnému omezení a z jeho odůvodnění je patrné, že to není Společenství, které by bylo omezeno základním lidským právem. Spíše naopak, základní lidské právo bylo omezeno politikami Společenství. V této souvislosti prohlášení, že hranice jednotlivých základních lidských práv vzrůstají z práv samotných je zavádějící (hranice lidských práv spíše než z práv samotných vzrůstá z důležitosti komunitárních politik.) Ochrana práva na vlastnictví a rigoróznější přezkum jeho možného omezení by, dle názoru ESD, nemělo smysl v porovnání s ekonomickými cíly Společenství. Co je v takovém případě hranice, která vzrůstá z práva samotného a která umožňuje na jedné straně omezit takové právo a na druhé straně vyslovit neplatnost omezení pro překročení jeho limitů? Z práva samotného nemůže dovést žádnou náповědu, která by vysvětlila, proč ESD nenašel porušení základního lidského práva na vlastnictví. Náповěda může být nalezena pouze v kontextu ostatních komunitárních politik.

Dle liberálního pohledu na lidská práva, je to právě pojem „práva“ (něco více než politika, něco absolutního) které trumfuje politiku a v takových případech by se

²⁸⁸ Rozhodnutí ESD 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*. [1979] E. Comm. Ct. J. Rep. 3727., odst. 29.

²⁸⁹ Tamtéž odst. 27.

politika měla vždy podrobit lidským právům. Zastánci liberální pozice mohou prohlašovat, že podmínky, které omezují použití restrikce lidských práv pouze na případy nezbytnosti dosažení účelu obecného zájmu a navíc přiměřenosti, ukládají pevné hranice pro narušení lidských práv. Daná instituce se potom může pohybovat pouze v rámci hranic nezbytnosti a přiměřenosti. Na druhou stranu, přestože podmínky nezbytnosti by měly jasně omezit prostor možných zásahů do lidských práv, pojmy jako obecný zájem, přiměřenost a nedovolený zásah jako takové neobjasňují, kde přesně takové hranice jsou. Výše uvedené pojmy jsou tak abstraktní, že nám neposkytují žádné konkrétní instrukce jak je vyhodnotit v konkrétních situacích. Je to proto v konečném důsledku orgán veřejné moci a konečně ESD, kdo určují, kde přesně jsou hranice přiměřenosti v každém konkrétním případě.

Jelikož neexistuje žádné právní pravidlo, které by vedlo ESD při posuzování přiměřenosti, neexistuje obdobně žádné právní pravidlo, které by vedlo ESD k použití buď práva, nebo odchýlení se od něj ve prospěch výjimky. Přednost omezení před právem nebo opačně je vyhodnocena v rámci balancování, ve kterém jsou základní lidská práva uváděna v soulad s komunitárními politikami a dle výsledků balancování zájmů ESD poté rozhodne, jestli dá přednost právu nebo výjimce. V rámci procesu balancování již nejde o právo jako takové, které by bylo poměřováno proti komunitárním politikám. Právo je omezeno na politiku, takže v rámci balancování se střetávají dva různé zájmy proti sobě: „*balancování jako takové nemůže být definováno aplikací práv, protože jeho jediný účel je určit aplikovatelnost (a proto limit) konkrétního práva v konkrétní situaci.*“²⁹⁰ Právo nepřevažuje politiku v důsledku jeho vyšší pozice v normativní hierarchii. Namísto toho, dva zájmy jsou porovnány a jednomu z nich je dána přísnost před druhým, nikoli v důsledku nadřazené pozice v právním řádu ale v důsledku důležitosti jednotlivých zájmů.

Balancování proto spíše než proces, který by omezoval diskreční pravomoci veřejných institucí, přináší do procesu rozhodování flexibilitu. Základní lidská práva jsou poměřována pokaždé, když stojí před ESD. V rámci balancování neexistuje žádná pevná hranice, která by určovala, kdy se uchýlit k právu a kdy k výjimce. Rozhodování o základních lidských právech s sebou proto nese jistou míru svévolnosti, které lidská

²⁹⁰ KOSKENNIEMI, Martti. Human Rights Mainstreaming as a Strategy for Institutional Power, Humanity: An International Journal of Human Rights, Humanitarianism, and Development, Fall 2010 Volume 1, Number 1, str. 47-58, str. 51.

práva v liberálním pojetí mají čelit. Deformalizace²⁹¹ procesu rozhodování o lidských právech, skrze pojmy jako obecný zájem Společenství, nezbytnosti a přiměřenosti, s sebou nutně nese důsledek toho, že lidská práva jsou nikoli interpretována ale spíše definována orgány veřejné moci, vyjadřující moc většiny.²⁹² Je potom těžké zastat liberální pozici obhajující užitečnost a specifickou lidských práv jako těch, které limitují orgány veřejné moci v jejich rozhodování, když zároveň jsou tyto instituce nadány širokými diskrečními pravomocemi, jak ostatně doložil také ESD „*jelikož Komise samotná je v pozici, kdy musí neustále sledovat trendy v zemědělském trhu a jednat rychle, když je toho zapotřebí, může Rada udělit Komisi široké diskreční oprávnění. Jestliže tak učiní, hranice takového oprávnění musí být určeny ve světle základních obecných cílů organizace trhu.*“²⁹³ Citace se týká případu, v němž ESD rozhodoval o, na jedné straně platnosti komunitárního pravidla týkajícího se ukládání daní na dovoz nezpracovaného oleje z nečlenských zemí v rámci veřejné soutěže, oproti na druhé straně, tvrzení že dané pravidlo porušuje základní lidské právo vykonávat svobodně hospodářskou činnost. ESD rozhodl, že jelikož má Komise široké diskreční promoci v této oblasti, dané opatření nemůže být shledáno jako nepřiměřený zásah do samé podstaty daného základního lidského práva. Je zajímavé, že z pohledu ESD to nebylo základní lidské právo, které by mu posloužilo jako vodítko pro výkon diskrečních pravomocí Komise. Byl to spíše obecný účel ochrany společné organizace trhu, která vedla ESD k rozhodnutí, že takové diskreční pravomoci překročeny nebyly.

Takto široké diskreční oprávnění institucí Společenství je patrné také z rozhodnutí „*Banana*.“²⁹⁴ Když přišlo na otázku základního lidského práva na vlastnictví a práva na uskutečňování podnikatelské aktivity, ESD nejprve uznal, že obě práva tvoří součást obecných principů práva Společenství, nicméně ani jedno z nich není absolutní.²⁹⁵ Co se týče práva na vlastnictví ESD byl názoru, že v rámci

²⁹¹ Tamtéž str. 86. Viz také Koskenniemi, KOSKENNIEMI, Martti. Human Rights Mainstreaming as a Strategy for Institutional Power, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, Fall 2010 Volume 1, Number 1, str. 47-58.

²⁹² Politická moc je tak odňata zákonodárnému orgánu a ponecháno administrativě. Koskenniemi argumentuje, že takové deformalizace procesu rozhodování o lidských právech zapadá do post-tliberálního proudu o lidských právech, kde práva pro jejich flexibilitu, kterou zajišťují pojmy jako proporcionalita, mohou adekvátně reagovat na konkrétní situace. KOSKENNIEMI, Martti. Human Rights Mainstreaming as a Strategy for Institutional Power, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, Fall 2010 Volume 1, Number 1, str. 47-58.

²⁹³ Rozhodnutí ESD 359/89, *SAFA Srl v Amministrazione delle finanze dello Stato*. [1991] E.C.R. I-01677, odst. 16.

²⁹⁴ Rozhodnutí ESD 280/93, *Federal Republic of Germany v Council of the European Union* [1994] E.C.R. I-04973.

²⁹⁵ Tamtéž odst. 78.

posuzovaného případu neexistuje právo na vlastnictví podílu na trhu, což odůvodnil tím, že podíl na trhu zakládá pouze ekonomickou pozici. ESD dále pokračoval, že obdobně jako právo na vlastnictví nemůže „ekonomický operátor požadovat získané právo nebo dokonce legitimní očekávání, že daná situace, která je může být změněna rozhodnutími institucí Společenství v rámci jejich diskrečních pravomocí, bude zachována (...), zvláště když daná situace je v rozporu s pravidly společného trhu.“²⁹⁶ Jak vyplývá z posudku generální advokátky Stix-Hackl k případu *Omega*, ESD „interpretuje shora zmíněné omezení základních lidských práv, v podstatě, konkrétním způsobem přizpůsobeným potřebám Společenství“²⁹⁷ a může být dodáno, že když se daná omezení dotýkají společného trhu, ESD se neváhá podvolit širokým diskrečním oprávněním Komise. Přizpůsobení základních lidských práv potřebám politikám Společenství nenaplnuje hodnotu lidských práv, omezujících pravomoc Společenství.

V rámci judikatury ESD můžeme rozpoznat případy, kdy komunitární legislativa je zpochybněna jako neslučitelná s lidskými právy a diskreční pravomoc slouží jako prostředek úniku před přezkumem dané komunitární legislativy, jak je patrné z případu *Stauder*, kde ESD posuzoval platnost komunitárního práva. Přezkum daného práva ESD obešel poukázáním na diskreční pravomoc, která byla ponechána daným ustanovením institucím členských států. Diskreční pravomoc založená daným opatřením (umožňující vyložit dané opatření v souladu se základními lidskými právy) proto vyloučila dané opatření z přezkumu. Komunitární právo je tak v bezpečí a břemeno je takovým výkladem přesunuto na právo členských států. V případě *Wachauf*²⁹⁸ se ESD zabýval případem německého práva implementujícího komunitární nařízení ohledně kvót pro produkci mléka, na základě něhož byl pan Wachauf připraven o kompenzaci za přerušení pokračování v produkci mléka v důsledku nedostatku souhlasu pronajímatele. ESD připomněl, že ochrana základních lidských práv tvoří součást obecných principů komunitárního práva a dále dodal, že členské státy jsou povinny implementovat komunitární právo v souladu se základními lidskými právy. ESD uzavřel, že dané komunitární nařízení ponechalo národním institucím široké diskreční pravomoci implementovat komunitární právo v souladu se základními lidskými právy buď tím, že „dá nájemci příležitost ponechat si celé nebo část referenčního množství, jestliže

²⁹⁶ Tamtéž odst. 30.

²⁹⁷ Posudek generální advokátky Stix-Hackl rozhodnutí ESD 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECR I-09609.

²⁹⁸ Rozhodnutí ESD 5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] E.C.R. 02609, odst.. 19.

*zamýšlí pokračovat v produkci mléka nebo kompenzací mu poskytnutou, jestliže se zaváže ukončit takovou produkci.“*²⁹⁹ Proto komunitární nařízení bylo zproštěno od přezkumu a bylo na institucích členských států, aby uvedly implementující legislativu do souladu se základními lidskými právy.

²⁹⁹ Tamtéž odst. 22.

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