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# Applying the Neo-Functionalist Paradigm to Assess the Integrative Consequences of the European Court of Justice's Human Rights Jurisprudence

Elizabeth Sarah Dolgicer  
*Bates College*, [edolgice@bates.edu](mailto:edolgice@bates.edu)

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**Applying the Neo-Functionalist Paradigm to Assess the Integrative  
Consequences of the European Court of Justice's Human Rights  
Jurisprudence**

By  
Elizabeth Sarah Dolgicer  
Political Science Department



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## **ABSTRACT**

This thesis examines the role of the European Court of Justice in aiding Europe's integrationist project with regards to law. Since the 1960s, the Union's acknowledgement and protection of fundamental rights have evolved considerably; it has transitioned from a supranational polity in which guaranteed rights were shrouded in normative ambiguity and forming only "the general principles of Community law," to that of a polity in which fundamental rights came to occupy their own sphere of influence, as the 2009 legal ratification of the Charter of Fundamental Rights and Freedoms indicates. This thesis is specifically concerned with examining the degree to which the Court's evolving human rights jurisprudence has served as a positive, integrative force in the ongoing construction of the EU. It leverages neo-functionalism as a paradigm to explain not only *how* the Court's rights-based adjudication enhances European integration, but also as a means of examining *to what degree* and *under what conditions* it does so. As such, this thesis analyzes various rights-oriented legal case studies, and it examines their outcomes from the analytical expectations of neo-functionalism as a means of gauging their integrative effects.

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# INTRODUCTION

## Establishing Context

Since its establishment in 1957, the European Court of Justice (ECJ) has maintained a central role in the legal integration of the European Union (EU). The Court's case law has shaped market integration, the balance of power among the EU's organs of government, and the constitutional boundaries between international, supranational, and national authority. The ECJ maintains various judicial doctrines, as well as several procedural guarantees, that enable it constitutionalize the EU.<sup>1</sup> Thus, the discursive narrative of European integration recounts the gradual transformation of a treaty regime through law and courts. As such, the EU's various treaties provide the procedural and substantive framework in which this supranational, expansionary legal system has developed. These treaties serve as "the basic constitutional charter"<sup>2</sup> of the EU.

The Treaty of Rome (1957) was an international agreement that led to the founding of the European Economic Community (EEC), now the EU. The Treaty's dominant philosophy was market driven, and many of its core provisions detailed the means by which neo-protectionist barriers – embodied in national standards, public procurement policies, industrial subsidies, and the like - would be removed in order to facilitate the free movement of goods, services, people, and capital. Absent from the Treaty were specific enumerations of human rights. It is within this context that the EU developed a "human rights discontinuity."<sup>3</sup> Without the Treaty explicitly stipulating human rights guarantees, there lacked an 'internal' judicial control on fundamental rights at the EU level. As the EU's

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<sup>1</sup> See Chapter 1.

<sup>2</sup> *Parti Ecologiste "Les Verts" v. European Parliament*. [1986]

<sup>3</sup> Scheeck, Laurent. *The Relationship Between the European Courts and Integration through Human Rights*. Working paper. Vol. 15. Research in Question. Paris: Science Po, 2005.

economic, political, and social competencies expanded, this reality became unsettling for the Member States, who realized that potential infringements on human rights were unavoidable. Recognizing this, the ECJ established its own human rights jurisdiction, and developed its own human rights jurisprudence. Since the early 1960s, the Court has concerned itself with procedural and substantive due process<sup>4</sup>, respect for private life<sup>5</sup>, lawyers' business secrecy<sup>6</sup>, the principle of review by courts<sup>7</sup>, the right not to incriminate oneself<sup>8</sup>, and more. "Reading an unwritten bill of rights into Community law is indeed the most striking contribution the Court made to the development of a Constitution for Europe,"<sup>9</sup> declared ECJ Judge Mancini in 1989.

The European Convention of Human Rights (ECHR) has proven to be of crucial importance in the ECJ's construction of its human rights jurisprudence. Indeed, the ECHR "is widely accepted as the 'most advanced and effective' international regime for enforcing human rights in the world today."<sup>10</sup> Since 1953, it has sought to define and protect an explicit set of civil and political rights for all persons within the jurisdiction of the Council of Europe's (CoE) Member States. Given the fact that the CoE and the EU have maintained complete overlap in their membership since May 1974, it seems logical that the ECJ instrumentalizes the ECHR in its human rights legal doctrine. The ECJ's use of the ECHR has evolved from very general references to "an expanding integration of the Conventional

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<sup>4</sup> *Precastaing* (1980), *Van Ladewyck* (1980)

<sup>5</sup> *Panasonic (National) UK Limited v. Commission* (1980); *Stanley Adams v. Commission* (1985)

<sup>6</sup> *AM&S Europe* (1982)

<sup>7</sup> *Kirk* (1984)

<sup>8</sup> *Hoechst AG* (1989)

<sup>9</sup> Horspool, Margot. *European Union Law*. Oxford: Oxford University Press, 2006.

<sup>10</sup> Moravcsik, Andrew. "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." *International Organization* 54, no. 2 (April 01, 2000): 217-52.

acquis into its own case law.”<sup>11</sup> This is illustrated by the fact that, between 1975 and 1998, the ECJ cited the ECHR in over seventy judgments.<sup>12</sup>

The Court’s efforts in constructing its human rights jurisprudence were formally recognized nearly thirty years later, with the Treaty of Maastricht (1993) and the Treaty of Amsterdam (1997). The Treaties declare,

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, *as general principles of Community law*.”<sup>13</sup>

Thus, the Treaty consolidated what had been previously articulated and practiced by the ECJ. By establishing respect for human rights as a Treaty obligation, it would seem as though the Union’s ‘human rights discontinuity,’ as previously defined, was remedied. In practice, though, this was not necessarily so. The Union’s lack of a legally binding, enumerated bill of fundamental rights impeded the Court’s ability to coherently judicialize within the domain. The ECJ extrapolates “the general principles of this instrument [ECHR],”<sup>14</sup> and applies “them as Community principles on an incremental case-by-case basis.”<sup>15</sup> In fact, the Court’s case law consistently asserts that fundamental rights guarantees exist only, “in the form of the general principles of Community law.”<sup>16</sup> Article 6(2) reaffirms this. Thus, the Court’s formulations of fundamental rights are shrouded in ambiguity. What, exactly, do “general principles of Community law” entail in relation to

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<sup>11</sup> Guild, Elspeth, and Guillaume Lesieur. *The European Court of Justice on the European Convention on Human Rights: Who Said What, When?* London: Kluwer Law International, 1998.

<sup>12</sup> *Ibid.* P9

<sup>13</sup> Article 6(2) Treaty of Amsterdam, Article F(2) Treaty of Maastricht

<sup>14</sup> Balfour, Adam. "Application of the European Convention of Human Rights by the European Court of Justice." *Harvard Law School Student Scholarship Series*, 4th ser. (March 1, 2005): 1-39.

<sup>15</sup> *Ibid.* P11.

<sup>16</sup> *Stauder* [1969], *Internationale Handelsgesellschaft* [1970], *Hauer* [1979], *Cinetheque* [1985], *Demirel* [1987], *Kadi* [2008]



rights? Why does the Court accept certain ECHR claims to be part of these “general principles of Community law,” while rejecting others?

By 1999, it became clear that such inconsistent application of the Convention was “unsatisfactory and should be replaced by a formal document listing such rights.”<sup>17</sup> It was reasoned that a bill of rights, drafted by the Union, and for the Union, would result in the emergence of a uniform concept of such rights, both in scope and content. In 2000, the European Parliament, the Council of Ministers, and the European Commission drafted and proclaimed the Charter of Fundamental Rights and Freedoms (CFRF); this document creates an explicit catalogue of fundamental rights within the EU legal order. As such, the Court is no longer bound to rely its arbitrary “general principles of Community law” formula when adjudicating on rights. The Charter draws its inspiration from the ECHR, the Constitutional traditions common to the EU Member States, and the Court’s case law. Essentially, its content codifies the sources of influence identified in the Treaty of Amsterdam’s Article 6(2). The Charter’s introduction marks a convergence of the interpretative tools the Court had leveraged when adjudicating on human rights in the past. With the ratification of the Treaty of Lisbon on December 1<sup>st</sup>, 2009, the Charter became legally binding within the EU legal order, and it acquired higher legal status, with Article 6(1) declaring:

“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

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<sup>17</sup> Weiler, Joseph H.H. "Human Rights, Constitutionalism, and Integration: Iconography and Fetishism." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*, by Riva Kastoryano. New York, NY: Palgrave Macmillan, 2009.

As such, the Charter now influences “the process of interpretation, of determination of the very content of particular norms, their extent and legal consequences, and thus they provide for the enlargement of the field of application of the European rules in the national legal order.”<sup>18</sup>

*The Judiciary as a Positive Tool for Regional Integration*

The political developments outlined above signal a shift in not only in behavioral attitudes of the Union’s political actors, but also an expansion of its governing competencies. As such, the narrative of the EU’s legal incorporation of human rights must be understood as a product of the dynamics of European integration. Since the 1950s, scholars have sought to provide a theory explaining how and why supranational governance has, and continues to, develop. This is not surprising as, “the creation of a multinational, multicultural, and multilingual federation of state with mature social, economic, political and legal systems”<sup>19</sup> is unprecedented.

The success of supranational integration is inherently contingent on the construction, coordination, acceptance, and diffusion of Community-oriented norms at the national level. However, such a process requires inter-governmental cooperation, to which “collective actions problems are endemic.”<sup>20</sup> In the context of the EU, collective action problems are unavoidable. The Union is “united in its diversity,”<sup>21</sup> by the mere fact that it is a two-layered polity, an entity that is simultaneously supranational and subnational. The first layer constitutes the EU itself, which must be understood as a polity maintaining its

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<sup>18</sup> Marek Safjan, ‘Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union,’ *EUI Law; Centre for Judicial Cooperation DL*, 2014/02. P2

<sup>19</sup> Cini, Michelle. *European Union Politics*. Oxford: Oxford University Press, 2003. P73

<sup>20</sup> Garrett, Geoffrey, and Barry R. Weingast. "Ideas, Interests, and Institutions: Constructing the European Community's Internal Market." In *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, by Judith Goldstein and Robert O. Keohane. Ithaca: Cornell University Press, 1993.

<sup>21</sup> See Preamble to the Draft Treaty Establishing a Constitution for Europe, CONV 850/03

own distinct value-choices and interests. The second layer encompasses the Member States; each of these distinct societies maintains autonomous social identities and their own constitutions, reflective of their diverse socioeconomic and cultural preferences. By virtue of joining the EU, Member States agree to share certain core, fundamental values. However, these national actors also want to retain dimensions of sovereignty in certain domains, such as those of enumerated constitutional rights.

How are the political, economic, social, and cultural preferences of these strikingly different political entities to be reconciled? Though all Member States advocate for economic and political integration, there are “often multiple paths towards capturing the gains from cooperation and no obvious way for a set of decentralized actors to converge on them.”<sup>22</sup> Thus, the Member States are left in political gridlock, providing for “the potentially pivotal role of ideas”<sup>23</sup> in solving this dilemma. It is within this framework that the ECJ assumes a critical role in aiding the Union’s integrationist efforts.

Through their utilization of various procedural mechanisms and certain legal doctrines, the ECJ’s case-law “coincides with the making of a constitution for Europe.”<sup>24</sup> Constitutionalization refers to “the process by which the Treaty of Rome evolved from a set of legal arrangements binding upon sovereign states into a vertical integrated legal regime conferring judicially enforceable rights and obligations on legal persons and entities, public and private, within the EU territory.”<sup>25</sup> To put it simply, EU integration is contingent upon constitutionalization, for it provides a solution to the EU’s inter-governmental collective

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<sup>22</sup> Garrett, Geoffrey, and Barry R. Weingast. “Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market.” P176.

<sup>23</sup> Ibid.

<sup>24</sup> Mancini, Frederico. “The Making of a Constitution for Europe.” *Common Market Law Review* 26 (1989): 595-614.

<sup>25</sup> Sweet, Alec Stone. “Chapter 1: The European Court and Integration.” In *The Judicial Construction of Europe*. Oxford: Oxford University Press, 2004.

action problem. This is because constitutionalization creates legal doctrine that “embodies, selects, and publicizes particular paths on which all actors are able to coordinate,”<sup>26</sup> in certain policy domains, and it “defines for the community what actions constitute cooperation and defection.”<sup>27</sup> Thus, the ECJ’s jurisprudence creates a shared belief system, in which “ideals become ‘focal points’ around which the behavior of actors converges.”<sup>28</sup> Taking this into account, it is apparent that the EU’s judiciary is well positioned to aid the efforts of supranational integration.

### *Thematic Questions Considered*

In the broadest sense, this thesis is concerned with examining the extent to which the ECJ has aided the Union’s integrationist project with regard to law. How do Member States’ distinct, national identities and normative interests affect the Court’s jurisprudence, and conversely, how does the Court’s jurisprudence affect Member States’ conceptualization of these norms? In particular, this thesis asks: to what degree has the Court’s evolving human rights jurisprudence served as a positive, integrative force in the ongoing construction of the EU? Does the Court’s conceptualization of rights at the Community level transcend Member States’ sovereign and nationally embedded interpretation of human rights norms? If integration is to excel and develop a self-sustaining, assimilating momentum, the answer to both of these questions should be in the affirmative. However, if the answers to the above question are in the negative, then thesis provides us with a better understanding of how institutions and entrenched sociopolitical preferences can alter and constrain the dynamics of regional integration, with human

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<sup>26</sup> Garrett, Geoffrey, and Barry R. Weingast. "Ideas, Interests, and Institutions: Constructing the European Community's Internal Market." P176

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

rights providing a case-study on this matter. The implications of such a finding are especially relevant as the Union's institutional capacities continue to evolve and consolidate, and "as the debate about the limit to Community competences and the applicability of the principle of subsidiary<sup>29</sup> in the judicial field continues to simmer or boil." <sup>30</sup>

This thesis leverages neo-functionalism as a paradigm to explain not only *how* the Court's rights-based adjudication enhances European integration, but also as a means of examining *to what degree* and *under what conditions* it does so. As such, I look to whether or not the ECJ's evolving rights jurisprudence adheres to the analytical expectations of neo-functionalism, which posits that a gradual transformation in Union's jurisdictional competencies in favor of supranational governance is a self-sustaining, expansionary process. "One strong assumption of neo-functionalism is that the ECJ will consistently work to produce pro-integrative policies, even when these are resisted by the most powerful states."<sup>31</sup> Thus, if neo-functionalism operates autonomously in aiding integration, one expects that the Court would widen its jurisdiction to partake in right-oriented judicial review, as well as strictly limit the degree of deference awarded to Member States charged with remedying a rights violation. Neo-functionalism's emphasis on political spillover leads to the expectation that such judicial behavior would become even more common as time goes on. If such behavior is observed, then the Court's jurisprudence can be understood as having a pro-Community, harmonizing effect on human rights norms at the national level.

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<sup>29</sup> The Principle of Subsidiarity will be discussed more in Chapter 2.

<sup>30</sup> Weiler, Joseph H.H., and Nicolas J.S. Lockhart. "'Taking Rights Seriously' Seriously: The European Court and Its Fundamental Rights Jurisprudence." *Common Market Law Review* 32 (1995): 51-94. P58

<sup>31</sup> Stone Sweet, Alec. *Neo-functionalism and Supranational Governance*. Yale Law School Legal Scholarship Repository. January 1, 2012. [http://digitalcommons.law.yale.edu/fss\\_papers/4628](http://digitalcommons.law.yale.edu/fss_papers/4628). P12.

However, if the Court leaves a wide margin of appreciation for the Member State to determine the scope of and the solution to the human rights violation, then the Court impedes human rights' integrative effects; this is because the Member State is free to establish its own distinct normative standard of rights protection in relation to the contested EU law.

### Organization of Content

Chapter one will argue that neo-functionalism provides a theoretical explanation for how and why constitutionalization and regional integration converge. It will discuss the interplay between functional and political spillover, and how this leads to an expansion of the policy domains the Court can adjudicate within, as well as create demand for the institutionalization of Community-level norms. Chapter two will illustrate how neo-functional spillover requires the Court to construct and to coordinate a normative framework for human rights. It strives to show how constitutionalization and normative construction and diffusion work symbiotically. Chapter two will also discuss the various factors influencing the normative construction of human rights, and it will highlight the inherent difficulty the Court faces in translating such considerations into a transnational, legal context. The chapter concludes with discussion of the various considerations (e.g. economic competencies) and substantive sources (e.g. the ECHR, the Charter) animating the Court's legal reasoning.

Chapters three and four attempt to gauge the integrative effects of the Court's human rights jurisprudence. It focuses on the Court's freedom of expression case law spanning the course of twenty-five years; it looks at judgments prior to the introduction of the Charter (1985 – 2000), after the proclamation of the Charter (2000 – 2009), and

following the legal ratification of the Charter (2009 – 2013). These chapters will examine the juridical outcomes of these cases within the analytical framework of neo-functionalism. As it will be discussed, these case studies will measure the presence of functional and political spillover in a context specific to jurisprudence. This thesis takes a doctrinal methodological approach, examining the jurisprudence of the court on the basis of textual reading, and evaluating the cases by reference to formal criteria such as consistency, clarity, and quality of legal reasoning, as well as broader teleological considerations.

### *Jurisdiction: How Do Cases Get Where They Get?*

Understanding the ECJ's jurisdictional standing is necessary for conceptualizing the procedural boundaries under which human rights claims can be invoked, and thus incorporated into the Union's legal order. The Treaty of Rome stipulates three circumstances under which a claim can be brought to the ECJ.

- **Article 169** gives a power to the Commission to bring an action before the Court against a Member State for failure to fulfill a treaty obligation.
- **Article 173** permits any natural or legal person to bring proceedings before the Court against an act of the Commission or Council. Cases brought by means of Article 173 primarily relate to anti-trust actions taken by the Commission under Articles 85 and 86 of the Treaty of Rome.
- **Article 177** awards the ECJ power to provide a preliminary ruling on questions regarding the correct interpretation of the EC treaty referred to it for that purpose by a national court or tribunal. The legally integrative consequences of Article 177 will be discussed in more detail in Chapter 1. By and large, the majority of the cases on the ECJ's docket are brought under Article 177, and the claims invoked often involve a diverse array of policy questions.

This thesis examines court cases brought to the ECJ only under Article 177 claims. In comparison to Article 169 and Article 173, Article 177 is “by far the most important provision to the development of human rights discourse in Community law.”<sup>32</sup> The majority of cases citing ECHR and the Charter are referred to the Court under Article 177, and they relate to the implementation of Community law at the national level. By examining such claims, this thesis assesses the extent to which the ECJ creates substantive human rights jurisprudence. By extension, and as a consequence of the Doctrine of Supremacy<sup>33</sup> and Doctrine of Direct Effect<sup>34</sup>, this thesis can assess the diffusion of Community-defined human rights norms within Member States’ national, legal orders. Such a measurement provides much insight into the directional dynamics of regional integration.

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<sup>32</sup> Guild, Elspeth, and Guillaume Lesieur. *The European Court of Justice on the European Convention on Human Rights: Who Said What, When?* P23

<sup>33</sup> See Chapter 1

<sup>34</sup> See Chapter 1



## **CHAPTER 1: The ECJ, Constitutionalization, and Europe's Regional Integration**

Though the process of the EU's integration can be observed from the perspective of the executive (the European Commission), the legislative (the European Parliament and the Council of the European Union), and the judiciary (the ECJ), this thesis examines only the judiciary's role in the construction of the EU. Reasons for this are self-evident, as this thesis explores solely the ECJ's role in formulating the EU's coordinated approach to human rights.

### *1.1 Background Information on the European Court of Justice*

The ECJ is the highest court of the EU, and it is tasked with interpreting EU law and ensuring its equitable application across all Member States. The Court was established in 1952, and it is based in Luxembourg. It is composed of one judge per Member State, for a total of twenty-eight sitting Justices as of the present. Under Article 166 of the Treaty of Rome, the ECJ judges receive assistance from Advocates General, who present legal opinions of the cases assigned to them; their opinions are advisory and not legally binding, though scholarship has noted that the ECJ is often receptive to the Advocate Generals' opinions. The Judges and Advocates-Generals are "chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries."<sup>35</sup> Both legal actors are appointed "by common accord of the Government of the Member States for a term of six years."<sup>36</sup>

The Court's judicial authority is rooted in Article 164 of the Treaty of Rome, which states, "The Court of Justice shall ensure that in the interpretation and application of this

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<sup>35</sup> Article 167, Treaty of Rome

<sup>36</sup> Ibid.

Treaty the law is observed.”<sup>37</sup> Scholars have often noted that Article 164 “is believed to contain an exceptionally broad mandate for the Court to lay down rules of law in accordance with its own preference.”<sup>38</sup> However, such a mandate is necessary given the shortcomings inherent in Treaties.

### 1.2 The Differences between a Treaty and a Constitution

The legal document giving rise to the EU was a traditional, multilateral treaty. By definition, treaties are strikingly different from constitutions. “As a rule, treaties devise systems of checks and balances whose main function is to keep under control the powers of the organization which they set up.”<sup>39</sup> However, because treaties are “products of protracted and laborious negotiations,”<sup>40</sup> they are often “vague and open-ended,”<sup>41</sup> regulating few topics, such as the delineation of powers, in exhaustive detail. Additionally, treaties do not enjoy the status of higher law. Rather, they are viewed as a negotiated agreement that is “subject to canons unlike all others. Such as, for example, the presumption that States do not lose their sovereignty.”<sup>42</sup>

The Treaty of Rome’s organization and content are illustrative of the political shortcomings inherent in such documents. Following its legal ratification, there remained “meaningful uncertainty as to the precise nature of the commitments made.”<sup>43</sup> Though the document outlined the basic ‘rules of the game,’ “the wording of many provisions was

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<sup>37</sup> Article 164, Treaty of Rome

<sup>38</sup> De Waele, Henri. “The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment.” *European Law Review*, 2010th ser.: 3-26.

<sup>39</sup> Mancini, Frederico. “The Making of a Constitution for Europe.” P596

<sup>40</sup> De Waele, Henri. “The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment.” P10

<sup>41</sup> Ibid. P9

<sup>42</sup> Mancini, Frederico. “The Making of a Constitution for Europe.” P596

<sup>43</sup> Sweet, Alec Stone. “Chapter 1: The European Court and Integration.” In *The Judicial Construction of Europe*. P19.

indeed terse and laconic.”<sup>44</sup> This was problematic, as it allowed Member States to distill and to apply their own policy interpretations of the Treaty’s provisional requirements. Furthermore, because the Treaty did not enjoy “higher law status with regard to the laws of the contracting party,”<sup>45</sup> the already ambiguous relationship between Treaty obligations, Community law, and national law was further exacerbated. It was at this juncture that Union’s integrationist efforts were threatened to come to a standstill, for those at the Community level struggled to harmonize the diverse policy actions of those at the Member State level.

The ECJ was well aware of the Treaty of Rome’s deficits, and of the necessity in providing “normative clarity”<sup>46</sup> to the document; “the main endeavor of the Court of Justice has precisely been to remove or reduce the differences”<sup>47</sup> between treaties and constitutions. Constitutionalization was the means by which the Court engaged in such an endeavor. Through its doctrinal case law, the Court transformed the Treaty of Rome and “fashioned a constitutional framework for a federal-type structure in Europe.”<sup>48</sup>

### 1.3 Procedural and Normative Mechanisms for Legal Integration

Given that the ECJ maintains a crucial role in the political, economic, and social construction of the EU, questions arise over how the Court pursues constitutionalization. As such, this section explains the various procedural mechanisms and doctrinal tools the Court utilizes to adjudicate.

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<sup>44</sup> De Waele, Henri. "The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment." P10

<sup>45</sup> Mancini, Frederico. "The Making of a Constitution for Europe." P599

<sup>46</sup> Sweet, Alec Stone. "Chapter 1: The European Court and Integration." In *The Judicial Construction of Europe*. P19

<sup>47</sup> Mancini, Frederico. "The Making of a Constitution for Europe." P599

<sup>48</sup> Ibid.

The Court's efforts to "endow the Community with a constitutional framework for a federal-type structure"<sup>49</sup> would be null if not for the presence of preliminary ruling mechanism enumerated in Article 234 of the Treaty of Rome. Whereas Article 177 (see *introduction*) enables the Court to partake in judicial review, Article 234 provides the procedural means by which the Court does so. Article 234 stipulates that when EU law is material to the settlement of a legal dispute being heard in a national court, the presiding judge can (and some judges must depending on their constitutional traditions) refer the matter to the ECJ. This referral, called a preliminary question, asks the ECJ for an authoritative interpretation of EU law. The ECJ responds with an interpretation of that law, an act called the preliminary ruling. The national judge of referral must apply the ECJ ruling at the national level to resolve the case. Thus, Article 234 must be understood as the "linchpin of legal integration,"<sup>50</sup> because it delegated the ECJ the power of judicial review, which "is an essential feature of all federal systems."<sup>51</sup>

Though Article 234 provides the procedural mechanism through which the EU's independent legal system could develop, the success with which it does so is dependent on the Court's establishment of three, distinct legal doctrines.

With *Costa v. ENEL* (1964), the Court established the Doctrine of Supremacy. The ECJ asserted that when a conflict emerges between EU law and national law, the former must be given primacy. According to the Court, "every EC norm, from the moment of entry into force, renders automatically inapplicable any conflict provision of national law,

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<sup>49</sup> Ibid. P604

<sup>50</sup> Sweet, Alec Stone. "Chapter 1: The European Court and Integration." In *The Judicial Construction of Europe*. P16.

<sup>51</sup> Mancini, Frederico. "The Making of a Constitution for Europe." P604.

including national constitutional rules.”<sup>52</sup> In practice, the Doctrine of Supremacy requires the EU to abandon its constitutional dualism within the realm of Community law. Thus, the Doctrine of Supremacy was “not only an indispensable development, it was also a logical development,”<sup>53</sup> given Europe’s integrationist efforts. The doctrine enabled Community level norms to “apply directly, that is bear upon the federations’ citizens without any need of intervention by the Member States.”<sup>54</sup>

As a consequence of *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963), the ECJ instituted the Doctrine of Direct Effect. The doctrine states that EU treaties are not mere intergovernmental agreements creating rights and obligation for Member States and EU institutions. On the contrary, they are the foundation of a separate legal order conferring rights and imposing obligations upon individuals. As such, the ECJ holds that “provisions of the Rome Treaty and a class of secondary legislation, called directives, were, directly effective.”<sup>55</sup> The Doctrine of Direct Effect also enables private actors to plead rights found in EU law before national courts. In effect, the Doctrine contributes to the integration process by bridging the gaps between the national and supranational legal systems.

Taken together, these two legal doctrines, when combined procedurally with Article 234, “would integrate national and supranational legal systems, and establish a decentralized enforcement mechanism for EU law.”<sup>56</sup> Through its judge-made law, the ECJ

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<sup>52</sup> Sweet, Alec Stone. "Chapter 1: The European Court and Integration." In *The Judicial Construction of Europe*. P16.

<sup>53</sup> Mancini, Frederico. "The Making of a Constitution for Europe." P600

<sup>54</sup> Sweet, Alec Stone. "Chapter 1: The European Court and Integration." In *The Judicial Construction of Europe*. P30

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

created “a legally driven constitutional revolution,”<sup>57</sup> that enabled it to become, arguably, “the most effective supranational judicial body in the history of the world, comparing favorably with the most powerful constitutional courts anywhere.”<sup>58</sup>

#### 1.4 Theoretical Overview: Europe’s Regional Integration

Social scientists, economists, legal scholars, and the like have documented the evolution of the EU’s supranational governance and its effects on regional integration. The Community has expanded, its “rule systems have become denser and more articulated within particular policy areas.”<sup>59</sup> Simultaneously, these competences have “broadened, covering an expanding range of substantive domains over time.”<sup>60</sup> Additionally, the capacities of the EU’s organs of government to monitor and enforce EU Law have “been steadily upgraded since the 1960s.”<sup>61</sup>

Over the decades, a wide array of theories accounting for the EU’s process and outcome of regional integration has been posited. They do not focus solely on the judiciary’s role in integration, but rather the interplay amongst all three branches of government. These theories are united by their attempt to provide an answer to the following question: “how – and through what processes – did an intergovernmental organization with limited authority develop into a quasi-federal polity with the capacity to establish binding rules in an expanding array of policy domains?”<sup>62</sup> This section provides an answer to this question, with the intention of providing the reader with the necessary

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<sup>57</sup> Varju, Marton. *European Union Human Rights Law: The Dynamics of Interpretation and Context*. United Kingdom: Edward Elgar Publishing, 2014.

<sup>58</sup> Sweet, Alec Stone. "Chapter 1: The European Court and Integration." In *The Judicial Construction of Europe*. P2.

<sup>59</sup> Stone Sweet, Alec. *Neo-functionalism and Supranational Governance*. Yale Law School Legal Scholarship Repository. P16

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid. P5

foundation for understanding the Court's juridical contributions to EU Integration, which will be discussed in the subsequent section.

Political scientists cite inter-governmentalism as one explanation of regional integration. This approach emphasizes the crucial role of a nation state in furthering the supranational construction of the EU. While some scholars contend that European integration renders the nation-state as obsolete, inter-governmentalists reject this notion. "The executives of the Member States, or a consortium of the most powerful ones, effectively regulate the pace and scope of integration, through their control of treaty-revision and the legislative process."<sup>63</sup> Consequently, European integration did not weaken Member States' sovereignty, but rather strengthened it. In certain policy domains, Member States realize it is in their national interest to pool together their sovereignty within a regional framework, and so they converge on policy matters as a means of achieving their desired outcome. According to Andrew Moravcsik, the continuation of Europe's integrative process is due to Member States desire "to coordinate policy responses to rising opportunities for profitable economic exchange, in particular growing intra-industry trade and capital movements."<sup>64</sup> As such, "the primary source of integration lays in the interests of states themselves and the relative power each brings."<sup>65</sup> This argument situates private actors as providing only a "secondary role,"<sup>66</sup> and supranational institutions as existing solely to facilitate agreements among the Member States. Inter-governmentalists cite the

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<sup>63</sup> Ibid. P14

<sup>64</sup> Moavcsik, Andrew. "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community." *The European Union*, 1998, 217-40.

<sup>65</sup> Ibid. P220

<sup>66</sup> Sweet, Alec Stone. "Chapter 1: The European Court and Integration." In *The Judicial Construction of Europe*. P15.

EU's history of employing the Principle of Unanimity<sup>67</sup> on Treaty revision as one of several justifications for their claims, for they contend this doctrine produces integrative policy outcomes reflecting the interests of the Member States.

Neo-functionalism provides an alternative approach, and one that contrasts sharply to inter-governmentalism. It seeks to explain, "How and why nation-states cease to be wholly sovereign, how and why they voluntarily mingle, merge, and mix with their neighbors so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts between themselves."<sup>68</sup> Ernst Haas, the pioneer of neo-functionalism, defined integration as the process where "political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities towards a new and larger center, whose institutions possess or demand jurisdiction over the pre-existing national states."<sup>69</sup> Unlike inter-governmentalism, neo-functionalism acknowledges the role of a myriad of political actors in sustaining regional integration. "The primary players in the integration process are above and below the nation-state. Actors below the state included interest groups and political parties. Actors above the state are supranational, regional institutions."<sup>70</sup> Neo-functionalism contends that a symbiotic relationship exists between supranational institutions and more minute political actors; as EU institution's role in policymaking grows, those "below the state" will "coalesce across

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<sup>67</sup> Article 48 of the Treaty of Maastricht states that Treaties can only be amended when all Member States agree to the provision, and amendments can only take effect when all Member States have ratified them in accordance with their national constitutional provisions.

<sup>68</sup> Haas, Ernst B. *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*. Stanford, CA: Stanford University Press, 1958.

<sup>69</sup> Ibid. P610

<sup>70</sup> Burley, Anne-Marie, and Walter Mattli. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization* 47, no. 01 (Winter 1993): 41-76.



national boundaries in their pursuit of community wide interests.”<sup>71</sup> This creates an “integrative momentum.”<sup>72</sup>

Neo-functionalism contends that this coalescing is motivated by instrumental self-interest. “Assumptions of good will, harmony of interests, or dedication to the common good need not be postulated to account for integration.”<sup>73</sup> Rather, the sub-national political actors adjust their distinct interests and goals by leveraging supranational means of governance “only when this course appears profitable to them.”<sup>74</sup> Similarly, “the supranational actors are likewise not immune to utilitarian thinking. They seek unremittingly to expand the mandate of their own institutions to have a more influential say in community affairs.”<sup>75</sup>

Once political actors realize that supranational governance provides them a platform in which they can pursue their entrenched interests, the *process* of integration is triggered. Three, interrelated concepts explain the means by which integration occurs. The first is that of functional spillover. It is based on the assumption that different sectors of a modern economy are highly interdependent on one another; this results in a situation where an integrative action in one sector undeniably affects other sectors. “Sector integration...begets its own impetus toward extension to the entire economy even in the absence of specific group demands.”<sup>76</sup> Consequently, an increase in cross-border transactions and communications among private actors occurs, triggering a “functional

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<sup>71</sup> Ibid. P54.

<sup>72</sup> Ibid. P55.

<sup>73</sup> Ibid. P54

<sup>74</sup> Ibid. P55.

<sup>75</sup> Ibid.

<sup>76</sup> Haas, Ernst B. *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*. P297

demand”<sup>77</sup> for supranational rules and policies governing such transactions. Whereas functional spillover focuses on economic integration, political spillover describes “the process of adaptive behavior, that is, the incremental shifting of expectations, the changing of values.”<sup>78</sup> Political spillover develops as a result of functional spillover because, “the ‘purely’ economic decisions always acquire political significance in the minds of the participants.”<sup>79</sup> Upgrading common interest provides the third and final element sustaining integration. This phenomenon occurs when Member States cannot converge on common policy, but they acknowledge that doing so is necessary for safeguarding the other aspects of sectoral and political interdependence that occur as a result of functional spillover. Realizing that intergovernmental inaction is politically costly, Member States compromise amongst themselves, and “construct patterns of mutual concessions from various policy contexts.”<sup>80</sup> It is crucial to note that neo-functionalism contends, “The context in which successful integration operates is economic, social and technical.”<sup>81</sup> Haas posits that in ‘noncontroversial’ areas of cooperation, the decision-making “might be so trivial as to remain outside the human expectations and actions vital for integration.”<sup>82</sup>

The interplay between functional spillover, political spillover, and the upgrading of a common interest illustrate how transnational integration develops an expansive logic. A positive feedback loop develops because the activities of an ever-increasing number of

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<sup>77</sup> Stone Sweet, Alec. *Neo-functionalism and Supranational Governance*. Yale Law School Legal Scholarship Repository. P10

<sup>78</sup> Burley, Anne-Marie, and Walter Mattli. "Europe Before the Court: A Political Theory of Legal Integration." P55.

<sup>79</sup> Haas, Ernst B. *Technocracy, Pluralism and the New Europe*. Berkeley, CA: Institute of International Studies, University of California, 1963

<sup>80</sup> Ibid. P152

<sup>81</sup> Haas, Ernst B.. *Beyond the Nation-State*. Ann Arbor (Michigan): UMI Books on Demand, 2003. P48

<sup>82</sup> Burley, Anne-Marie, and Walter Mattli. "Europe Before the Court: A Political Theory of Legal Integration." P56

political actors, who occasionally operate in separate spheres of influence, become contingent upon one another. As supranational governance expands to meet the objectives of such transactions, “the body of supranational rules expands in scope and becomes more formal and specific over time.”<sup>83</sup> In other words, deeper integration is facilitated. As such, neo-functionalism posits integration to be a dynamic, self-sustaining process. Theoretically, neo-functionalism explains why contested values become assimilated, and how Member States’ accommodate this in a way that cedes power to supranational institutions. In this regard, neo-functionalism is at odds with inter-governmentalism. The latter interprets isolated events (e.g. treaty negotiations) and the policy preferences of a concentrated group of elites (e.g. Member States that maintain the most economic weight, such as Germany) as triggering regional integration. In doing so, the theory refuses to acknowledge the importance of other, relevant political undercurrents, such as the role of private interest groups and the ECJ.

### 1.5 Theoretical Overview: Juridical Contributions to European Integration

Whereas Section 1.4 discusses the general dynamics of regional integration, this section focuses on the distinct role that supranational legal institutions play in aiding regional integration. Specifically, it will apply the neo-functionalist paradigm to that of legal integration. This section provides the foundation for understanding how the ECJ has managed to expand its influence into various policy domains.

An inter-governmentalists theory of regional integration, as defined in the preceding section, cannot be applied to that of legal integration. Though inter-governmentalism proves to be a plausible theory, it maintains a significant drawback.

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<sup>83</sup> Stone Sweet, Alec. *Neo-functionalism and Supranational Governance*. Yale Law School Legal Scholarship Repository. P16

Specifically, it does not consider “other EU institutions’ bases of power.”<sup>84</sup> Inter-governmentalists conceptualize the Treaty of Rome as an “inter-state bargain,”<sup>85</sup> and nothing more. This claim is accurate, but it fails to account for the reality that the ECJ maintains supreme authority in interpreting the Treaty itself; note again that this delineation of power is the result of the ECJ’s own construction of certain procedural (Article 234) and normative (Doctrine of Supremacy and Direct Effect) judicial mechanisms. “The Treaty of Rome effectively insulated the ECJ from Member States controls: when it interprets the Treaty, the ECJ exercises the fiduciary power of a powerful court.”<sup>86</sup> Essentially, inter-governmentalism does not consider inter-governmental decision making as “embedded in, and provoked by, larger processes going on around and between what governments do.”<sup>87</sup> Applying an inter-governmentalist theory to legal integration proves inadequate, as it fails to acknowledge the independent role of the ECJ in advancing integration.

On the other hand, applying a neo-functionalist theory to legal integration provides more promise. This theory contends, “legal integration of the Community corresponds remarkably closely to the original neo-functionalist model developed by Ernst Haas in the late 1950s.”<sup>88</sup> Specifically, neo-functionalism emphasizes the role of transnational and private actors in activating and sustaining European legal integration. At the supranational level, the principal actors are the thirteen ECJ judges; at the subnational level, the principal actors are private litigants, their lawyers, and lower national courts. Article 177 (see

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<sup>84</sup> Sweet, Alec Stone. “Chapter 1: The European Court and Integration.” In *The Judicial Construction of Europe*. P14.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Anne-Marie Burley, Walter Mattli. *Europe Before the Court: A Political Theory of Legal Integration*. P56.

*Introduction*) provides the procedural framework that links the Court and subnational actors to one another.

“The glue that binds this community of supra- and subnational actors is self-interest”<sup>89</sup> On the part of national judiciaries, constitutionalization enables them to acquire power previously unavailable to them; “the E.C. system gave judges at the lowest level powers that had been reserved to the highest court in the land,”<sup>90</sup> and for many, “to have de facto judicial review of legislation...would be heady stuff.”<sup>91</sup> In the context of private litigants, the ECJ’s establishment of the Doctrine of Direct Effect, in neo-functionalist terms, enabled the Court to “create a pro-community constituency of private individuals by giving them a direct stake in promulgation and implementation of Community law.”<sup>92</sup> Taken together, it becomes clear that the ECJ has created opportunities in which individual litigants, their lawyers, and lower national courts are incentivized to participate in the construction of the Community legal system.

Once subnational and supranational parties realize and accept the benefits associated with legal integration, functional spillover becomes inevitable. “Functional spillover presupposes the existence of an agreed objective and simply posits that the jurisdiction of the authorities charged with implementing that objective will expand as necessary to address whatever obstacles stand in the way.”<sup>93</sup> In announcing the Doctrine of Supremacy and Doctrine of Direct Effect, the ECJ enhanced the effectiveness of EU law, which attracted litigation brought by private actors; more litigation expanded the ECJ’s

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<sup>89</sup> Ibid. P60.

<sup>90</sup> Weiler, Joseph H.H. "The Transformation of Europe." P2426.

<sup>91</sup> Ibid.

<sup>92</sup> Anne-Marie Burley, Walter Mattli. *Europe Before the Court: A Political Theory of Legal Integration*. P60.

<sup>93</sup> Ibid.

jurisprudence and the domain of EC law, which continued to socialize private litigants into the legal system.

Functional spillover triggers political spillover. In the context of legal integration, political spillover is marked by the development of “legal transnational incrementalism.”<sup>94</sup> This refers to the process of some Member States’ national courts endorsing the utilization of Article 234, which, in turn, influences their Member States counterparts elsewhere to do the same, for they realize they cannot “resist the trend with any modicum of credibility.”<sup>95</sup> Once this complicit relationship is recognized, both judicial bodies play a role in creating a uniform and comprehensive law. Neo-functionalism also expects that political spillover will result in the “ECJ routinely producing supranational outcomes that the Member States would not have produced on their own.”<sup>96</sup>

If neo-functionalism defines “shifting expectations, changing loyalties, and evolving values”<sup>97</sup> as pre-requisites to regional integration, then the creation of a coordinated body of law fits into this theoretical framework. “Law operates as law by shifting expectations. The minute a rule is established as ‘law,’ individuals are entitled to rely upon the assumption that social, economic, or political behavior will be conducted in accordance with that rule. The creation and application of law is inherently a process a shift expectations.”<sup>98</sup>

As a whole, neo-functionalism provides a theoretical explanation for how and why constitutionalization and regional integration converge. It demonstrates that “the internal

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<sup>94</sup> Weiler, Joseph H.H. “The Transformation of Europe.” P2425

<sup>95</sup> Ibid.

<sup>96</sup> Stone Sweet, Alec. *Neo-functionalism and Supranational Governance*. Yale Law School Legal Scholarship Repository. P18

<sup>97</sup> E. Haas. *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*. P297

<sup>98</sup> Burley, Anne-Marie, and Walter Mattli. “Europe Before the Court: A Political Theory of Legal Integration.” P67.

dynamics of EU *law* – of litigation, jurisprudence, and doctrinal discourse – were also at the core of the *politics* of European integration, right from the beginning.”<sup>99</sup> Understanding this is critical, because the process of functional and political spillover provide insight into how the increasing competencies of Community law pressures the Court to extend its influence into various policy domains, such as human rights, among others.

### 1.6: Legal Integration and the ECJ's Zone of Discretion

Section 1.5 discusses how legal integration creates a self-sustaining process in which the construction of supranational norms become accepted and coordinated within a body of law. It discusses how this process, within and of itself, augments and strengthens Europe's regional integration. However, Section 1.5 does not discuss the degree to which the ECJ exercises judicial discretion in constructing the very jurisprudence that is inherent in legal integration. Judicial discretion is defined as the authority of judges to interpret and apply legal rules to situations in order to resolve disputes.<sup>100</sup>

How has the ECJ's judicial discretion, separate from the other subnational actors, impacted the directional discourse of legal integration? This question is of interest when one considers that the ECJ maintains judicial supremacy within the EU's vertically arranged hierarchy of judicial power, and that their legal decisions are directly effective to Member States' national judiciaries.

Several scholars apply a “Trustee-Principal” theory to understand how judicial discretion develops. Within this framework, the ECJ acts as the Trustee, and the Member

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<sup>99</sup> Stone Sweet, Alec. *The European Court of Justice and the Judicialization of EU Governance*. Yale Law School Legal Scholarship Repository. P15.

<sup>100</sup> Stone Sweet, Alec. *The European Court of Justice and the Judicialization of EU Governance*. Yale Law School Legal Scholarship Repository. P15.

States' act as the Principal. In such a relationship, the Trustee is designed to govern both third parties and the Principals themselves. Additionally, a Trustee maintains an unlimited zone of judicial discretion. "This zone of discretion can be determined by (a) the sum of powers explicitly delegated to a court, and possessed as a result of a court's own accreted rulemaking, minus (b) the sum of control instruments available for us by non-judicial authorities to shape (constrain) or annul (reverse) outcomes that emerge as a result of the court's performance of its delegated task."<sup>101</sup> Taking these two criteria's into account, a "Trusteeship situation can thus be characterized as one of structural judicial supremacy."<sup>102</sup> A Trustee-Principal relationship is distinct from a Principal-Agent relationship in the sense that the Trustee maintains a complete insulation from the demands of the Principal.

In the context of the ECJ, the concept of Trusteeship becomes appropriate. Judicial scholar Alec Stone Suite<sup>103</sup> articulates three conditions that are met for this to be the case. First, the ECJ possesses the authority to review the legality of, and to annul, acts taken by the EU's organs of governance and by the Member States in domains governed by EU law. Additionally, the Court's jurisdiction, with regards to the Member States, is compulsory. Finally, the Member-States, acting as principals, find it impossible to "punish" the Court by restricting its jurisdiction, or reversing its rulings.

Essentially, the ECJ, as a Trustee, "possesses the capacity to expand or contract its own zone of judicial discretion, through interpreting the law, and the scope of its own

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<sup>101</sup>Ibid. P13.

<sup>102</sup> Ibid. P12

<sup>103</sup> Ibid.



powers.”<sup>104</sup> Thus, the ECJ has full authority to define the direction of legal integration substantively; the Court’s establishment of the Doctrine of Supremacy and Direct affect “in the absence of express authorization of the Treaty, and despite the declared opposition of Member States governments,”<sup>105</sup> is case and point. What is key here is recognizing that, in doing so, the Court has enhanced its own capacities to govern in a wide range of policy domains. As such, “trusteeship constitutes a necessary condition for feedback and spillover to emerge and become entrenched,”<sup>106</sup> as posited by neo-functionalism. Examining when the Court widens or restrains its zone of discretion on a case-to-case basis reveals much about the values judges maximize when creating legal doctrine. Taking this reality into account becomes necessary when attempting to examine how the ECJ approaches constitutionalization within the human rights domain.

### 1.7: Legal Integration and its Relationship to Jurisdiction

When the ECJ extends the process of legal integration within the domain of human rights, it is tasked with creating a transnational, normative interpretation of such rights. However, expanding legal competence into the human rights domain depends on the Court’s willingness to either constrain or broaden its jurisdiction.

The Court consistently holds that it maintains judicial review “from the moment when national regulations enter the field of application of Community law.”<sup>107</sup> However, such a formulation is open-textured, and begs the question: *when* does a national regulation enter the field of application of Community law? The answer to such a question

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<sup>104</sup> Ibid. P13.

<sup>105</sup> Stone Sweet, Alec. *Neo-functionalism and Supranational Governance*. Yale Law School Legal Scholarship Repository. P13.

<sup>106</sup> Sweet, Alec Stone. "Chapter 1: The European Court and Integration." In *The Judicial Construction of Europe*. P22

<sup>107</sup> Wachauf [1989], ERT [1991], Article 51(1) Charter of Fundamental Rights and Freedoms

is complicated, and far from static. Because the EU's competences continue to grow, few sovereign policy domains remain untouched by the Community obligations the Treaty confers upon them. In fact, "the potential for Community legislative reach into Member State domains is not only dynamic, but may perhaps, be limitless.... there simply is, no nucleus of sovereignty that the Member States can invoke, as such, against the Community."<sup>108</sup> Consequently, defining the threshold for when a national regulation interferes with Community law becomes a point of contention. Under these conditions, the "greatest uncertainty about the role of the ECHR"<sup>109</sup> and the Charter "in community law arises."<sup>110</sup>

In such a context, the positive relationship between Court's unlimited zone of discretion, jurisdiction, and integration become apparent. Because the Court maintains insulated hegemony in delineating the boundaries of Community law in relation to national law, it can initiate judicial review. This, in turn, enables the Court to constitutionalize the policy domain at hand, thereby triggering normative harmonization, a component critical to the processes of integration. This raises the question: normatively, how far should the Court go in extending its jurisdiction *within* the area of Community law?

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<sup>108</sup> Weiler, Joseph H.H., and Nicolas J.S. Lockhart. "'Taking Rights Seriously' Seriously: The European Court and Its Fundamental Rights Jurisprudence." P64

<sup>109</sup> Guild, Elspeth, and Guillaume Lesieur. *The European Court of Justice on the European Convention on Human Rights: Who Said What, When?* P23

<sup>110</sup> Ibid.

## **CHAPTER 2: NORMATIVE CONSIDERATIONS FOR JUDICIAL PROTECTION OF HUMAN RIGHTS**

Chapter 1 discusses the ECJ's distinct role in legal integration, and how spillover has expanded the Community's jurisdictional competencies. Chapter 2 focuses on how these developments require the ECJ to create and to coordinate a normative framework for human rights. Normative conceptions of certain principles – whether they are economic, social, or political - influence the development of subsequent law and policy. Consequently, understanding how political actors construct and understand norms provides insight into why certain policy domains, such as those of human rights, develop as they do. In the broadest sense, this chapter's motivating question is: How has the ECJ created a normative framework for human rights? What normative considerations does the ECJ award to the judicial protection of human rights?

### **2.1: The EU as a Normative Power**

Scholars have long established the EU as a normative power. As such, the EU maintains the distinct ability to shape supranational conceptions of norms. Norms can be defined as, "standards aimed at codifying the behavior of actors sharing common principles in order to generate collective disciplines and to forbid certain conducts in the different field of public policies."<sup>111</sup> In practice, norms reflect a community's shared understandings and intentions of certain principles, "they are 'social facts' and reflect 'legitimate social purpose.'"<sup>112</sup> Thus, the process of normative construction is closely tied to the process of constitutionalization. When a Member State's national judiciary initiates a preliminary question (Art. 177), "it is acknowledging, at least at face value, Community norms are

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<sup>111</sup> Payne, R. A. "Persuasion, Frames and Norm Construction." *European Journal of International Relations* 7, no. 1 (2001): 37-61.

<sup>112</sup> Ibid. P38

necessary and govern the dispute.”<sup>113</sup> Thus, normative diffusion and constitutionalization are united by their ability to create a shared social purpose and understanding among Europe’s political actors and peoples alike.

## 2.2: The Origins and Emergence of Norms

Scholars across disciplines have recognized different categories of norms. The most common distinction is between *regulative norms*, which order and constrain behavior, and *constitutive norms*, which create new actors, interests, or categories of actions.<sup>114</sup> These distinctions aside, normative construction is critical within any political landscape. Norms facilitate cooperation among self-interested actors, they constrain the behavior of States and individuals alike, and they reflect underlying power distributions. As such, it is important to understand how norms originate, develop, and become institutionalized. Normative development can be defined as the process in which principled ideas (beliefs about right and wrong held by individuals) become norms (collective expectations about proper behavior for a given identity).<sup>115</sup>

At its foundational level, the emergence of norms is contingent on the presence of various political actors. These individuals maintain strong notions about appropriate or desirable behavior within their community, and they strive to call attention to the issue “by using language that names, interprets, and dramatizes”<sup>116</sup> the norm they wish to establish. The presence of a norm ‘agent’ is not sufficient, and “all norm promoters need some kind of

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<sup>113</sup> Weiler, Joseph. "Chapter 5: The Least-dangerous Branch: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration." In *The Constitution of Europe: "do the New Clothes Have an Emperor?" and Other Essays on European Integration*. Cambridge: Cambridge University Press, 1999.

<sup>114</sup> Finnemore, Martha, and Kathryn Sikkink. "International Norm Dynamics and Political Change." *International Organization* 52, no. 4 (1998): 887-917.

<sup>115</sup> Ibid. P891

<sup>116</sup> Ibid. P897

*organizational platform* from and through which they promote their norms.”<sup>117</sup> These organizational platforms have distinctive structural features that influence the kinds of norms it promotes.<sup>118</sup> Additionally, organizational platforms have the “expertise and information”<sup>119</sup> necessary to change the behavior of other actors. However, because “new norms never enter a normative vacuum but instead emerge in a highly contest normative space,”<sup>120</sup> maintaining an organizational platform cannot guarantee norm diffusion within itself. Normative contestation requires the norm entrepreneur to promote their norm “within the standards of appropriateness”<sup>121</sup> defined by prior norms. Thus, the norm entrepreneur must *frame norms* in a way that resonates with relevant audiences, and they “devote significant attention to constructing a suitable cognitive frame in order to persuade targeted states to embrace the normative idea they support.”<sup>122</sup> Taken together, these three factors (the presence of a various political actors with similar interests, an organizational platform, and the framing of norms) compel state actors to endorse the given norms, and to make norm socialization part of their agenda. However, these State actors realize that, for an emergent norm to reach the threshold of norm diffusion, an institutionalization of the norm must occur. “Since 1948, emergent norms have increasingly become institutionalized in international law, in the rules of multilateral organization, and in bilateral foreign policies.”<sup>123</sup> Institutionalization of norms is key to norm harmonization; it clarifies “what, exactly, the norm is, and what constitutes violation (often a matter of some disagreement

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<sup>117</sup> Ibid. P899.

<sup>118</sup> For example, consider the EU’s vertical hierarchy of judicial authority. This structural delineation of power enables the ECJ to diffuse its legal norms in a “top-down” mechanism, thereby ensuring legal conformity.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid. p897.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid. P899

<sup>123</sup> Ibid. P894

among actors) by spelling out specific procedures by which norm leaders coordinate disapproval for norm breaking.”<sup>124</sup>

### 2.3 The ECJ and Normative Construction: A Neo-Functionalist Perspective

Taking into account the discussion above, the ECJ can be seen as one of the preeminent political actors seeking to expand supranational norms. As one of the EU’s key institutions, the ECJ is charged with legally integrating Europe and ensuring the internal market. As such, it has clear notions about what behavior is necessary and desirable within their supranational community. It uses the various Treaties<sup>125</sup> as *framing devices* for its creation of legal norms. Within the domain of human rights, it leverages its “fundamental rights form general principles of Community law”<sup>126</sup> formula, the Charter, and its past case law. By virtue of its status as Europe’s preeminent court, the ECJ maintains the *organizational platform* necessary to legitimize its ideas. Its structural organization of a vertical hierarchy of judicial authority, in combination with the judges’ legal expertise, enables the Court to compel other State actors to endorse their articulated norms.

However, because the ECJ is also an institution, its transaction costs in creating and institutionalizing norms are significantly lower in comparison to other political actors. The Doctrines of Supremacy and Direct Effect enable the ECJ to circumvent the process of compelling state actors to endorse their proposed norms. Instead, the ECJ can issue binding legal decisions that articulate these norms, and make them ‘supreme’ and ‘directly effective,’ on national orders in matters of Community law. With every ECJ decision, the Court clarifies what the norm is and what constitutes a violation of that norm. Thus, the ECJ

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<sup>124</sup> Ibid. P899

<sup>125</sup> i.e. Treaty of Rome, Treaty of Maastricht, Treaty of Amsterdam, Treaty of Lisbon

<sup>126</sup> By extension, then, the ECHR and the Constitutional Traditions of Member States also serve as framing devices.

simultaneously ensures norm diffusion and norm institutionalization on the supranational level. This makes its efforts in constructing and harmonizing legal norms throughout the Community contingent on its adjudication.

It is also important to note that the dynamics of normative change are contingent on the operational presence of neo-functionalist spillover. The Court's evolution in how it leverages its various rights-oriented, normative 'framing devices' are indicative of this. What were once regulative norms- "those that order and constrain behavior"<sup>127</sup> – gave way to constituent norms, "which create new actors, interests, and categories of actors."<sup>128</sup> In the context of human rights, the Court transitioned away relying on its "general principles" formula as a means of framing human rights norms, preferring instead to make use of the Charter following its ratification. What is to be underscored here is that neo-functionalist spillover creates the demand for the institutionalization of past norms (i.e. the general principles formula), and over time, this provides an impulse for the emergence of new, complimentary norms (i.e. the Charter). Thus, the Court's role in normative construction works symbiotically with the processes of integration.

#### 2.4: Neo-Functionalism and its Correlation to the Narrative of the Legal Incorporation and Normative Construction of Human Rights at the Community Level

As discussed, neo-functionalism offers a causal explanation of the development and expansion of supranational governance. Unlike inter-governmentalism, neo-functionalism acknowledges the critical role of the courts and law in advancing Europe's regional integration. This section utilizes the previously discussed tenants of neo-functionalism as a means of explaining how and why the legal incorporation of human rights occurred at the

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<sup>127</sup> Finnemore, Martha, and Kathryn Sikkink. "International Norm Dynamics and Political Change." P891

<sup>128</sup> Ibid.

Community level. By discussing and evaluating the casual mechanisms of such a narrative, this section illustrates the gradual, integrative effects that Community-level human rights norms have had, as well as the various entrenched interests animating the dynamics of such legal, normative incorporation.

When the Treaty of Rome was drafted, the framers failed to provide any enumerated fundamental rights protections. “Presumably they knew that a bill of rights are in the long run a powerful vehicle of integration and in 1957, when the European climate was already tinged with skepticism...they were not eager to see the integration process speeded up by a central authority.”<sup>129</sup> Such a sentiment was also off-set by their belief that, “the scope of Community law was essentially limited to economic issues and, as such, did not involved human rights problems.”<sup>130</sup> Member States echoed such sentiments, for the absence of a bill of rights ensured their sovereign hegemony over their distinct, constitutional traditions and fundamental right guarantees. However, as the Union’s internal market evolved, economic (functional) spillover led to the inevitable expansion of supranational competencies into novel policy domains; Community law “came to govern diverse and sometimes unforeseen facets of human activity.”<sup>131</sup> This reality, in combination with the Court’s declaration of the Doctrine of Direct Effect and Supremacy, alarmed Member States. On what lawful, democratic basis could Union law supersede national law, and thus rob Member States’ citizens of their human rights guarantees when operating within the boundaries of Community law? Member States with strong constitutional traditions, such as Germany and Italy, threatened to defect. “It was a brutal blow, a blow

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<sup>129</sup> Mancini, Frederico. "The Making of a Constitution for Europe." P608.

<sup>130</sup> Ibid. P609

<sup>131</sup> Ibid. P609



jeopardizing not only the supremacy, but the very independence of Community law.”<sup>132</sup>

Though Member States’ desired to maintain the economic benefits associated with the internal market, they realized that the regulatory laws governing such an objective had the potential to infringe on their constitutional guarantees at the national level. Such concerns were further exacerbated by their awareness of the potentially eroding effects a supranational enumeration of rights would have on their constitutional traditions, and by extension, their national sovereignty. Thus, the Member States found themselves at a critical juncture: they could either effectively threaten the coherence of the internal market by refusing to acknowledge the supremacy of Community law, or they could coalesce around the establishment of human rights jurisprudence. Realizing that defection was more costly, the Member States ‘upgraded their common interest,’ and became willing “to extend supranational policy-making to additional domains,”<sup>133</sup> such as those of human rights.

By articulating such sentiments, Member States elites made clear their transnational, self-interest in having a general, legal framework for guaranteed rights; such a request was “forced on the Court from the outside, by the German, and later, the Italian Constitutional Courts.”<sup>134</sup> The Court obliged, due to its own self-interest in preserving its institutionalized judicial supremacy, and “because of its growing awareness that a ‘democratic deficit’ had become apparent in the management of the Community.”<sup>135</sup> Additionally, “a changing historical climate and international consciousness towards

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<sup>132</sup> Ibid.

<sup>133</sup> Stone Sweet, Alec. *The European Court of Justice and the Judicialization of EU Governance*. Yale Law School Legal Scholarship Repository. P8.

<sup>134</sup> Mancini, Frederico. "The Making of a Constitution for Europe." P611.

<sup>135</sup> Ibid. P610

human rights was unfolding”<sup>136</sup> at the time, providing the Court with the perfect environment in which it could advance rights protections. In *Stauder* [1969], the Court proclaimed:

“Fundamental rights are enshrined in the general principles of Community law and protected by the Court.”

In doing so, the Court declared fundamental rights to be a cornerstone of Community law, and a means by which “to check the legality of Community measures.”<sup>137</sup>

These pivotal political and legal developments – of which *Stauder* is a product off – illustrate the dynamics of neo-functionalist spillover. On the part of the Court, *Stauder* must be understood as a measure of functional spillover, for the Court carved out for itself a novel policy domain within which it could adjudicate. With regard to the Union’s national actors, *Stauder* initiated another policy realm in which Community law became effective. The effects of political spillover became apparent soon after. In relation to the Court, political spillover manifested itself through the Court’s active construction of rights-oriented jurisprudence and adherence to *stare decisis* (precedent). The effects of political spillover also trickled down to affect the normative behavior of national judiciaries and private litigants alike; “those actors to which the Court’s decisions are directed – Member State governments, national courts, and individuals – accept one decisions as a statement of existing law and proceed to make arguments in the next case from that benchmark.”<sup>138</sup> By leveraging supranational human rights norms (vis-à-vis legal precedent) as a means of

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<sup>136</sup> Weiler, Joseph H.H., and Nicolas J.S. Lockhart. “Taking Rights Seriously” Seriously: The European Court and Its Fundamental Rights Jurisprudence.”P70.

<sup>137</sup> Weiler, Joseph H.H. “Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space.”P 81

<sup>138</sup> Burley, Anne-Marie, and Walter Mattli. “Europe Before the Court: A Political Theory of Legal Integration.” P67.

achieving certain, desired policy outcomes, these political actors attitudes shifted in favor of supranational governance, thereby propelling political integration forward.

The expansive logic of neo-functionalism in relation to human rights became apparent once again with the subsequent ratification of Treaty of Maastricht in 1993.

Article 6(2) declares:

““The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, *as general principles of Community law.*”

By introducing human rights as a Treaty obligation for the first time, the Union made clear its enduring commitment to the protection of human rights. Clearly, the Court's rights jurisprudence created and consolidated political interests for both supranational and subnational actors alike within the human rights domain. If this had not been the case, such explicit acknowledgment of respect for fundamental rights would have remained absent, as it had in the past. This is because such an amendment could not have been legally incorporated given the Principle of Unanimity for Treaty revisions at this time. Under Article 48 of the Treaty of Maastricht, Treaties can only be amended when all Member States have agreed to the provisions, and amendments can only take effect when all Member States have ratified them in accordance with their national constitutional provisions. Thus, the Treaty of Amsterdam highlights the salient role that entrenched political interests play in “producing incremental but steady”<sup>139</sup> integrative change.

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<sup>139</sup> Burley, Anne-Marie, and Walter Mattli. "Europe Before the Court: A Political Theory of Legal Integration." P74.

Neo-functionalism also contends that as “hindrances to cross-national exchange and interactions”<sup>140</sup> are removed, “new obstacles to such transactions are revealed and become salient to national and supranational transactors.”<sup>141</sup> These political actors are then motivated to “target these obstacles, through litigation and through pressure on EU institutions to expand the reach of EU rules into new domains.”<sup>142</sup> What is to be underscored here is the transformation of preferences with time; political interests that were once viewed as inconsequential acquire significant weight to them, and as such, prompt novel, reactionary processes favoring integration. Taking this neo-functionalist component into account, the logic motivating the adoption of The Charter of Fundamental Rights and Freedoms crystallizes.

By the mid-1990s, the Court’s formulation of “fundamental rights form general principles of Community law,” proved to be inadequate, for reasons discussed in the *Introduction*. These worries were further exacerbated by national political actors recurrent concerns over the Union’s increasing competencies. As Joseph Weiler says most eloquently,

“As the polity grows, as the ability of national mechanisms and instruments to provide democratic legitimacy to European norms is increasingly understood as partial and often formal rather than real, the necessity of democratizing decision making at the European level becomes pressing. Such democratization requires, in its turn, the emergence of a polity with social commitment...The only normatively acceptable construct is to conceive the polity as a community of values...When one grasps for content for such a community of values, the commitment to human rights becomes the most ready currency.”<sup>143</sup>

Consequently, the Union sought to create and to ratify a legally binding document in which the material and scope of human rights protections at the Community level were made

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<sup>140</sup> Stone Sweet, Alec. *The European Court of Justice and the Judicialization of EU Governance*. Yale Law School Legal Scholarship Repository. P11

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Weiler, Joseph H.H. "Human Rights, Constitutionalism, and Integration: Iconography and Fetishism." P107

stricter and more explicit. The political demand for such an expansive document can be understood as an evolutionary product of functional spillover within and of itself.

Furthermore, the very process of the Union's drafting of the Charter reflects the dynamics of political spillover, "in the sense that the 27 Member States, with their own history and culture, have declared their adhesion to these common fundamental values."<sup>144</sup> In this connection, the Charter must be understood as "part of the Iconography of European integration."<sup>145</sup>

The historical, political, and legal developments outlined above illustrate how the judicial process provides the 'functional' means by which fundamental rights came to occupy an integrative space within the Union's federalist-like political order. From the time of *Stauder* to that of the present, the Court has constitutionalized human rights through its case law. However, the aforementioned narrative also highlights the important role that both supranational and national actors' political self-interest maintain in influencing their endorsement of supranational human rights norms. If one looks at the historical facts, it is very much apparent that human rights became a vehicle for integration at the request and behest of the Member States; both the origins (*Stauder*) and culmination (The Charter) of the Union's normative discourse on human rights are rooted in Member States' willingness to cede a certain amount of authority within their human rights jurisdiction in return for the benefits associated with EU membership. Similarly, the Court legally incorporated

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<sup>144</sup> Chapter 5: EU Charter of Fundamental Rights and its relationship with other European human rights norms.

<sup>145</sup> Weiler, Joseph H.H. "Human Rights, Constitutionalism, and Integration: Iconography and Fetishism." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*, by Riva Kastoryano. New York, NY: Palgrave Macmillan, 2009. P109.

rights due to its own desire in maintaining a “formal constitutional legitimacy and a legal basis,”<sup>146</sup> for the supremacy of its judge-made law.

What is to be emphasized, then, is that political self-interest maintains an important role in how the integrative consequences of the Court’s jurisprudence are consolidated. Though the Court maintains discretion in crafting its legal rulings, it is clearly sensitive to its surrounding political environment and the supranational and national preferences that arise and operate within it. However, the question that remains is how such political, self-interest influences the value-choices the Court makes when adjudicating and crafting a supranational, human rights standard. As discussed in section 1.6, the Court is not explicitly institutionally constrained by the preferences of Member State governments, thereby making the implications of such a question that much more relevant.

### 2.5 What Considerations Influence Human Rights Norms?

As a normative concept, human rights “illustrate the themes of uniformity and diversity and of European multiculturalism.”<sup>147</sup> Indeed, a State’s understanding of its enumerated rights is a product of its particularized historical discourse, of its social and political culture. Joseph Weiler cites America and Germany’s contrasting understandings of freedom of expression in relation to a neo-Nazi march as case and point.<sup>148</sup> However, it is not solely a State’s distinct historical past or its cultural traditions that influence how it defines the normative parameters of human rights. A State’s understanding of its

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<sup>146</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." P81

<sup>147</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*, by Riva Kastoryano. New York, NY: Palgrave Macmillan, 2009.

<sup>148</sup> Given Germany’s past history of Nazi rule, their constitution’s freedom of expression guarantees does not protect public expression of supportive Nazi rhetoric. As such, holding a pro-Nazi rally would be prohibited in Germany. In America, on the other hand, freedom of expression would protect a group’s decision to host a pro-Nazi rally.

guaranteed rights is contingent on, in the words of Weiler, its conceptualization of its “fundamental boundaries.”<sup>149</sup> Though fundamental rights are “an expression of a vision of humanity that vests the deepest values in the individual that, hence, may not be compromised by anyone,”<sup>150</sup> a State does not always regard them as absolute. On the contrary, a State may curtail fundamental rights when attempting to strike the delicate balance between the interests of the collective, as represented by government authority, and the interests of the individual in pursuit of autonomy and liberty.<sup>151</sup> It is the State’s establishment of this equilibrium that creates the fundamental boundary. If a fundamental right is “invariably the expression of compromise between competing social goods in the polity,”<sup>152</sup> then the fundamental boundary inherently determines that fundamental right.

Taking this all into account, it is not surprising that States often differ in how they conceptualize their fundamental rights guarantees. Numerous factors influence a State’s normative discourse on human rights and its relationship to their articulated notions of the fundamental boundary; these elements range from that of cultural concerns (i.e. past historical traditions) to that of institutional concerns (i.e. their constitutional tradition, unitary versus federal). Perhaps it was this reality that motivated the framers of Treaty of Lisbon to defiantly declare with Article 4(1):

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional,

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<sup>149</sup> Ibid. P75

<sup>150</sup> Ibid.

<sup>151</sup> Such a balancing approach to rights is by no means novel. In many International human rights conventions there are general provisions permitting restrictions of declared rights. For example, the European Convention of Human Rights contains certain clauses entitling restrictions for specific reasons, which are often described as being “necessary in democratic society.” See Art. 2(2), 5(1), 8(2), 9(2), 10(2), and 11(2). Similarly, many national constitutions explicitly permit a balancing of rights of the individual with the common good (e.g. Canada, Israel).

<sup>152</sup> Ibid. P77

inclusive of regional and local self-government....”

How does the Court make sense of such a Treaty requirement? How does the ECJ translate the various considerations, as discussed above, into a transnational context when fashioning a normative, legal framework for human rights at the Community level?

## 2.5 The European Court of Justice's Normative Considerations for Judicial Protections of Human Rights

### **2.5A: Jurisdiction**

As discussed in Chapter 1, spillover has created the unavoidable expansion of Community competencies. This was especially so following the 1993 ratification of the Maastricht Treaty, which established two, additional pillars of EU governance: the Common Foreign and Security Policy (CFSP) and the Justice and Home Affairs (JHA). Consequently, EU activity expanded into policy areas such as immigration, asylum, security, and data protection.<sup>153</sup> These developments make the ECJ's role in constructing legal norms a much more complex and dynamic process. With every additional policy domain subject to Community law interference, the Court must establish new legal norms. However, recall again that the ECJ maintains an unlimited zone of discretion; invoking the primacy of Community law, it can extend judicial review onto national legislation it deems to be divergent from obligations dictated by the Treaty and Community directives and law.

This broad delineation of power has a crucial implication for how the Court crafts the Community's human rights standards. Because the ECJ maintains sole authority in deciding when national legislation lies within the scope of Community law, it can shift the Community's 'fundamental boundaries,' at its own discretion, and, by extension, define the

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<sup>153</sup> Defeys, Elizabeth F. "Human Rights, The European Union, and the Treaty Route: From Maastricht to Lisbon." *Fordham Law Review* 35 (June 2012).



fundamental right in question. As discussed in the previous section, it is this balance between the fundamental right and the fundamental boundary that “is a normative expression of core values, of basic societal choices.”<sup>154</sup>

Despite the Court’s unlimited zone of discretion, the Court acknowledges that it cannot extend its jurisdiction to adjust the ‘fundamental boundary’ of Community law in an inconsistent and unpredictable manner. Surely, this would threaten the Court’s political legitimacy.<sup>155</sup> Such actions could be construed as an assault on the sovereignty of Member State policies, and be viewed as “a direct encroachment to the fundamental boundaries of the member state.”<sup>156</sup> In *Cinetheque* (1985), the Court recognized this, declaring:

“Although it is true that it is the duty of this Court to ensure observance of fundamental rights within 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.”

Consequently, the Court’s case law has articulated the circumstances under which Community law becomes applicable in relation to human rights.

In *Wachauf* (1989), the Court asserted that Member States, acting “as a decentralized agent of the Union,”<sup>157</sup> must consider fundamental rights when implementing EU law vis-à-vis regulations or directives. Often<sup>158</sup>, the Court contends that

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<sup>154</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*. P78

<sup>155</sup> See discussion in Carrubba, Clifford J., Matthew Gabel, and Charles Hankla. "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." *Am. Pol. Sci. Rev. American Political Science Review* 102, no. 04 (2008): 435.

<sup>156</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*. P78.

<sup>157</sup> Jacque, Jean-Paul. "The Charter of Fundamental Rights and the Court of Justice of the European Union: A First Assessment of the Interpretation of the Charter's Horizontal Provisions." In *The EU after Lisbon: Amending or Coping with the Existing Treaties?*, by Lucia Serena Rossi and Federico Casolari.

<sup>158</sup> See *Stauder* [1969], *Wachauf* [1989]

Community regulations are expressed in broad enough terms to allow for fundamental rights to be respected. Thus, the Court holds that “where a Community provision incorporates the protection of a fundamental right, national measures which implement that provision must give effect to the provision in such a way that the fundamental right is respected.”<sup>159</sup>

Shortly after, the ECJ established another formula clarifying the relationship between Community law, national measures, and human rights. In *ERT* (1991), the Court declared the right to assess Member States’ public policy derogations from Community law on fundamental rights grounds. Since its founding, the EU’s commitment to guaranteeing the four, market freedoms has endured; these provisions assure free movement of goods, workers, services, and capital, and they have “played a vital role in building Europe’s economic constitution.”<sup>160</sup> The Union’s various Treaties interdict Member State measures interfering with these market freedoms, regardless their source. “The mere fact that the interference may emanate from a constitutional norm is, in and of itself, irrelevant. Likewise, the fact that the constitutional measures may be an expression of a deeply held national societal more or value is, in and of itself, irrelevant.”<sup>161</sup> However, Treaty of Rome<sup>162</sup> states that a Member States’ legislation constituting a violation of these market provisions may be exculpated if it is shown to fall under the derogation clauses; these exceptions can be justified on the grounds:

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<sup>159</sup> Coppel, Jason, and Idan O'Neill. "The European Court of Justice: Taking Rights Seriously?" *Common Market Law Review* 29, no. 4 (1992): 669-92.

<sup>160</sup> Vries, Sybe A. De. "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice." *ULR Utrecht Law Review* 9, no. 1 (2013): 169.

<sup>161</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*. P91.

<sup>162</sup> See Article 36, 56, 66 in Treaty of Rome.

“Public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic historic or archaeological value; or the protection of industrial and commercial property.”

What is crucial to note “is that defining what constitutes a violation of the basic market freedoms is, substantively and jurisdictionally, a matter of Community law and for the Court to decide, as is the exculpatory regime.”<sup>163</sup> Thus, the ECJ’s assertion in *ERT* that,

“When a Member State invokes Article 56 and 66 of the Treaty in order to justify rules which hinder the free movement of services, this justification, which is provided for in Community law, *must be interpreted in the light of general principles of Community law, notably fundamental rights.*”

was groundbreaking for its time, and it must be understood as a bold, judicially activist move on the part of the Court. With this proclamation, the Court expands the doctrine of jurisdictional application formulated in *Wachauf*. Member States’ derogations must be compatible with not only “the general administrative principles of Community law, but should also conform to the principles of fundamental rights which the Court claims to respect and protect.”<sup>164</sup>

As it has been seen, *Wachauf* and *ERT* created normative constructs of judicial authority in relation to jurisdiction. The Court clearly delineated the conditions under which Community law ‘absorbs’ Member States’ national legislation, and thus becomes susceptible to fundamental rights review. The Charter confirms to this standards, with Article 51(1) stating:

“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law.*”

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<sup>163</sup> Ibid. P92.

<sup>164</sup> Coppel, Jason, and Idan O'Neill. "The European Court of Justice: Taking Rights Seriously?"P684

The judge-made creation of these jurisdictional boundaries creates a two-fold, symbiotic effect on the Union's human rights protections. It enables the Court to extend judicial review of human rights into various national policy domains, but in doing so, such domains become susceptible to normative harmonization of the Court's articulated human rights standards. In this sense, then, legal integration of human rights, both in scope and content, becomes contingent on how the Court conceptualizes its jurisdiction.

### **2.5B: Defining "Fundamental Rights as General Principles of Community Law"**

Once the ECJ establishes its jurisdiction within a certain policy domain, what considerations does it award to human rights when adjudicating? As mentioned previously, with *Stauder* (1969), the Court proclaimed:

"Fundamental rights are enshrined in the general principles of Community law and protected by the Court."<sup>165</sup>

However, the ECJ failed to explain what substantive, normative sources define the very character of these 'fundamental rights.' The Court clarified its definition in *Internationale Handelsgesellschaft* (1970), asserting:

"Respect for fundamental rights form an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, *whilst inspired by the constitutional traditions common to the Member States*, must be ensured within the framework of the structure and the objectives of the Community."

Four years later, in *Nold II* (1974), the ECJ expanded its reach, finding that in addition to factoring in Member States' constitutional traditions, it would also consider:

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<sup>165</sup> *Stauder* [1969]

“Similarly, *international treaties for the protection of human rights*, on which the Member States have collaborated or of which they are signatories, *can supply guidelines* which should be followed within the framework of Community law.”

Subsequent case law indicated that among these international conventions taken into account is the ECHR. Indeed, the ECJ made its first, explicit reference to the convention one year later in *Rutili* (1975), and it has continued to do so.

Thus, with *Internationale Handelsgesellschaft* and *Nold II*, the Court clarified how it conceptualizes fundamental rights as part of the ‘general principles of Community law’; both Member States’ constitutional traditions and international treaties alike inspire the Court’s human rights jurisprudence. It is interesting to note that the Court’s rights rhetoric is fairly cautious. It makes clear that it does not feel itself firmly anchored by these normative human rights standards. Rather, constitutional traditions are merely a source of “inspiration,” and international treaties supply only “guidelines.” In this context, the legal doctrine determining human rights standards is normatively weak, for it is based on how the Court infers meaning into these vague points of reference. “Principles are merely a norm enabling decision-makers to optimize different entitlements which lack the rule-character of codified and binding fundamental rights.”<sup>166</sup>

## **2.5C: The Charter of Fundamental Rights and Principles**

Since 2009, the Charter has provided the Court with another set of human rights standards it can use when adjudicating. Many of the Charter’s clauses correspond to the rights articulated by the ECHR, and the Charter itself recognizes the legitimacy of the Convention. Article 52(3) states:

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<sup>166</sup>Besselink, Leonard F.M. "The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions." In *The Protection of Fundamental Rights Post-Lisbon: Reports of the XXV FIDE Congress Tallinn 2012*, by Julia Laffranque, 1-139. Vol. 1. Tallinn: Tartu University Press, 2012.

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, *the meaning and scope of those rights shall be the same as those laid down by the said Convention*. This provision shall not prevent Union law providing more extensive protection.”

However, in comparison to the ECHR, the Charter’s provisions also go beyond the rights articulated in the Convention, and it recognizes some rights not expressly listed (e.g. the rights of the elderly to lead a life of dignity and independence [Art. 25], the rights to protection of personal data [Art. 8]). In doing so, the Charter provides “much needed innovation to our constitutional norms that were shaped by gaining constitutions and international treaties.”<sup>167</sup>

The rights provided are subdivided into six chapters: Dignity (Articles 1-5), Freedoms (Articles 6-19), Equality (Article 20-26), Citizen’s Rights (Articles 39-46), and Justice (Articles 47-50). Perhaps the most significant feature of the Charter’s content lies in its innovative grouping of rights; it abandons the traditional demarcations between, on the one hand, civil and political rights, and on the other, economic and social rights. This convergence creates interesting implications for how the Court is to adjudicate on human rights, as tensions can arise between the former in relation to the latter. This will be discussed in more detail in the following sub-section.

It is also important to note that the Charter makes the distinction between rights and principles. Article 51(1) holds that:

“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore *respect the rights, observe the principles*

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<sup>167</sup> Weiler, Joseph H.H. "Human Rights, Constitutionalism, and Integration: Iconography and Fetishism." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*. P110.

*and promote the application thereof in accordance with their respective powers.”*

Whereas rights have a binding and directly enforceable character, principles are to be interpreted as guidelines rather than enforceable entitlements. “It needs to be stressed, however, that the distinction between rights and principles should not be drawn according to their litigability, but rather according to their ‘status of enforceability.’”<sup>168</sup> Unlike rights, principles cannot be invoked directly by individuals, because they are objective standards addressed to the Union’s Member States in pursuit of a given purpose. “This purpose is achieved through measures of implementation that themselves create rights for individuals.”<sup>169</sup> Thus, a principle only becomes a protected right when there has been legislation implementing such measures. To clarify, whereas freedom of expression (Art. 11) is defined to be a right, the rights of the elderly (Art. 25) are considered to be principles. The logic motivating the delineation between rights and principles lies in the Charter’s desire to leave a margin of appreciation to Member States’ legislation; “some of the principles, therefore, have a kind of defensive character, and primarily aim at protection national norms (specifically social standards) from a leveling by the side of the Union.”<sup>170</sup> In practice, however, “the lines between rights and principles are floating,”<sup>171</sup> for some articles contain both elements of a right and a principle (e.g. equality between men and women [Art.23]). Thus, how the Court applies principles as a standard of human rights protection can be rather equivocal, as it depends on how it conceptualizes its jurisdiction

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<sup>168</sup> Bojarski, Lukasz, Dieter Schindlauer, and Katrin Wladasch. *The European Charter of Fundamental Rights as a Living Instrument*. Austria: Ludwig Boltzmann Institute of Human Rights, 2014.

<sup>169</sup> Jacque, Jean-Paul. "The Charter of Fundamental Rights and the Court of Justice of the European Union: A First Assessment of the Interpretation of the Charter's Horizontal Provisions." In *The EU after Lisbon: Amending or Coping with the Existing Treaties?*, P155

<sup>170</sup> Ibid.

<sup>171</sup> Bojarski, Lukasz, Dieter Schindlauer, and Katrin Wladasch. *The European Charter of Fundamental Rights as a Living Instrument*. P93

over the legislative act at hand. If the Charter is to be used as an integrative tool in all of its capacity, then one expects the Court to place ‘hard’ limits on the enforceability of the Charter’s enumerated principles.

As it has been seen, the Charter’s normative scope is simultaneously more expansive and more demanding than that of the “general principles” formula. Not only does the Charter codify the past rights inferred by the Court’s “general principles” case law, but it also creates novel rights. Furthermore, the Charter now maintains “the same legal value as the Treaties.”<sup>172</sup> As such, one would think that the Charter renders the Court’s “general principles” formula unnecessary. However, this is not so, for Article 6(3) of the Treaty of Lisbon states:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, *shall constitute general principles of the Union's law.*”

Such a declaration raises questions about how Article 6(3) is to be interpreted in relation to the Charter and its normative scope. Are the general principles of EU law, as they stem from Article 6(3), only ancillary to the Charter? Or will the Court rely on the Charter “as a source of inspiration to elaborate ‘general principles’ of EU law,”<sup>173</sup> which is dictated by its preceding case law? Only the Court’s case law over time can provide an answer to this question. If the Court aims to leverage fundamental rights as a means of advancing integration, one would expect that the scope of application of the general principles and the

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<sup>172</sup> Treaty of Lisbon. Article 6(1): “The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

<sup>173</sup> Lorenz, Nina-Louisa Arold, Xavier Groussot, Gunnar Thor Petursson, and Lawrence M. Friedman. “Chapter 5: The EU Charter of Fundamental Rights and Its Relationship with Other European Human Rights Norms.” In *The European Human Rights Culture: A Paradox of Human Rights Protection in Europe?*



Charter's rights to be, at a minimum, similar, as it "would ensure the coherence of the protection of EU fundamental rights post-Lisbon."<sup>174</sup> If the Court does choose to utilize the Charter as one of "the starting points of its inquiry"<sup>175</sup> when adjudicating, then Article 6(3) has a diversifying effect on the normative conceptualization of rights at the Community-level. This is because the Court can now simultaneously leverage the constitutional traditions of Member States and the ECHR "in situations of gap filling due to the inherent lacunae of the Charter."<sup>176</sup> By extension, this would enable the Court to further develop the material scope of the Charter.

## **2.5D: Internal Market Guarantees**

As mentioned in the *Introduction*, the EU's foundation is rooted in its desire to create and to ensure a functioning, internal market. To attain this goal, the Union's various treaties stress the importance of market freedoms; free movement of goods, persons, services, and capital are central tenets within the Union's constitutional order.<sup>177</sup> As such, the ECJ is legally obliged to respect these principles when adjudicating on matters of Community law.

The ECJ's case law indicates that the Court fulfills this obligation. In *Dassonville* (1974), the Court constructed a broad legal standard for when national legislation constrains a market freedom and is subject to annulment.<sup>178</sup> "The very fact that an indirect and potential effect on trade suffices for the national measure to fall within the scope of Article 34 (Treaty of Rome) means that citizens have a far-reaching right to challenge

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<sup>174</sup> Ibid. P173

<sup>175</sup> Ibid. P175

<sup>176</sup> Ibid. P177

<sup>177</sup> Article 8A of the Single European Act states, "the internal market shall comprise an area without internal frontiers in which the free movement of goods, services, and capital is ensured."

<sup>178</sup> Unless, of course, such national legislation falls under the derogation clause. See subsection 2.5A for more clarification.

national legislation which they find in their way and which restricts their (economic) rights.”<sup>179</sup> In subsequent cases, the Court has made various references to the fundamental character of the Treaties’ market provisions.<sup>180</sup> The Court’s rhetoric uses words such as “fundamental freedom,”<sup>181</sup> “one of the fundamental principles of the Treaty,”<sup>182</sup> or “fundamental Community provision.”<sup>183</sup> How does the Court factor in these economic motives when adjudicating on human rights?

*Wachauf* [1989] provides an answer to this question, with the Court declaring:

“...The fundamental rights recognized by the Court *are not absolute*, however, but must be considered in relation to their social function. Consequently, *restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the market*, provided those restrictions in fact correspond to the *objectives of general interest pursued by the Community*...and do not have a disproportionate and intolerable interference, impairing the very substance of those rights.”

The Court’s equation of the “common organization of the market” with that of “objectives of general interest pursued by the Community” directly implicates the Community’s normative conception of human rights. The former explicitly serves as a mitigating factor in how the ECJ awards legal recognition to fundamental rights. Article 52(1) of the Charter confirms such a legal approach, stipulating:

“Any limitation on the exercise of the rights and freedoms recognized by this Charter...May be made only if they are necessary and genuinely meet objectives of general interest by the Union....”

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<sup>179</sup> Vries, Sybe A. De. “Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice.” P175

<sup>180</sup> Oliver, Peter, and Wulf-Henning Roth. “The Internal Market and the Four Freedoms.” *Common Market Law Review* 41, no. 2 (2004): 407-41.

<sup>181</sup> *Schmidberger* [2000], *Angonese* [2000], *Omega* [2004], *Laval* [2005]

<sup>182</sup> *Commission v. France (Spanish Strawberries)* [1995]

<sup>183</sup> *Corsica Ferries France* [1989]

However, economic freedoms serve as a control on fundamental rights claims inasmuch as there is a rigid delineation in the substantive content and scope of such market freedoms. Establishing such demarcations is difficult, as market freedoms can transcend solely their economic dimension, and encompass fundamental rights. In this context, the ECHR and the Charter provide the Court with little guidance, as the documents themselves collapse the traditional distinctions between economic and social rights. For example, the freedom to pursue a trade or profession (Art. 16 in the Charter) can be interpreted as the market freedom of services and peoples. Similarly, the right to non-discrimination (Art. 14 in the ECHR, Art. 21 in the Charter) directly relates to the free movement provisions, and such a fundamental right can also be invoked as a protectionist claim of human dignity (Art. 1 in the Charter).

In such circumstances, creating legal human rights norms becomes even more difficult. The ECJ must balance the Union's competing economic and social interests. However, doing so is contingent on how the Court decides to separate two legal guarantees that diverge in substance, but can converge in practice. If the ECJ rules in favor of an economic freedom over that of a fundamental right, the former has an integrative effect at the intersection of Community's legal and economic order at the expense of the latter. In this sense, then, "the judicial protection of fundamental human rights...may operate as a source of both unity and disunity in the dialectical process of European integration."<sup>184</sup>

## **2.5E: Conclusion**

As it has been seen, the ECJ considers a myriad of factors when constructing a transnational, legal framework for human rights at the Community level. From a

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<sup>184</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*. P81

procedural point of view, the ECJ must, first and foremost, establish its jurisdiction within a certain policy field. Doing so is crucial, as it enables the Court to constitutionalize, and by extension harmonize, human rights norms at the Community level. Once it does so, the Court must then decide on the substantive content characterizing the direction of such legal integration. It is at this juncture that the Court confronts two, distinct tenets of Community law. The ECJ must, on the one hand, guarantee the “common objectives of the Union,” as dictated in the Treaties, *Wachauf*, and Art. 52(1) of the Charter, and on the other hand, it must promote its claim that “fundamental rights form general principles of Community law.”<sup>185</sup> As this section has shown, the ECHR, the Constitutional traditions of Member States, and the Charter form the normative, substantive basis from which these “general principles of Community law” are gathered.

What should be underscored is that these considerations accommodate Member States’ distinct, national identities and normative interests within and of themselves. All Member States are contracting parties to the ECHR, their Constitutional traditions, and the Charter, and they also desire to maintain the benefits of the internal market. Thus, the normative content characterizing the Union’s conceptualization of rights reflect, at a bare minimum, a commonality at the transnational and national level, in the spirit of neo-functional logic.

This section has also emphasized the reality that certain ambiguities exist in regards to the normative reach of fundamental rights at the Community level. Specifically, questions remain over the exact scope of application of the Charter in light of the Union’s growing competencies, the distinction between the Charter’s rights and principles, and the

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<sup>185</sup> *Stauder* [1969], *Internationale Handelsgesellschaft* [1970], *Hauer* [1979], *Cinetheque* [1985], *Demirel* [1987], *Kadi* [2008]

Charter's relationship with the general principles of EU law, as developed by the Court's case law. Thus, while the Union maintains a plurality of normative sources characterizing the very content of fundamental rights, the degree to which such content has an integrative effect on the Union's legal order is to be determined. It is the goal of chapter three and four to provide a case-study analysis on this matter.

#### 2.6: Methods for Translating the Normative Considerations into a Coherent Standard

The preceding section establishes what normative factors influence the Court's human rights jurisprudence. It also reveals the competing interests that some of these considerations create (e.g. economic competencies vs. social rights, the Charter's principles vs. rights). The goal of this section is to explain how the Court makes sense of these various sources of inspiration, and comes to its own value judgment, as embodied in its legal judgments. Though chapters three and four will focus on the actual, substantive outcome of such reconciliations as a means of examining the Court's integrative effect, this section seeks to explain the various doctrinal tools the Court uses to reach such legal conclusions. When adjudicating on matters of enshrined, constitutional rights, judges, by virtue of their profession, are confronted by questions over what the appropriate standard of protection should be between the individual in relation to the collective; "it is a key function in the jurisprudence of constitutional courts and is often unavoidable in solving conflict between fundamental rights."<sup>186</sup>

If the Court draws upon the constitutional traditions of Member States when adjudicating on fundamental rights, should the Court adopt the highest constitutional standard, like that of Germany or Italy? Should such a constitutional standard be

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<sup>186</sup> Vries, Sybe A. De. "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice." P170

transposed as a “general principles of Community law,” under Article 6(3) of the Treaty of Lisbon, thereby effectively expanding the material scope of the Charter? This method is characterized as *maximalist*. Such an approach would be deserving of applause, for it would result in the ECJ widening its zone of protection for human rights. However, “the maximalist approach does not work, cannot work, and for good reason, has been rejected by the Court.”<sup>187</sup> The workability of such a method rests on idealistic assumptions. Why should the Union’s Member States accept the legal standard articulated by only one of many Member States? Not only would this create a potential conflict of values, but such a high national standard may also “be considered as entirely unsuitable for the Community as a whole.”<sup>188</sup> The Court articulated this reality in *Hauer* (1979),

“The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community.”

Take, for example, Ireland’s high-level, constitutional protection for the unborn. Such a standard of protection is non-existent in every other EU Member State; “these countries guarantee the ‘opposing’ right of a woman to autonomy over her body.”<sup>189</sup> How is the Court to react to such starkly opposing conceptions of life of the unborn? If it utilizes a maximalist approach, the Court would, in effect, disband the sovereign rights of the other Member States in performing abortion services within the area of Community jurisdiction.

Conversely, if the Court were to leverage a maximalist approach in awarding women the

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<sup>187</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*. P81

<sup>188</sup> Ibid. P82.

<sup>189</sup> Ibid. P83

right to self-determination, Ireland's constitutional tradition would be eroded. Such a situation is illustrative of the reality that "the community is comprised of many member states and peoples. Its basic values should be an expression of that mélange."<sup>190</sup> A maximalist approach is antithetical to such an expression, for it "privileges the core values of one Member State, the one which happened to accord the 'highest' level of protection to the individual."<sup>191</sup> This brings our attention to the second flaw inherent in a maximalist doctrine. By awarding the EU citizen with the 'highest' level of rights protection, the Court effectively provides the collective polity (i.e. the EU) and its general interest with the 'lowest' level of protection. "A maximalist approach to human rights would result in a minimalist approach to Community government."<sup>192</sup> As such, this legal doctrine threatens to bring integrative effects of constitutionalization to a standstill.

How, then, does the Court create a transnational, normative standard for rights in light of such diverse and conflicting national values? Through its own case law<sup>193</sup>, the ECJ established the *principle of proportionality*, and it must be understood as "the necessary corollary of any such a delicate balancing exercise."<sup>194</sup> The proportionality test contains three elements<sup>195</sup>:

- 1) There must be a casual connection between the national measure and the aim pursued; the measure is relevant and pertinent
- 2) There is no less restrictive, alternative measure available

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<sup>190</sup> Ibid. P84

<sup>191</sup> Ibid.

<sup>192</sup> Ibid. P85

<sup>193</sup> LIST CASES!

<sup>194</sup> Lorenz, Nina-Louisa Arold, Xavier Groussot, Gunnar Thor Petursson, and Lawrence M. Friedman. "Chapter 5: The EU Charter of Fundamental Rights and Its Relationship with Other European Human Rights Norms." P103

<sup>195</sup> Vries, Sybe A. De. "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice." P172

- 3) There must be a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective thereby pursued and its actual attainment. This is referred to as proportionality *stricto sensu*; meaning that the measure will be disproportionate if the restriction is out of proportion to the aim sought by or the result brought about by the national rules.

“How intrusively the proportionality test will be employed by the ECJ depends on a number of factors.”<sup>196</sup> First, the Court must weight the public interest at stake and deem it relevant within the boundaries of Community jurisdiction. For example, a more intrusive proportionality test within the consumer policy domain is performed because “the Court relies on the capacity of the consumer to process information and make informed choices about available products and services.”<sup>197</sup> Second, the Court also considers “regulatory instrument used by the Member State.”<sup>198</sup> That is, it examines the national legislation in question, and how Member State utilizes it to attain its policy goals. As a whole, the principle of proportionality enables the Court to articulate the logic of its policy justification and its relationship to the facet of Union law in question; this, in turn, enables the Court to consolidate and craft a normative standard of protection. The Charter acknowledges the merits of such doctrinal balancing exercises itself, with Article 51(1) proclaiming, “the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity...”<sup>199</sup>

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<sup>196</sup> Ibid. P173

<sup>197</sup> Ibid.

<sup>198</sup> Ibid. P174

<sup>199</sup> Charter of Fundamental Rights and Freedoms, Article 51(1)



How the Court perceives fundamental rights “under the scheme of the justification grounds is important,”<sup>200</sup> for it directly implicates the degree to which human rights do or do not serve as an integrative impulse. If the Court does not view fundamental rights on “self-standing justification grounds,”<sup>201</sup> then such normative constructs can be side-lined in favor of other policy merits, such as pursuing a free movement provision. Consequently, the harmonization of Community-level rights would be circumvented, as the ECJ would fail to impose a common legal conception and obligation of the right in question on the Member States. With the legal ratification of the Charter, one would expect the Court to more consistently award fundamental rights a self-reflexive justification for its pre-eminence, and thus be subject to a ‘softer’ application of the principle of proportionality. However, recall again that the ECJ maintains an unlimited zone of discretion, and, as such, need not always adhere to such expectations. Nevertheless, “it must be understood that the doctrine of proportionality involves a Community imposed value choice by the Court on a Member State.”<sup>202</sup> s

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<sup>200</sup> Ibid. P188

<sup>201</sup> Ibid.

<sup>202</sup> Weiler, Joseph H.H., and Nicolas J.S. Lockhart. “Taking Rights Seriously” Seriously: The European Court and Its Fundamental Rights Jurisprudence.” P77

## **ESTABLISHING CONTEXT FOR CHAPTERS 3 and 4**

Chapter 1 stressed the development and subsequent entrenchment of various types of spillover as a means of explaining the gradual constitutionalization of the Union's human rights discourse. Chapter 2 addresses the normative consequences of regional integration by establishing the symbiotic relationship that emerges between normative construction and institutionalization and that of constitutionalization. Collectively, the goals of Chapter 1 and Chapter 2 have been to establish the operational presence of neo-functionalist logic as the institutional level. However, it is still unclear whether or not neo-functionalism's integrative effects operate at the substantive, jurisprudential level. Do nationalistic sentiments mitigate the Court's imposition of supranational rights? Or does the Court understand that the Union must develop "as a polity with its own separate identity and constitutional sensibilities, that has to define its own fundamental balances – its own core values?"<sup>203</sup> If so, does the Court's conceptualization of Community-level rights transcend nationally embedded interpretations of human rights norms?

Chapters 3 and 4 attempt to answer these questions and gauge human rights' integrative effect on the EU by analyzing the outcomes of several ECJ rights-oriented court decisions. The Court cases examined will be those in which a freedom of expression and information claim was invoked. There are several reasons for this. First, freedom of expression is a provision within both the ECHR (Article 10) and the Charter (Article 11). Additionally, forms of expression also encompass others rights enumerated in the Convention and Charter, such as: freedom of thought, consciences, and religion (Article 9

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<sup>203</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*. P89

ECHR, Article 10 CFRF), freedom of assembly and of association (Article 11 ECHR, Article 12 CFRF), and freedom of arts and sciences (Article 13 ECHR). Third, the Court's case law on such claims is well developed, and offers points of comparison in terms of how the ECHR and the Charter have been interpreted over the decades. Finally, many of the freedom of expression cases involve interactions with market freedoms, therefore clarifying the values judges consider when adjudicating on fundamental rights.

This thesis divides its case-study portion into two, separate chapters based on time period. Chapter three examines ECJ judgments from 1985 – 2000. The first case examined is *Cinetheque* (1985), which is the *first* judgment in which a litigating party invoked a freedom of expression claim. *ERT* (1991) and *Grogan* (1991) will also be studied, as these are the only other judgments post-1985 involving freedom of expression. The final case reviewed in chapter three will be *Familiapress* (1997); this is because *Familiapress* is the *last* judgment concerned with freedom of expression prior the proclamation of the Charter in 2000. Though the Charter was not legally binding until 2009, “the legally binding nature of the Charter did not emerge in a vacuum; the period of its ‘soft’ value served as a ‘prelude’ during which legal actors struggled to find the right place for this significant instrument.”<sup>204</sup> As such, chapter four examines a total of five cases, dating from 2000 – 2013. It assesses four of the freedom of expression cases brought to the Court's docket during this thirteen-year period, and this involves cases from the time *preceding* the legal ratification of the Charter to the time *after* it became legally binding. By separating these case studies in relation to the pre- and post-proclamation of the Charter, this thesis can

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<sup>204</sup> Sanchez, Sara Iglesias. "The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights." *Common Market Law Review* 49, no. 5 (2012): 1565-612. P1595

examine the integrative effects of the Court's human rights jurisprudence from a qualitative and quantitative perspective. Given that the Charter "represents a fundamental evolution in the 'stage of integration,'" <sup>205</sup> such divisions by time enable this thesis to assess the degree to which the Court's rights adjudication has had a decisive, normative impact. This thesis also studies how this finding operates in relation to the Union's gradual legal incorporation of rights, as evidenced by *Wachauf* (1969), the Treaty of Amsterdam (1993), the Treaty of Maastricht (1997), the Treaty of Lisbon (2009).

This thesis will then examine the juridical outcomes within the analytic framework of neo-functionalism. If neo-functionalist logic transcends into the human rights domain, then the expectations will be as followed:

- *Functional Spillover* posits that once a policy objective has been agreed upon, "the jurisdiction of the authorities charged with implementing that objective will expand as necessary to address whatever obstacles stand in the way." <sup>206</sup> With rights protections being the agreed upon objective, it is anticipated that the Court will expand the policy realms it can adjudicate this matter within. With the introduction of the Charter in 2009, a subsequent expansion of rights-oriented jurisdiction is to be especially expected, as the Charter now has the same legal value as the Treaties, making it an obligatory standard of review.
- *Political Spillover* contends that functional spillover will inspire a "shift in resources and policy efforts at the supranational level." <sup>207</sup> As such, it is expected that Court will evolve to apply the principle of proportionality more intrusively when engaging

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<sup>205</sup> Ibid. P1568

<sup>206</sup> Burley, Anne-Marie, and Walter Mattli. "Europe Before the Court: A Political Theory of Legal Integration." P65

<sup>207</sup> Stone Sweet, Alec. *Neofunctionalism and Supranational Governance*. P8

in rights-oriented judicial review. By extension, it is expected that the Court will provide Member States with less deference in terms of how to remedy a human rights violation, thereby resulting in normative displacement or affirmation of the national in favor of the supranational. "The ECJ has been more concerned with the unification and primacy of EC law, which leaves less scope to State for diverse application."<sup>208</sup>

- *Measuring the Effect of Time* Neo-functionalism concerns itself with the gradual process rather than the end result of integration. This thesis acknowledges the important role time plays in regional integration, and so it examines freedom of expression cases over the course of twenty-five years. It is expected that, with the legal ratification of the Charter in 2009, the integrative effects of functional and political spillover will become amplified.

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<sup>208</sup> Lorenz, Nina-Louisa Arold, Xavier Groussot, Gunnar Thor Petursson, and Lawrence M. Friedman. "Chapter 5: The EU Charter of Fundamental Rights and Its Relationship with Other European Human Rights Norms." P91

## Defining Freedom of Expression and Information

### **The European Convention of Human Rights (Article 10)**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### **The Charter of Fundamental Rights (Article 11)**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

### **CHAPTER 3: CASE STUDIES [1985 – 2000]**

In this chapter, I strive to show how the Court's legal reasoning adheres to the analytical expectations of functional and political spillover. As these case studies will illustrate, the Court gradually incorporates rights guarantees as additional standards of legality when assessing national legislation. Consequently, rights, as a normative legal construct, come to occupy a greater space within the jurisdictional boundaries of Community law, as posited by functional spillover. These case studies will also show how the Court's approach to rights-oriented judicial review evolves in a way that coheres with political spillover. This is because the Court will begin to apply the principle of proportionality more intrusively, thereby making it more likely for Community law to absorb national law, and to trigger normative harmonization.

#### **3.2: *Cinetheque SA and Others v. Federation Nationale des Cinemas Francais* (1985)**

##### **Facts of the Case**

French Law No. 82-623 states that all imported audiovisual material must be licensed and approved by the France's Ministry of Culture. Article 89 of the law establishes a strict, chronological order between different methods of cinematographic distribution. In particular, it holds that cinematographic work currently offered in cinemas cannot be sold for private use in the form of videocassettes for a period between six to eighteen months until *after* its cinematic closing-date. The law permits the French Minister of Culture to waive such a requirement if agreed upon by "a committee composed of eight members including two representing video-cassette and video-disc producers."<sup>209</sup>

In 1982, the British company Glinwood Films Limited released the film *Furyo*. In March 1983, it awarded the French cinema chain AAA the exclusive right to distribute and

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<sup>209</sup> Paragraph 3

show the film throughout France. Such an action was in accordance with Law No. 82-623. One month later, Glindwood Films granted Cinetheque SA, a French videocassette company, the exclusive license to produce and sell videocassettes of *Furyo* from October 1983 onwards. Cinetheque received consent from AAA, and began to produce and sell such cassettes. Shortly after, the National Federation of French Cinemas issued an injunction to such selling activities, and obtained an interim order for the seizure of all video recordings offered for sale to public retailers. The national authorities claimed that Cinetheque's selling arrangement violated Law No. 82-623, because the production and distribution of the cassettes *preceded* the mandatory wait period following the film's cinematic release. Cinetheque and Glintwood Films brought action before France's High Court, claiming that Article 89 of France's law violates Articles 30 and 59 of the Treaty regarding the free movement of goods and services because it "prevents certain products from being made available for sale in the national territory even though they may circulate freely in the territory of other Member States."<sup>210</sup> They also cited Article 10 of the ECHR, asserting that the law violates their freedom of expression. On its end, France contends "that the legislation in question applies to imported and national products alike, that it was adopted in the absence of community legislation in a field falling within the exclusive competence of the Member States, and that it was justified by the mandatory requirements of the general interest,"<sup>211</sup> as permitted by Article 36 of the Treaty's derogation clause. In regards to the latter claim, the French government claims that Article 89 of French Law No. 82-623 attempts to protect "the cinema as a means of cultural expression, which was necessary in

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<sup>210</sup> Paragraph 14

<sup>211</sup> Paragraph 15



view of the rapid development of other modes of film distribution.”<sup>212</sup> This is because the “cinemas produce the bulk of their [i.e. the film industry’s] revenue and income from other forms of exploitation [i.e. other forms of video distribution] is very small.”<sup>213</sup> In regards to freedom of expression claims, the French government contends, “it is not for the Court to consider whether measures taken by the Member States are compatible with the Convention.”<sup>214</sup> The French High Court referred the claims to the ECJ.

### **The Preliminary Question(s) Referred to the Court**

- 1) Are the provisions of Article 89, regulating the distribution of cinematographical works, compatible with the Provisions of Article 30 regarding the free movement of goods?<sup>215</sup>
- 2) Are these same provisions compatible with Article 59 regarding the free movement of services?<sup>216</sup>
- 3) If the answer to either of these questions is in the negative, can Article 89 of the domestic law be excused under Article 36’s derogation claim?<sup>217</sup>

### **The Court’s Ruling**

The Court first assesses the compatibility of France’s law with the free movement of goods and services. It acknowledges that providing cinematographic works to the public by means of videocassette recordings “merges with the putting of the works on the market.”<sup>218</sup> It rules that Article 89 of French Law No. 82-623 cannot be defined as a service [Art. 59]. This is because the distribution of video-cassettes are “governed by provisions relating to the free

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<sup>212</sup> *ibid.*

<sup>213</sup> Paragraph 16

<sup>214</sup> Opinion of Advocate General, P2615

<sup>215</sup> Paragraph 6(1)

<sup>216</sup> Paragraph 6(2)

<sup>217</sup> Paragraph 6(3)

<sup>218</sup> Paragraph 9

movement of goods [Art. 30].”<sup>219</sup> The Court concludes that the national legislation “undeniably has the effect of hindering imports of video recordings lawfully produced and marketed in another Member States and in free circulation,”<sup>220</sup> and is thus in violation of the free movement of goods.

As such, the Court then considers whether or not such a violation is justified under the derogation claim of Article 36. Discussing the claims brought forth by both the National Federation of French Cinemas and the French Government<sup>221</sup>, it finds that “cultural aims may justify certain restrictions on the free movement of goods provided that those restrictions apply to national and imported products without distinction, that they are appropriate to the cultural aim which is being pursued and that they constitute the means of achieving them which affects intra-community trade the least.”<sup>222</sup> The Court examines whether or not France carried out such considerations.

Studying other Member State legislation regarding the distribution of videocassettes post-cinematic release<sup>223</sup>, the Court notes that all national laws “delay the distribution of films...during the first months,”<sup>224</sup> though in varying degrees. The Court takes this finding as indicative that such provisions are “considered necessary in the interest of the profitability of cinematographic production.”<sup>225</sup> Consequently, it finds that “the Treaty leaves it to the Member States to determine the need for such a system, and any temporal restricts which ought to be laid down.”<sup>226</sup> It rules that, because France’s policy does not discriminate between

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<sup>219</sup> Ibid.

<sup>220</sup> Paragraph 18

<sup>221</sup> Paragraphs 14-18

<sup>222</sup> Paragraph 18

<sup>223</sup> Paragraphs 18-20

<sup>224</sup> Paragraph 20

<sup>225</sup> Paragraph 20

<sup>226</sup> Paragraph 20

national and transnational videocassettes, the national legislation “is so justified.”<sup>227</sup> As such, Article 89 of French Law No. 82-623 is permitted to derogate from the Treaty’s legal obligations.

The Court devotes the final paragraph of its judgment to addressing the claim that Article 89 of French Law No. 82-623 is “in breach of the principle of freedom of expression recognized by Article 10 of the ECHR.”<sup>228</sup> The Court states that, though “it is the duty of this Court 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.”<sup>229</sup>

### **Analysis**

Scholarly literature discussing the judicialization of human rights at the Community level makes reference to the Court’s *Cinetheque* decision often. This is not surprising, as this case was among the first judgments in which remedial action for a rights violation was brought to the Court’s docket following its groundbreaking judgment in *Rutili* (1975), in which the Court suggested, “that limitations on Member State action under Community law were paralleled by certain provisions of the ECHR.”<sup>230</sup> Scholar’s assessment of *Cinetheque* often revolves around the Court’s refusal to engage in rights-oriented judicial review despite its preceding declaration in *Rutili*. As such, the case is often cited as a prime example of the Court’s original hesitancy in engaging with rights-focused value judgments. What should be

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<sup>227</sup> Paragraph 23

<sup>228</sup> Paragraph 25

<sup>229</sup> Paragraph 26

<sup>230</sup> Coppel, Jason, and Idan O'Neill. "The European Court of Justice: Taking Rights Seriously?" P674

underscored is that *Cinetheque* sets a base line for the comparing future human rights judgments and their relationship with supranational integration.

In this connection, *Cinetheque* fails to adhere to neo-functionalist logic. In *Rutili*, the Court articulated that fundamental rights form a legitimate policy interest, and it “alluded to fundamental rights considerations in the context of Member State action. It did not, however, apply them directly, or indeed hold them applicable, to that Member State action.”<sup>231</sup> Nevertheless, *Rutili* was understood as a pivotal first step towards the legal incorporation of rights. In adherence with the logic of functional spillover, one would expect that, in *Cinetheque*, the Court would expand its jurisdiction and partake in rights-oriented review as a means of pursuing the objective put forth in *Rutili*. However, the Court consciously declines to pursue such efforts, and it is extremely brief in discussing the merits of the plaintiff’s claim that Article 89 of the national law violates freedom of expression. In fact, the Court renders such a question as null on the grounds that France’s national policy in relation to the ECHR “falls within the jurisdiction of the national legislator,”<sup>232</sup> and not that of a supranational Court. In doing so, the Court delineates the ‘fundamental boundary’ of Community law as precluding rights-oriented judicial review of national policies. This, in turn, inhibits the subsequent development of political spillover. Judge Pescatore, commenting on the *Cinetheque* decision, writes: “this position shows that the Court is conscious of the limits of its jurisdiction: called upon to guarantee respect for the law within the Community it has no

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<sup>231</sup> Ibid.

<sup>232</sup> Paragraph 26

mission to busy itself with the defense of human rights within the sphere of legislative sovereignty of Member States.”<sup>233</sup>

3.3: *Elliniki Radiophonia Tileorassi (ERT) v. Dimotiki Etairia Pliroforissis (DEP) and Sotirios Kouvelas (1991)*

**Facts of the Case**

Elliniki Radiophonia Tileorassi Anoinimi (ERT) is a radio and television Company; Dimotiki Etairia Pliroforoissis (DEP) is the municipal information company of Thessaloniki, a Greek port city located in Northern Greece. Under national Law no. 1730/1987, ERT maintains exclusive rights to emit radio sound and television images by all possible means, including cable television. According to Article 2(1) of that law, “ERT’s objects is, without a view to profit, to organize, exploit and develop radio and television and to contribute to the information, culture, and entertainment of the Hellenic people.”<sup>234</sup> Article 16(1) of that same law prohibits any persons from undertaking any of the broadcasting activities that ERT holds the exclusive right for, unless explicit authorization was granted.

In 1989, DEP formed a local television station, thereby violating Article 16 of the national law in question. ERT sued DEP, and issued an injunction “prohibiting any kind of broadcasting and an order for the seizure and sequestration of the technical equipment.”<sup>235</sup> DEP and Mr.Kouvelas appealed the injunction, relying “mainly on the provisions of Community law and the European Convention of Human Rights.”<sup>236</sup> Specifically, they argued that Greece’s monopoly law infringes on their freedom to provide goods and services, and curtails their freedom of expression by not allowing them to impart

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<sup>233</sup> Pescatore “La Cour de Justice des Communautés Europeennes et la Convention Europeenne des Droits de l’Homme” in *Protecting Human Rights: The European Dimension*, (1988), pp 441, 446 [author’s translation]

<sup>234</sup> Paragraph 3

<sup>235</sup> Paragraph 4

<sup>236</sup> *ibid.*

information vis-à-vis television broadcasts to the public. For its part, ERT sought exculpation from the Treaty's obligations under the derogation clause, claiming that the law falls under the 'social policy' exception of Article 36.

### **The Preliminary Question(s) Brought to the ECJ**

The Greek national court referred to the ECJ for clarification of the following provisions:

1. Is a law that allows a single TV broadcaster to have a television monopoly for the entire territory of a Member State consistent with: *a)* Article 9's fundamental principle of free movement of goods *b)* Article 30's prohibition on measures having equivalent effect to quantitative restriction on imports *c)* Article 36's derogation clause, which would exempt ERT from Community law on the grounds of pursuing the public interest?<sup>237</sup>
2. Whether and to what extent is the same law compatible with the provisions of Article 10 of the ECHR?<sup>238</sup>
3. Whether the freedom of expression secured by Article 10 of the ECHR imposes per se obligations on the Member States, independently of the written provisions of Community law in force, and if so what those obligations are. <sup>239</sup>

### **The Court's Ruling**

The Court begins its decision with a general review of the compatibility of a television monopoly with Community law. Citing *Sachi* (1974), the Court holds that nothing in the Treaty denies Member States the power to grant a monopoly for reasons of public interest and of a non-economic nature.<sup>240</sup> However, "the manner in which such a monopoly

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<sup>237</sup> Paragraphs 5(1) – 5(4)

<sup>238</sup> Paragraph 5(9)

<sup>239</sup> Paragraph 5(10)

<sup>240</sup> Paragraph 10

is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services.”<sup>241</sup> The Court finds that a television monopoly does not violate the free movement of goods.<sup>242</sup> However, it notes that ERT’s monopoly has the potential to infringe upon the free movement of services.<sup>243</sup> This is because ERT maintains the exclusive ability to retransmit programs from other Member States, which “may lead the undertaking to favor its own programs to the detriment of foreign programs.”<sup>244</sup> Such “discriminatory effects”<sup>245</sup> are in violation of the freedom to provide services. However, the Court contends that only “the national court has jurisdiction to determine,”<sup>246</sup> if such bias does, in fact, occur.

If the Greek court determines that the national law infringes upon the freedom to provide services, then ERT’s derogation claim becomes applicable as a means of justifying such violation. As such, the ECJ provides the national court with the framework it is to use when assessing the merits of ERT’s derogation invocation. It is at this juncture that the Court reviews the compatibility of Article 10 of the ECHR and television monopolies. Citing *Cinetheque* (1985), the Court reaffirms its position that it “has no power to examine the computability with the ECHR of national which do not fall within the scope of Community law.”<sup>247</sup> However, as established in *Wachauf* (1988), “the Community cannot accept measures which are incompatible with the observance of the human rights thus recognized and guaranteed.”<sup>248</sup> On the basis of the mandate put forth in *Wachauf*, the Court declares

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<sup>241</sup> Paragraph 12

<sup>242</sup> Paragraphs 13 - 16

<sup>243</sup> Paragraph 20

<sup>244</sup> Paragraph 22

<sup>245</sup> Paragraph 26

<sup>246</sup> Paragraph 23

<sup>247</sup> Paragraph 42

<sup>248</sup> Paragraph 41

that where a Member State justifies its Treaty derogations under Article 36 “on grounds of public policy, public security, and public health,”<sup>249</sup> such derogation “must be appraised in the light of the general principles of Freedom of Expression embodied in Article 10 of the ECHR,”<sup>250</sup> because it forms “a general principle of law the observance of which is ensured by the Court.”<sup>251</sup> As such, the ECJ requires the Greek court to review the monopoly legislation with deference to the ECHR and its provisions. However, the national court is obliged to undertake this rights-oriented judicial review *only if* it has already determined that the national law *does* result in a bias inhibiting other Member States’ freedom to provide services.

### **Analysis**

The Court’s ruling enables Member States to create and to maintain public enterprises with exclusive or special rights, insofar as such exclusive rights do not result in discriminatory practices, which inhibit other Member States’ from exercising their freedom to provide services. In this connection, the Court secured the EU’s legitimate interest in pursuing the establishment of the internal market.

In addition to motivating further integration within the economic domain, *ERT* also expands the operational presence of human rights within the Community’s legal order. As such, it adheres to the neo-functionalist paradigm. By requiring that a Member States’ derogation respect fundamental rights, the Court expanded the policy domains in which it could partake in rights-oriented judicial review. Undoubtedly, this strengthens the integration process, as supranational judicial review triggers normative harmonization. With regard to functional spillover, *ERT* expanded the Court’s jurisdiction “into areas

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<sup>249</sup> Paragraph 45

<sup>250</sup> Ibid.

<sup>251</sup> Paragraph 44



previously reserved for Member State.”<sup>252</sup> Consequently, since 1991, the Court has been “free to determined whether Member state acts are in compliance with human rights as protected on the Community level, and as conceived by the Court under the guise of ‘general principles of Community law.’”<sup>253</sup>

On this front, it is important to acknowledge that *ERT* marks the *first* instance in which the Court explicitly tested the conformity of national legislation with provisions of the ECHR. Thus, the Court has re-defined the ‘fundamental boundary,’ as previously established *Cinetheque*. *ERT* “is a development of *Rutili* precisely in that is uses the ECHR as an additional standard on the basis of which to judge Member State action, rather than, as in *Rutili*, merely a declaration which happens to echo general principles of existing Community law.”<sup>254</sup> It is crucial to underscore that in the *Cinetheque*, the Court refused to leverage the mandate it had established in *Rutili* as a justification for engaging in rights-oriented judicial review. In this regard, *ERT*’s novelty lies in the Court’s sharp departure from the precedent it had set forth in *Cinetheque*.

The political spillover effects of *ERT* are also apparent, but only at the macro level. By narrowing the derogation clause to encompass fundamental rights, the Court recognizes the ECHR as part of Community law much more explicitly than it has in the past. Despite these far-reaching legal consequences, the harmonizing effects of Court’s supranational decision could not be measured in relation to Greece’s national, normative conceptualization of freedom of expression. This is because the ECJ granted the national court complete discretion in applying the principle of proportionality for its determination

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<sup>252</sup> Coppel, Jason, and Idan O'Neill. "The European Court of Justice: Taking Rights Seriously?" P678

<sup>253</sup> Ibid.

<sup>254</sup> *ibid.*

of whether or not the national law results in discriminatory retransmissions. By extension, the Greek court is obliged to engage in rights-oriented judicial review *only if* the national court concludes there to be an infringement on the freedom to provide services. Thus, though the Court set the precedent for the expansion of its jurisdiction, it did not leverage this mandate in a way that created a substantive, normative change in Greece's freedom of expression protections.

### 3.4 *Society for the Protection of Unborn Children Ireland Limited (SPUC) v. Gogan* (1991)

#### **Facts of the Case**

Since 1861, abortion has been prohibited in Ireland. Section 58 of the Offences Against the Persons Act (1861) makes it a criminal offence for a pregnant woman to attempt to procure an abortion, and for others to provide assistance to that end. The prohibition was confirmed after a referendum in 1983, in which a new provision was added to the Irish Constitution. "Article 40.3.3 not only outlawed interference by public authorities with the right to life of the unborn, but also provided for a clear positive obligation to defend it."<sup>255</sup> The Constitution proclaims:

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its law to respect and, as far as practicable, by its law to defend and vindicate that right."

The decision was praised by many, including Chief Justice Finlay, who referred to the new amendment as "a decision by the people to insert into the Constitution a specific guarantee and protection for a fundamental right perceived to be threatened by the developments in the societies of countries outside Ireland."<sup>256</sup> By virtue of the amendment, Ireland became

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<sup>255</sup> Lawson, Rick. "The Irish Abortion Cases: European Limits to National Sovereignty?" *Common Market Law Review* 29, no. 1 (1992): 167-86.

<sup>256</sup> *Ibid.* P167

the only EU Member State formally recognizing the Constitutional right of the life of the fetus. Ireland has “exercised extreme vigilance in ensuring that this fundamental right is protected in effective fashion.”<sup>257</sup> In March 1988, the Irish Supreme Court ruled that it is unlawful to assist pregnant women to travel abroad to obtain an abortion or even to provide information about clinics abroad that are willing to carry out abortion. It was within this context that the *Grogan* disputes arose.

The Society for the Protection of Unborn Children (SPUC) is a company incorporated under Irish law whose purpose is to prevent the decriminalization of abortion and, more generally to protect the rights of unborn life from the moment of conception. In September 1989, SPUC requested several student publications to not include any information as to the identity, location, and method of communication with abortion clinics. The student organizations declined SPUC’s request. Subsequently, “SPUC initiated proceedings against the representatives of three student organizations for a declaration that the publication of information such as that described above was unlawful and for an interlocutory injunction restraining the publication nor distribution of such information until the hearing of the full action.”<sup>258</sup> The student organizations, represented by Mr. Grogan, appealed the injunction to Ireland’s High Court. The defendants claimed that pregnant women residing in Ireland may, by virtue of Community Law, travel to another Member State where abortion was permitted, thereby exercising their right to receive the benefits arising from the free movement of services [Article 59]. They also argued that, as a corollary to the right established by Art. 59 of the Treaty, Irish women maintain the right to obtain information

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<sup>257</sup> Curtin, Deirdre. "Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v. Grogan, Judgment of 4 October 1991." *Common Market Law Review* 29, no. 3 (1992): 585-603.

<sup>258</sup> *Ibid.* P587

regarding such abortion services in other Member States. Mr. Grogan also contended that Article 10 of the ECHR, regarding the freedom to receive and to impart information, also guaranteed such a corollary right. In October 1989, the High court “decided in the proceedings on the motion for an interlocutory injunction to refer a number of questions to the Court of Justice for a preliminary ruling.”<sup>259</sup>

### **The Preliminary Question(s) Brought to the ECJ**

The Irish High Court referred to the ECJ for clarification on the following:

- 1) Does the organized activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of “services” provided for within Article 59 of the Treaty establishing the EU?<sup>260</sup>
- 2) In the absence of any measures providing for approximation of the laws of Member States concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, can a Member State prohibit the distribution of specific information about the identity, location, and means of communication with a specified clinic or clinics in another Member State where abortions are performed?<sup>261</sup>
- 3) Is there a right at Community law in a person in Member State A to distribute specific information about the identity, location, and means of communication with a specified clinic or clinics in Member State B where abortions are performed, where the provision of abortion is prohibited under both the Constitution and the criminal law of Member State A but is lawful under certain conditions in Member State B?<sup>262</sup>

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<sup>259</sup> Ibid. P588

<sup>260</sup> Paragraph 9(1)

<sup>261</sup> Paragraph 9(2)

<sup>262</sup> Paragraph 9(3)

## The Court's Ruling

The Court rules that because abortion “is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity,”<sup>263</sup> it is to be treated as a service within the legal scope of the Treaty. The Court justifies its claim by citing *Luisi* (1982) and *Carbon* (1983), two cases in which Court held that “medical activities fall within the scope of Article 59.”<sup>264</sup> By doing so, the Court rejects SPUC’s argument that “the provisions of abortion cannot be regarded as being a service, on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child.”<sup>265</sup>

The Court then questions the compatibility between the injunction banning the distribution of the student’ pamphlets, the freedom to provide services, and the freedom to receive and to impart information. “The question which is relevant in the particular context of *Grogan* is whether it can be considered compatible with the general principles of Community law on the basis of the constitutional traditions of that Member States, and in particular Article 10 of the Convention, that a Member State prohibits the provision and receipt of information by way of assistance about abortions lawfully carried out in other Member states, thereby infringing individual’s freedom of expression.”<sup>266</sup>

The Court finds that economic link “between the activity of the students associations ...and medical terminations of pregnancies carried out in clinics in another Member State is too tenuous,”<sup>267</sup> to be regarded as a restriction on the free movement of services. This is because the student associations “are not in cooperation with the clinics whose addressees

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<sup>263</sup> Paragraph 17

<sup>264</sup> Paragraph 18

<sup>265</sup> Paragraph 19

<sup>266</sup> Ibid. P599

<sup>267</sup> Paragraph 24

they publish,"<sup>268</sup> and the pamphlets are not "distributed on behalf of an economic operators established in another Member State."<sup>269</sup> On the contrary, the Court contends that the pamphlets' content "constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State."<sup>270</sup>

It is at this juncture in the decision that the Court discusses the limits of its jurisdictional authority. Citing *ERT* (1991), the Court recognizes that, though it is obligated to "assess the compatibility of national legislation with fundamental rights,"<sup>271</sup> it "has no such jurisdiction with regard to national legislation lying *outside* the scope of Community law."<sup>272</sup> As such, the Court finds that the latter provision is applicable in the current case. Because the student organizations distribute the information without remuneration, "their publications lost their relevance to Community law,"<sup>273</sup> thereby rendering the defendant's freedom of expression claim null. Thus, the Court found that SPUC's injunction "is not contrary to Community law,"<sup>274</sup> by virtue of the Union's delineated competencies.

## Analysis

Considering that "it is difficult to image a more controversial and divisive topic"<sup>275</sup> than that of abortion, the Court's ruling was shockingly brief. Perhaps it was this very reality that motivated the Court to be cautious throughout its judgment, continuously emphasizing its jurisdictional limits throughout.

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<sup>268</sup> Paragraph 25

<sup>269</sup> Paragraph 26

<sup>270</sup> Paragraph 26

<sup>271</sup> Paragraph 31

<sup>272</sup> Ibid.

<sup>273</sup> Lawson, Rick. "The Irish Abortion Cases: European Limits to National Sovereignty?" P173

<sup>274</sup> Paragraph 32

<sup>275</sup> Curtin, Deirdre. "Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v. Grogan, Judgment of 4 October 1991." P585

By concluding that the “scope *ratione materia* of Article 59,”<sup>276</sup> encompasses abortion services, the Court places the national provision “squarely within the scope of Community law,”<sup>277</sup> thereby enabling it to engage in judicial review. Such a declaration has strong merits, for it enables the ECJ to play an active role in aiding Community’s continuous pursuit of the internal market. Consequently, it is not surprising that *Grogan* falls in line with the Court’s past case-law on the freedom to provide services; “If one looks at the recent case law<sup>278</sup>...one is struck in particular by the way in which the Court has dealt with the requirement of economic activity loosely so as to avoid narrowing the scope of the rules on free movement.”<sup>279</sup> Thus, with *Grogan*, the Court implicitly consolidates its past case law, articulating that free movement provisions are effective for certain categories of persons who were not necessarily economically active. It is clear that the Court’s legal reasoning in this economic realm is motivated by its “integrationalist desire.”<sup>280</sup>

However, just as quickly as the Court seems to declare the relevancy of Community law, so too do they reject it. However, now the Court refuses to extend its jurisdictional authority within the realm of freedom of expression. With *Grogan*, the court simply concludes that, because the students do act on behalf of an economic operator, they cannot appeal to the Treaty for protection of their rights under Article 59. It is notable that the first paragraph of Article 10 of the ECHR guarantees everyone to “hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”<sup>281</sup> This clause has particular relevance to the type of information at issue in

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<sup>276</sup> Ibid. P592

<sup>277</sup> Ibid.

<sup>278</sup> *Cowan v. Le Tresor Public* (1989); *Steymann v. The Netherlands* (1987)

<sup>279</sup> Ibid.

<sup>280</sup> Ibid. P593

<sup>281</sup> European Convention of Human Rights, Article 10(1)

*Grogan*. Yet, the Court seems blind to this fact, choosing instead to sharply limit its judicial authority.

What is striking is that the Court could have protected the students' right to distribute the pamphlets – and by extension, their freedom of expression - from an economic perspective, as opposed to a fundamental rights perspective, but it chose not to. The means by which it could have done so were legitimate: citing its precedent. In *GB-INNO* (1988), the Court ruled that a prohibition on advertising obstructed the free movement of goods in violation of the Treaty. As such, the Court “recognized access to information to be an essential corollary to the free movement of goods.”<sup>282</sup> Their reasoning centered upon the “importance of maintaining the link between protecting the consumer and providing the consumer with information.”<sup>283</sup> In the proceedings, Mr. Grogan cited *GB-INN*'s logic to defend the student's right to distribute the pamphlets. The Court refused to draw upon its past precedent, contending, “a link had existed between the advertiser and the provider of goods in *GB-INNO* that did not exist in *Grogan*.”<sup>284</sup> However, if one examines the substantive content of *GBI-INNO*, it becomes apparent that the Court's distinction between the two cases is out of context and misleading. In “*GB-INNO* the Court did not mention the necessity of a link between the seller and the advertiser, but between the consumer and the advertisement.”<sup>285</sup> Thus, the Court refused to extend *GB-INNO*'s emphasis on the importance of providing information to the consumer to the factual context of *Grogan*. This is despite the fact that the Court defined abortion as a service at the very start of its

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<sup>282</sup> Colvin, Cathleen M. "Society for the Protection of Unborn Children Ireland v. Grogan: Irish Abortion Law and the Free Movement of Services in the European Community." *Fordham International Law Journal*, 7th ser., 15, no. 2 (1991): 476-526.

<sup>283</sup> *Ibid.* P506

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*



judgment. In this sense, then, the Court's legal reasoning seems questionable, as it draws a distinction between commercial and non-commercial information, both of which play an equal role in protecting the consumer, as the *GB-INNO* decision stressed. "One is left with the suspicion that the Court's approach in *Grogan* is a clever judicial strategy, enabling it, with a great sigh of relief, to avoid dipping as much as its little finger in the murky waters of morality or to engage in a balance exercise as the relative strength of competing (highly sensitive) fundamental rights."<sup>286</sup>

As a whole, the Court's legal approach to rights *Grogan* is one of caution. This is evidenced not only by the Court's declaration that fundamental rights questions are null in the *Grogan* context, but also by its hesitancy to apply its precedent in *GB-INNO* to the case at hand. In such a context, the Court fails to leverage human rights jurisprudence as an integrative tool. By declining to extend rights-oriented judicial review to the measure at hand, the Court inhibits the processes of functional spillover, and by extension, that of political spillover.

In this regard, *Grogan* illustrates the potential dynamics that may limit neo-functional logic. Clearly, the ECJ, "as a reluctant constitutional adjudicator,"<sup>287</sup> prefers to evade "giving substantive ruling on a sensitive issues,"<sup>288</sup> such as abortion. In fact, the Court's judicial restraint "has been noted by virtually all commentators of the judgment."

<sup>289</sup> The Court's rhetoric throughout *Grogan* also confirms such a characterization. Almost immediately, the court eschewed "any assessment or comment as to any immorality

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<sup>286</sup>Curtin, Deirdre. "Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v. Grogan, Judgment of 4 October 1991." P596

<sup>287</sup> Ibid. P506

<sup>288</sup> Ibid.

<sup>289</sup> Lawson, Rick. "The Irish Abortion Cases: European Limits to National Sovereignty?" P173

attaching to the practice of abortion,"<sup>290</sup> noting simply that "whatever the merits of those argument on the moral plane,"<sup>291</sup> it was not for the Court to substitute its assessment for that of the legislature where abortion is legal. "In this manner, the Court attempted to avoid being embroiled in the on-going debate as to the rights and wrongs of abortion and to avoid the distasteful spectacles its US Supreme Court colleagues have had to witness."<sup>292</sup>

*Grogan's* emphasis on the sovereign competencies of the national legislature also deserves attention in that it is reminiscent of the Court's rhetoric in *Cinetheque*. Recall that in *Cinetheque*, the Court argued that, because France's national law on cinematographic distribution forms part of their cultural policy, its remedial relationship with fundamental rights claims is an area, which "*falls within the jurisdiction of the national legislature.*"<sup>293</sup> In *Grogan*, the Court takes a similar approach, but it shifts its rhetoric. Now, the Court declares, "It has no such jurisdiction with regard to national legislation *lying outside the scope of Community law.*"<sup>294</sup> This change in emphasis from that which is within the jurisdiction of the national legislator to that which is within the jurisdiction of Community law is subtle, but nonetheless reflects the ongoing process of integration, as championed by neo-functionalist theory. It seems that, in the seven years following its *Cinetheque* judgment, the Court has become aware of the Union's evolving competencies, realizing that sovereign legislative action, though implemented separately Community law, has the

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<sup>290</sup> Curtin, Deirdre. "Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v. Grogan, Judgment of 4 October 1991." P593

<sup>291</sup> Paragraph 19 of *Grogan* judgement

<sup>292</sup> Curtin, Deirdre. "Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v. Grogan, Judgment of 4 October 1991." P593

<sup>293</sup> *Cinetheque*, Paragraph 26

<sup>294</sup> Paragraph 31

potential to enter the sphere of Community obligations. Thus, the Court's adjusted language illustrates that the Union's 'fundamental boundaries,' are a "shifting target."<sup>295</sup>

Despite this change in language, *Cinetheque* and *Grogan* are similar in that the Court fails to leverage freedom of expression as a supranational, legal norm that may push integration forward by expanding the operational domain of rights in relation Community law. In this regard, *ERT*'s integrative consequences are distinct from that of *Cinetheque* and *Grogan*. Though *ERT* did not cause an explicit, normative shift in how Greece conceptualizes its freedom of expression protections relative to its national monopoly law, the Court's judgment created the possibility for supranational harmonization to occur *potentially*. In this connection, the Court's legal reasoning in *ERT* maintains some resemblance to that of *Cinetheque* and *Grogan*. This is because the Court emphasizes its jurisdictional limits in *ERT* as well, though to a lesser degree; recall that the ECJ required the Greek court to engage in rights-oriented review *only if* a casual connection was established between the infringement on the freedom to provide services and the national policy. Thus, in all three of these judgments, the Court stresses the jurisdictional boundaries of Community law in a way that limits its ability to generate supranational, substantive change in the remedial relationship between freedom of expression guarantees and Community law. The only difference amongst these cases is the degree to which such jurisdiction is emphasized; whereas in *Cinetheque* and *Grogan*, the Court places 'hard' limits to its ability to engage in judicial review, in *ERT* the Court takes a 'softer' approach by requiring freedom of expression to be respected only if the national court determines such action to be necessary.

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<sup>295</sup> Weiler, Joseph H.H., and Nicolas J.S. Lockhart. ""Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence." P64

### 3.5 Vereinigte Familiapress v. Heinrich Bauer Verlag (1997)

#### **Facts of the Case**

Heinrich Bauer Verlag (HBV) is a Germany publishing company that produces and distributes *Laura*, a weekly magazine containing crossword puzzles for which small cash prizes – ranging from 500DM to 5,000DM - are awarded to the reader who submits the correct solution. *Laura* is distributed in Germany and Austria alike. Vereingte Familiapress is an established newspaper operating in Austria. In 1992, Austria introduced paragraph 9a(1)(1) of the Austrian Unfair Competition Law, which placed a general prohibition on offering consumers free gifts linked to the sale goods or supply of services. As such, any periodical containing prizes, competition, or invitations to take part in such free gift exchanges is in breach of Austrian law. Familiapress brought action against its Germany competitor HBV, claiming that *Laura* violated Austria's Unfair Competition Law, and requiring that HBV cease selling publications infringing upon the relevant law. Germany's Unfair Competition Law does not contain any provisions to the same affect.

HBV defended *Laura*, contending that Austria's law encroaches on their freedom of expression and freedom of the press by curtailing their ability to publish their desired content. HBV also claimed that Austria's law violates their right to the free movement of goods [Art. 30]. The Austrian government dismissed HBV's argument, claiming that Austria's Unfair Competition Law can be exculpated because it falls under the Treaty's derogation clause; the law's intention is to promote consumer protection, prevent tax evasion, protect the public health of citizens from compulsive gambling, and preserve press diversity by ensuring that small publishers are not forced to compete with larger publishers with respect to the monetary value of the prize published.

Given the absence of an equivalent provision under German competition law, the Austrian High Court inquired whether or not such a law affects intra-Community trade, and if so, whether it could be justified under the Treaty's derogation clause.

### **Preliminary Question(s) Referred to the Court**

- 1) Is Article 30 of the EC Treaty to be interpreted as precluding application of legislation of Member State A prohibiting an undertaking established in Member State B from selling in Member State A periodical produced in Member State B, where that periodical contains prize puzzle competitions or games which are lawfully organized in Member State B?<sup>296</sup>

### **The Court's Ruling**

The Court rules in favor of HBV, finding that Austria's law inhibits the free movement of goods.<sup>297</sup> As such, it then assesses whether or not such Austria's violation of Treaty obligations can be exculpated under the derogation clause. It reaffirms the principles set forth in *ERT* (1991), stating "where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such a justification must also be interpreted in the light of the general principles of Community law and in particular of fundamental rights."<sup>298</sup>

Examining the relevant Austrian bill's memorandum, the Court notes that Austria pursues the legitimate interest of preserving press diversity. The judgment acknowledges that the law was enacted because Austria maintains "a very high degree of concentration of press,"<sup>299</sup> with the largest press group in Austria maintaining "54.5% of the market share,

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<sup>296</sup> Paragraph 5

<sup>297</sup> Paragraph 12

<sup>298</sup> Paragraph 24

<sup>299</sup> Paragraph 15

as compared with only 34.7% in the United Kingdom and 23.9% in Germany.”<sup>300</sup> As such, “maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps safeguard freedom of expression.”<sup>301</sup> However, the Court also notes “Article 10 of the ECHR does permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are prescribed by law and are necessary in a democratic society.”<sup>302</sup> It is at this juncture in the Court’s judgment that the complexity of the fundamental rights issue at hand crystallizes. The Court must balance two competing fundamental rights claims – freedom of expression and press diversity – both of which stem from the same provision of the ECHR. Given these circumstances, the Court emphasizes the importance of employing the principle of proportionality, and ensuring that “the national prohibition...is proportionate to the aim of maintaining press diversity and where that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.”<sup>303</sup>

Accordingly, the Court requires Austria to determine “first, whether newspapers which offer the chance of winning a prize in games, puzzles, or competition are in competition with those small press publishers who are deemed to be unable to offer comparable prizes and whom the contested legislation is intended to protect, and, second, whether such a prospect of winning constitutes an incentive to purchase capable of bring about a shift in demand.”<sup>304</sup> It is only once such instructed market research is carried out

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<sup>300</sup> Paragraph 17

<sup>301</sup> Paragraph 18

<sup>302</sup> Paragraph 26

<sup>303</sup> Paragraph 27

<sup>304</sup> Paragraph 28

that Austria's Unfair Competition Law can be assessed as validly derogating from Article 30 on the grounds of preserving press diversity. The Court then concludes its judgment by stating that, "it is for the national court to determine whether those conditions are satisfied."<sup>305</sup>

## Analysis

In comparison to past cases, the Court was surprisingly brief when adjudicating on the economic measure at hand, in this case, the compatibility of Article 30 with Austria's Unfair Competition Law. Instead, the Court directed most of its efforts in assessing the compatibility of Austria's law with fundamental rights. This is not surprising, as the substantive conflict of fundamental rights in *Familiapress* is complex; "the very same provision of the ECHR in fact could potentially be invoked in support of the two conflicting arguments put forward by the parties: on the one hand, the positive freedom of expression protected under Article 10.1, and on the other, a negative restriction on that freedom, which might be necessary to preserve press diversity and which may be admissible under Article 10.2"<sup>306</sup>

When assessed in a continuum with the previous freedom of expression case examined, *Familiapress* marks a positive shift in how the Court employs fundamental rights as an integrative tool within the Community's supranational, legal framework. As such, it adheres the analytical expectations of functional spillover. By reaffirming the principles set forth in *ERT* (1991), the Court legitimizes fundamental rights' ability to serve as a positive, interpretative tool when adjudicating on matters of Community law. In this case, freedom

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<sup>305</sup> Paragraph 29

<sup>306</sup> Bavasso, Antonio F. "Case C-368/95 Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v. Heinrich Bauer Verlag, Judgement of 26 June 1997, ECR." *Common Market Law Review* 35, no. 6 (1998): 1413-426.

of expression serves as “an invalidating function. It is a condition of lawfulness of Community acts as well as national measures.”<sup>307</sup> The Court’s judgment also coheres to the posited dynamics of political spillover. By inviting the national court to conduct extensive market research in determining the Austrian law’s relationship to press diversity, the Court approaches its rights-oriented judicial review with strict scrutiny. By doing so, the Court awards less deference to Austria in determining the parameters of its fundamental rights violation. Though the Court “is actually imposing on the national court an excessively onerous task,”<sup>308</sup> it has the effect of strengthening the normative coherence of freedom of expression protections at the national and supranational level. This is because the Court, by requiring Austria to conduct such extensive market research, forces Austria to become more elaborate and detailed in its freedom of expression and press diversity protections. In this respect, the Court’s judgment can be said to displace, to some degree, Austria’s normative conceptualization of freedom of expression and press diversity. Now, Austria must expand on its freedom of expression protections, but it must do with by factoring in supranational considerations regarding Community competences, such as that of free movement of goods (Article 30). However, it should be emphasized that *Familiapress* will cause normative change insofar as the national court complies with the ECJ’s instructions, and determines that the national law does, in fact, preserve press diversity. In this regard, the maximal, integrative effects of political spillover become contingent upon the national court’s ruling.

Nevertheless, *Familiapress* exhibits the dynamics of political spillover in a way that contrasts sharply to that of *Cinetheque* and *ERT*. Whereas the operational presence of

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<sup>307</sup> Ibid. P1423

<sup>308</sup> Ibid. P1425



political spillover was rendered inapplicable in the context of *Cinetheque*, in *ERT* political spillover was observed only to the extent that the Court required Greece to evaluate its freedom of expression guarantees insofar as a causal relationship was established between the national provision and the violation of free movement of services. In *Familiapress*, the Court also requires the national court to demonstrate this contingent relationship, but it now provides the national court with a much more stringent framework under which such a determination is to be made. This positive shift in favor of integrative, supranational policy making can be explained by the ratification of the Treaty of Maastricht in 1993 and the Treaty of Amsterdam in 1997, the same year as this case. In their respective provisions, these Treaties declare:

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, *as general principles of Community law.*”

As a result of this novel incorporation and ratification of this amendment, the Court’s past case law is codified. What should be noted is that *Cinetheque*, *Grogan*, and *ERT* predate the implementation of these two Treaties. Thus, it seems that the ratification of these Treaties motivated the Court to become more intrusive when assessing the merits of fundamental rights protections in relation to national legislation that falls within the scope of Community law. In this regard, the Court’s seems to view this amendment as a mandate for continuing to engage in rights-oriented judicial review of national measures implemented separately from Community law.

The Court’s utilization of market relations to justify the remedial protection of freedom of expression also deserves to be discussed. By taking such an approach in

*Familiapress*, the Court drives integration forward in both economic and rights-oriented domains. It is notable that the Court refused to employ a similar strategy in *Grogan*. Recall that Court declined to protect the students' distribution of pamphlets (a manifestation of their freedom of expression) on the legal grounds that there is a corollary right to receive information regarding services. In *Familiapress*, on the other hand, the Court leverages free movement of goods guarantees as a means of assessing the remedial relationship between press diversity and freedom of expression.

What explains these different legal approaches? The answer is fairly straightforward: the nature of the services in question is strikingly different. Whereas press diversity is often viewed in neutral terms amongst the Union's liberal democratic Member States, abortion is a decisive and controversial subject. Furthermore, all of the Union's Member States guarantee press diversity within their constitutions, but this is not so for abortion services; by and large, Member States' national legislation widely diverge on the matter of the medical termination of pregnancy.<sup>309</sup> Thus, it seems that the integrationalist impulse can be brought to a standstill when a strong, normative consensus of the guaranteed fundamental right and its remedial relationship to the violation at hand is lacking amongst Member States.

### 3.6 Concluding Observations

When examining these four cases as a continuum, the operational presence of functional and political spillover at the jurisprudential level becomes increasingly apparent. The Court's departure from the legal reasoning it championed in *Cinetheque* is strikingly more evident when assessed in relation to *ERT* and *Familiapress*. Whereas in the

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<sup>309</sup> Curtin, Deirdre. "Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v. Grogan, Judgment of 4 October 1991." P593

former case the Court refuses to utilize fundamental rights protections as an additional standard of review for national legislation derogating from Community law, in the latter cases, the Court champions such an approach. The only exception to this is *Grogan*, and, as noted previously, this is most likely due to the Court's desire to stray away from contentious political debates. From a comparative standpoint, *ERT* and *Familiapress* cohere with neo-functionalism's emphasis on the positive relationship between integration and time. In *Familiapress*, the Court feels far less restrained in engaging in rights-oriented judicial review than it did six years earlier in *ERT*; as discussed, this is evidenced by the Court's decision to award far less deference to the national court in determining the remedial relationship between freedom of expression and the free movement of goods. By continuously reaffirming the derogation precedent it set forth in *ERT*, the Court simultaneously expands its jurisdictional competencies. This directly implicates the Court's ability to partake in rights-oriented judicial review, thereby creating far more opportunities from which the integrative effects of normative harmonization can unfold.

It is crucial to note that *ERT* inaugurated the erosion of Member State competences in a way that is favorable to supranational integration. Though it has always been at the discretion of the Court, both substantively and jurisdictionally, to determine whether or not a State's derogation claim is justified, by incorporating human rights-review into this determination process, the Court interferes "with the core of the sovereign value choices of the particular state."<sup>310</sup> Take, for example, the following scenario. A Member State justifies a policy that violates the Treaty's economic obligations on the grounds of preserving public

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<sup>310</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*. P89

morality for the general public interest. The Member State may be aware that such a policy infringes on a some-said fundamental right for its citizen, but it deems such a violation as acceptable due to the balance it strikes between the interests of the individual and that of the collective. In essence, the Member State has made a distinct value-choice embodying its self-determination and autonomy. Prior to *ERT*, the Member State is able to maintain such a value-choice so long as it convinces the Court that the said national policy does, in fact, preserve public morality. Under these circumstances, the Court does not question the Member States' 'fundamental boundary,' but only examines its relationship to the market freedom in question. Following the publication of *ERT*, such a scenario is no longer viable. The Court now maintains full authority to question the Member State's value-choice, and it does not so from the solely perspective of economic interests. Rather, the Court now maintains jurisdiction in legitimizing or negating the Member States' policy preferences and its relationship to the 'fundamental boundary.' In this framework, the Member State will have to take into account fundamental rights considerations, as defined by the ECJ's previous case law, when crafting its future policy on the grounds of justified derogations.

As a whole, chapter three illustrates the evolving and positive relationship between supranational integration and the legal incorporation of rights. It is notable that after the ratification of the Treaty of Maastricht and the Treaty of Amsterdam, the Court exhibited a strong preference towards constructing substantive freedom of expression guarantees, which have the potential to transcend national norms, and displace the 'fundamental boundary' in favor of the supranational (see *Familiaress*). As such, it is the goal of chapter four to determine if such integrative effects are continued and amplified following the proclamation of the Charter in 2000.

## **CHAPTER 4: CASE STUDIES, PART II [2000 – 2013]**

Chapter four focuses on cases following the proclamation of the Charter in 2000, as well as its legal ratification in 2009. It is notable that references to the Charter gradually replace those of the ECHR. In continuum with the previous case studies examined, the Court continues to incorporate rights guarantees as additional standards of legality when assessing national legislation, as functional spillover posits. It should be underscored that, in cases concerning Member State implementation of EU Directives, rights considerations become especially more salient within the Court's legal reasoning. Political spillover also becomes apparent, though only to a certain degree. As initiated by *Familiapress*, the Court continues its trend of applying the principle of proportionality intrusively, which makes it more likely for Community law to absorb national law, thereby triggering normative harmonization. However, as these case studies will show, the Court's judgments do not always permeate substantively within the national legal orders, inciting normative change at the subnational level.

### **4.1 Eugen Schmidberger, Internationale Transporte und Planzuge v. Republic of Austria (2003)**

#### **Facts of the Case**

Schmidberger is a European haulage company based in Southern Germany. It transports timber and steel to Italy via Austria by way of the Brenner Pass, "which is the most convenient transport route for most goods traffic heading to Italy from Northern Europe. Without the use of the Brenner Pass, motorists are restricted to using routes such

as the Tauern motorway, which undoubtedly constitutes a considerable detour.”<sup>311</sup> The Transitforum Austria Toril (TAT) is an environmental group whose cause focuses on the environmental effects of heavy goods traffic on the Brenner motorway. After consultation with the relevant Austrian authorities, TAT received authorization to partake in a thirty-hour demonstration, in which a segment of the Brenner Pass was closed off. As a consequence of the demonstration, Schmidberger’s lorries were considerably delayed in reaching their destination in Italy.

Schmidberger brought an action against the Austrian government on the grounds of Article 30, which ensures the free movement of goods, and Article 10, which requires loyal cooperation amongst Member States in fields of Community law. Schmidberger complained that Austrian authorities had failed in their duty to guarantee the free movement of goods, thereby incurring a liability toward the firm inasmuch as it was prevented from operating its vehicles on their normal transit routes. As such, Schmidberger requested that he be reimbursed for the loss of his earnings and additional related expenses. Schmidberger justified its claim by citing the Court’s past judgment in *Commission v. France* (1997); in this ruling, the Court ruled that France had failed to fulfill its obligations under Article 30 and Article 10 of the Treaty, because it had not taking sufficient action to counter violent acts perpetrated by individuals and farmers, which had the effective of impeding Spanish produce from being imported to France.

The Austrian government rejected Schmidberger’s claims, contending that its Constitution and Laws on Assembly of 1953 permit organized demonstrations under

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<sup>311</sup> Brown, Christopher. "Case C-112/00 Eugen Schmidberger, Internationale Transporte Und Planzuge v. Austria. Judgment of 12 June 2003, Full Court." *Common Market Law Review* 40, no. 6 (2003): 1459-510.

certain conditions, with which TAT complied. For example, the information such as the date of the closure of the Brenner motorway had been announced in advance to Austria, Germany, and Italy. Additionally, Austria argued that the demonstration did not result in substantial traffic jams, and that the restriction on free movement of goods arising from the demonstration is permitted because it was neither permanent nor serious. As such, Austria contended that the “interests involved should lean in favor of the freedoms of expression and assembly, since fundamental rights are inviolable in a democratic society.”<sup>312</sup> The Austrian government cited the Court’s derogation precedent, as established in *ERT* (1991), as the legal justification for its demonstration. Nevertheless, the nature of the demonstration infringed on Community law, requiring Austria’s High Court to refer the case to the ECJ.

### **The Preliminary Question(s) Referred to the Court**

1. Are the principles of the free movement of goods under Article 30 of the EC Treaty to be interpreted as meaning that a Member State is obliged to keep major transit routes clear of all restrictions and impediments, inter alia, by requiring that a political demonstration to be held on a transit route, of which notice has been given, may not be authorized, if it can also be held at a place away from the transit route with a comparable effect on public awareness?<sup>313</sup>
2. Does a Member State’s failure to indicate in its national legislation concerning freedom of assembly the principles of Community law, in particular the provisions on the free movement of goods, constitute itself as a sufficiently

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<sup>312</sup> Paragraph 17

<sup>313</sup> Paragraph 25(1)

serious infringement of Community law, thereby enabling the Member State to be sufficiently liable under the principles of Community law?<sup>314</sup>

3. “Is the objective of an officially authorized political demonstration...to be deemed to be of a higher order of than the provisions of Community law on the free movement of goods under Article 28 EC?”<sup>315</sup>

### **The Court’s Ruling**

The Court began its judgment by underscoring the importance the Community’s free movement of goods provisions, proclaiming it to be “one of the fundamental principles of the Community.”<sup>316</sup> Citing *Commission v. France* (1997), the Court reaffirms its position that Member States ensure the prevention of obstacles “to the free movement of goods that are created...by actions by private individuals on its territory aimed at products originate in other Member States.”<sup>317</sup> As such, the Court holds that Member States must “take all necessary and appropriate measures to ensure that this fundamental freedom is respect on their territory.”<sup>318</sup> In addition to citing Article 30 and its judicial precedent, the Court also justifies such a declaration by contending, “Article 10 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the Treaty.”<sup>319</sup> Now that the Court has laid out the basis for its legal reasoning, it concludes that the demonstration infringes upon the free movement

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<sup>314</sup> Paragraph 25(2)

<sup>315</sup> Paragraph 25(3)

<sup>316</sup> Paragraph 51

<sup>317</sup> Paragraph 58

<sup>318</sup> Paragraph 59

<sup>319</sup> Paragraph 59



of goods [Art. 30] when read in conjunction with the provisions concerning loyal cooperation among Member States [Art. 10].<sup>320</sup>

As to be expected, the Court then goes on to consider whether or not such a violation can be exculpated under the derogation clause. The Court affirms Austria's derogation defense, asserting it to be "inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution."<sup>321</sup> The Court declares such objectives to be buttressed by provisions of Community law as well, given that these "principles are established by past case-law,"<sup>322</sup> and "reaffirmed...in Article F.2 of the Treaty on Maastricht."<sup>323</sup> As such, the Court declares Austria's derogation claim to be of "legitimate interest."<sup>324</sup>

However, the Court notes that freedom of expression and freedom of assembly guarantees are never absolute. Citing *Familiapress* (1997) and the explicit wording of Article 10 of the ECHR, the Court declares such rights to be "subject to certain limitations justified by...the public interest."<sup>325</sup> It is at this juncture that the Court emphasizes the necessity of employing the principle of proportionality as a means of balancing these competing interests. Though the Court declares, "The competent authorities enjoy a wide margin of discretion in that regard,"<sup>326</sup> the Court itself must also "determine whether the

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<sup>320</sup> Paragraph 64

<sup>321</sup> Paragraph 69

<sup>322</sup> Paragraph 72

<sup>323</sup> *ibid.*

<sup>324</sup> Paragraph 74

<sup>325</sup> Paragraph 79

<sup>326</sup> Paragraph 82

restrictions placed upon intra-Community trade are proportionate...to the protection of fundamental rights.”<sup>327</sup>

In this connection, the Court rejects Schmidberger’s justification that the legal reasoning of *Commission v. France* is applicable in relation to the present case. The Court draws a sharp distinction between *Schmidberger* and *Commission v. France*, finding that: 1) the obstruction was relatively minor, lasting for a set time period, and only on one road<sup>328</sup> 2) the intention of the demonstration was not to restrict trade in goods of a particular type or from a particular source<sup>329</sup> 3) the necessary authorities had taken measures to limit disruptions to road traffic<sup>330</sup> 4) The isolated incident did not have an effect on intra-Community trade as a whole. <sup>331</sup>

Weighing all of these factors, the Court reaffirms Austria’s view that “The imposition of stricter conditions concerning the site and the duration of the demonstration” <sup>332</sup> would mitigate the effectiveness of the demonstration, and curtail the demonstrator’s right to assembly. In fact, the Court contends that “all the alternative solutions... would have been liable to cause much more serious disruption to intra-Community trade and public order.”<sup>333</sup> As such, the Court concludes, “the national authorities were reasonably entitled”<sup>334</sup> in allowing the demonstrations to occur, and that such a demonstration “is not incompatible with Articles 30 of the Treaty.”<sup>335</sup>

## Analysis

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<sup>327</sup> Paragraph 82

<sup>328</sup> Paragraph 85

<sup>329</sup> Paragraph 86

<sup>330</sup> Paragraph 87

<sup>331</sup> Paragraph 88

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<sup>333</sup> Paragraph 92

<sup>334</sup> Paragraph 93

<sup>335</sup> Paragraph 94

By and large, commentators have hailed *Schmidberger* as an example “where the judges in Luxembourg acted as genuine human rights judges.”<sup>336</sup>In line with *Dassonville* (1974) and *Commission v. France* (1997), the Court rules the demonstration to constitute a trade barrier. However, the Court exculpates Austria’s treaty violation on purely human rights grounds, defining the freedom of assembly as a “legitimate interest”<sup>337</sup> when viewed “in relation to its social function.”<sup>338</sup>Thus, “in the present case, the ECJ seemed to take human rights seriously and the reasoning of the Court contrasted with that of previous cases where it gave priority to free movement over the arguments given by the Member States to justify their restrictions.”<sup>339</sup> As a consequence of the Court’s judgment, Austrian citizens’ are now awarded an additional tier of legal protection within the realm of freedom of expression.

This case adheres to the neo-functionalist paradigm in several ways. By reaffirming *ERT* (1991), the Court consolidates its past case law authorizing its right to partake in rights-oriented judicial review of national legislation derogating from Community law. By extension, the Court further entrenches the jurisdictional boundaries it has previously established, cohering with the analytical expectations of functional spillover. *Schmidberger* also adheres, to a certain degree, to the principles of political spillover, as evidenced by the Court’s employment of the principle of proportionality. In a manner similar to *Familiapress* (1997), the Court engages in such a balancing exercise intrusively; it devotes several paragraphs of its judgment to examining how Austria carried out its own balancing test

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<sup>336</sup> Scheeck, Laurent. *The Relationship Between the European Courts and Integration through Human Rights*. Working paper. Vol. 15. Research in Question. Paris: Science Po, 2005.

<sup>337</sup> Paragraph 80

<sup>338</sup> Paragraph 80

<sup>339</sup> Gonzales, Geraldine. "EC Fundamental Freedoms v. Human Rights in the Case C-112/00 Eugen Schmidberger v. Austria [2003]." *Legal Issues of Economic Integration* 31, no. 3 (2004): 219-30.

before validating the national court's claim. Though such judicial behavior indicates that the logic of political spillover is present, *Schmidberger* fails to result in a normative shift in Austria's conceptualization of freedom of expression and freedom of assembly. The Court simply validates Austria's legislation and the permission it awarded to the demonstrators in carrying out their right to assembly. This contrasts sharply to *Familiapress*, where the Court required Austria to revise the national legislation at hand and to determine its remedial relationship with press diversity, freedom of expression, and free movement of services. However, this difference in normative impact is attributed to the fact that, in *Familiapress*, the Court found Austria to be in potential violation of freedom of expression, whereas in *Schmidberger*, no remedial action with regards to freedom of expression were necessary. Rather, the Community's conceptualization of freedom of expression simply aligned with that of Austria's.

Despite the fact that *Schmidberger* fails to incite normative change at the substantive and national level, the decision signals a positive shift in how the Court conceptualizes fundamental rights guarantees in relation to judicial review of national measures. This is especially so when it is viewed in relation to the preceding case, *Familiapress*. Recall that that in *ERT* (1991), the Court refused to make any balancing value judgments to the rights violation in question, declaring such an exercise to be solely within the authority of the national court. In *Familiapress* and *Schmidberger*, the Court actively participates in such considerations, reassessing all of the facts itself before validating the national court's derogation claims. Whereas in *Familiapress* this shift in judicial behavior was accredited to the ratification of the Treaty of Maastricht, in *Schmidberger* it can be attributed to the introduction of the Charter, which was proclaimed in 2000, three years prior to this case.

The Charter, with its emphasis on both economic and non-market rights, implies that there be no hierarchical approach in the protection of such rights. Thus, under the Charter, Austria's actions were no longer acting in derogation from Community law, but rather "as an agent of the Union, as the Charter stipulates."<sup>340</sup> Though the Charter was not ratified until 2009, the Court was well aware of its presence, and their "pre-Lisbon use of the Charter may have eased the way for its progressive incorporation into judicial reasoning, thus preventing the impression of sudden change."<sup>341</sup>

However, the Court's legal reasoning in *Schmidberger* also illustrates that the effects of political spillover may be consciously curbed in a way that mitigates a shift in favor of supranational policy making among Member States. In this respect, the Court's reference to the national authorities' "wide margin of discretion"<sup>342</sup> deserves to be analyzed. According to the Court's judgment, Member States, "as a matter of Community law...enjoy some room for maneuverer when considering how to limit the interference"<sup>343</sup> of a Treaty provisions when such a breach comes from private individuals. Thus, while the Court did apply a more intrusive principle of proportionality test by re-evaluating all of the procedural facts against one another, it was more lenient in how it conceptualized the juxtaposition of those facts. The Court's declaration of discretion "arguably has its origins in the struggle to instill the principle of the supremacy of Community law over national law...the collective

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<sup>340</sup> Morijn, John. "Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omea in the Light of the European Constitution." *European Law Journal* 12, no. 1 (2006): 15-40.

<sup>341</sup> Sanchez, Sara Iglesias. "The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights." *Common Market Law Review* 49, no. 5 (2012): 1565-612.

<sup>342</sup> Paragraph 82

<sup>343</sup> Brown, Christopher. "Case C-112/00 Eugen Schmidberger, Internationale Transporte Und Planzuge v. Austria. Judgment of 12 June 2003, Full Court." *Common Market Law Review* 40, no. 6 (2003): 1459-510.

conscience of the ECJ...leads it tread very carefully around the interface of (Community) economic rights and (national constitutional) fundamental rights.”<sup>344</sup>

In this regard, *Schmidberger* exemplifies how the Court intentionally delineates its competencies in a way that avoids displacing national rights-oriented norms. It is notable that such an intention can also be observed in *ERT*, a judgment that occurred a decade earlier. In both cases, the Court explicates some margin of deference to the national court in assessing the merits of their derogation claim. The only difference is the means by which such deference is justified. In *ERT*, the ECJ awards the Greek Court the sole ability to determine whether or not its derogation claim – and by extension its freedom of expression guarantees - are even applicable to the current case<sup>345</sup>, and its legal reasoning rests on solely a jurisdictional claim. In *Schmidberger*, the Court asserts that Austria’s derogation invocation is relevant to the facts of the case, and it assesses the validity of the national claims with stricter scrutiny. In this connection, *Schmidberger* clearly illustrates that human rights have come to occupy a more integrative space within the EU’s legal order since the time of *ERT*. However, in *Schmidberger*, the Court fails to maximize the integrative effects of political spillover because it explicitly states that it’s ruling was conditioned by the discretion it awarded to Austria in justifying its derogation claims. Thus, both *ERT* and *Schmidberger* show how the Court continues to be receptive to the value judgments national courts make when justifying their derogation claim.

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<sup>344</sup> Ibid. P1506

<sup>345</sup> Recall that in *ERT*, the Court stated that Greece’s law has the potential to infringe upon the freedom to provide services, and that whether or not such effects are observed is to be determined by the national court. As such, Greece’s derogation claim (and with it, the guarantees for freedom of expression) is applicable only if the national court determines that its national law is in violation of the Treaty.

Additionally, if one examines the substantive content of the judgment, it becomes clear that the Court carved out itself a *very* narrow precedent in regards to when a freedom of expression claim trumps an economic freedom. Whereas *Commission v. France* (1997) has been hailed as an exceedingly broad judgment regarding the remedial relationship between demonstrations and free movement of goods, *Schmidberger* lies at the opposite end of the spectrum. The Court makes sharp distinctions between *Commission v. France* and *Schmidberger*, enumerating the specific precautions undertaken by Austria in enabling the demonstration to take place. By doing so, the Court narrows the applicability of this freedom of assembly precedent for future demonstrations, thereby failing to “furnish sufficiently helpful indications to the national courts for the future.”<sup>346</sup> This becomes especially problematic given that, as the Union’s competencies continue to evolve, rights question are “likely to come increasingly to the fore as fundamental rights protections become more frequently invoked.”<sup>347</sup>

It becomes apparent that the Court seems to be constructing its rights jurisprudence on an incremental, case-by-case basis, thereby limiting human rights’ integrative effects. Such legal reasoning may be motivated by the Court’s steadfast commitment to protecting economic freedoms as much as possible, and attempting to find the least restrictive means by which market rights and fundamental rights can be balanced. In this connection, it is important to note that the Court sidestepped Austria’s third preliminary question regarding the normative hierarchy of economic and non-market freedoms.<sup>348</sup> Clearly, the

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<sup>346</sup> Ibid. P1509

<sup>347</sup> Ibid. P1510

<sup>348</sup> The third preliminary question is as follows: “Is the objective of an officially authorized political demonstration...to be deemed to be of a higher order of than the provisions of Community law on the free movement of goods under Article 28 EC?”

Court “views the EU not so much as an organization fully committed to the protection of human rights as an economic power accepting human rights as a breaking force on economic rights.”<sup>349</sup>

#### 4.2 Mesopotamia Broadcast A/S METV and ROJ TV A/S v. Germany (2010)

##### **Facts of the Case**

Directive 89/552/EEC, also referred to as the “Television Without Frontiers” Directive, seeks to remove obstacles to the freedom to provide television-broadcasting services within the EU. Article 22(1) of the Directive requires that Member States ensure that their national broadcaster’s programs do not contain any incitement to hatred on grounds of race, sex, religion and nationality. In addition, Article 2(a) stipulates that Member State A cannot restrict the retransmission on their territory of programs broadcasted by a television broadcaster established Member State B for reasons related to the incitement of hatred, which is to be assess exclusively by Member State B.

The Danish company Mesopotamia Broadcast is the holder of several television licenses in Denmark. It operates Roj TV, which broadcasts programs via satellite, mainly in Kurdish, throughout Europe and the Middle East. Roj TV commissions program to be transmitted by a company established in Germany. Among Roj TV’s transmitted programs was a 2008 segment that called for the resolution of difference between Kurds and Turks by violent means, encouraging such actions to be carried out in Turkey and Germany as well. The segment was explicit in its support for the Kurdistan Workers Party (PKK)’s efforts in recruiting young Kurds as guerrilla fighters against the Republic of Turkey. It is worth noting that the EU classifies the PKK as a terrorist organization. In 2008, the

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<sup>349</sup> Ibid.



Germany authorities prohibited Mesopotamia broadcast, and by extension Roj TV, from conducting any activities in Germany. They based their prohibition on German law.

Article 9(1) of Germany's Constitution guarantees the freedom of association. Article 9(1[b]) prohibits associations "whose purposes or activities infringe criminal laws, or which conflict with the constitutional order or the principles of international understanding."<sup>350</sup> In 2000, the Germany government amended its Public Law of Associations, with Article 3 declaring "a measure for maintains security and public order may be adopted against associations abusing the freedom of association only under this law."<sup>351</sup> As such, Germany argued that Roj TV's broadcasting of pro-PKK efforts conflicts with the "principles of international understanding," within the meaning of Article 3 of Germany's Public Law on Associations when read in conjunction with Article 9 of its Constitutional Law. The German government "took the view that those programs are clearly biased in favor of the PKK, reflecting to a large extent a militaristic and violent approach...Roj TV does not report the conflict impartially but supports the PKK's use of guerrilla units and terrorist attacks...thereby playing a role in inciting violent confrontations between persons of Turkish and Kurdish origin in Turkey and in exacerbating tensions between Turks and Kurds living in Germany."<sup>352</sup> The German Federal Administrative Court shared the federal government's opinion, ruling that Roj TV had infringed on the laws in question.

For its part, Roj TV disagreed with the national ruling, contending it to be incompatible with the EU Directive on grounds that it violated their freedom to receive and

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<sup>350</sup> Paragraph 18

<sup>351</sup> Ibid.

<sup>352</sup> Paragraph 25

to impart services [Art. 59], as acknowledged in Recital 1 and 4 of the Directive's preamble. Furthermore, Roj TV contended that, in accordance with the Directive, Germany could not prevent a retransmission of its programs because only the Danish Radio and Television Board could determine whether or not such transmissions incite hatred on grounds of race, sex, religion and nationality. Roj TV made no claim that the German law, by prohibiting the broadcasting of its television content, infringed on its right to freedom of expression. The German authorities rebutted Roj TV's claims by citing the Treaty's derogation clause as a justification for their actions; they contended that the national laws governing the constitutionally enshrined right to association were to be seen as an exception to the Directive's obligations on the grounds of public interest. The German Federal Administrative Court referred the matter to the ECJ.

### **The Preliminary Question(s) Referred to the Court**

1. "Does, and if so, under what circumstances, national legislation concerning the prohibition of an association for infringement of the principles of international understanding fall within the field coordinated by the Directive, and is thus precluded by Article 2a of the Directive?"<sup>353</sup>

### **The Court's Ruling**

The Court first assess whether or not the content of Roj TV's broadcasts are in violation of Article 22(1)'s provisions regarding the "incitement of hatred." Citing the EU Commission's drafting process, the Court contends that Article 22(1) was inserted to with "public order considerations,"<sup>354</sup> in mind, and was "designed to forestall any ideology which fails to respect human values, in particular initiatives which attempt to justify

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<sup>353</sup> Paragraph 26(1)

<sup>354</sup> Paragraph 39

violence.”<sup>355</sup> The Court validates Germany’s claim that Roj TV “plays a role in stirring up violent confrontations between persons of Turkish and Kurdish origins,”<sup>356</sup> and subsequently rules that Roj TV’s broadcasts are in violation of Article 22(1) of the Directive.

The Court then goes on to address whether or not Germany’s Public Law on Association, in conjunction with its Constitutional Law, violates Article 2(a) of the Directive, which prohibits discriminatory retransmissions of broadcasts. Citing its precedent in *De Agostini* (1995) and *TV-Shop* (1995), the Court notes that the Directive “does not in principle preclude the application of national rules with the general aim of consumer protection,”<sup>357</sup> insofar as such a law does not affect the retransmission of television programs from other Member States. The Court buttresses this claim by also citing Recital 8 of the Directive’s preamble which states, “the broadcasting and distribution of television services is also a specific manifestation of a more general principle, namely the freedom of expression as enshrined in Article 10(1) of the ECHR...Furthermore, it follows from Article 6(2) of the Lisbon Treaty that the EU is to respect the rights, freedoms, and principles laid down in the Charter of Fundamental Rights...so that any measure aimed at restricting the reception and/or suspending the retransmission of television broadcasts must be compatible with the abovementioned principles.”<sup>358</sup>

Given its past case law and this preamble, the Court questions whether or not the German law on associations is compatible with freedom of expression and association guarantees. The Court notes that the national legislation “concerns only the activities of

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<sup>355</sup> Paragraph 42.

<sup>356</sup> Paragraph 42

<sup>357</sup> Paragraph 48

<sup>358</sup> Paragraph 33

associations in general,”<sup>359</sup> and is not designed to specifically prevent the retransmission of Roj TV’s transnational television broadcasts. Rather, the national provisions prohibit Roj TV’s activities in Germany in its capacity as an association, which limits screening in public, German spaces.<sup>360</sup> Under these circumstances, “the reception and private use of Roj TV’s programs is not prohibited and remains in fact possible in practice.”<sup>361</sup> As such, Germany’s law does not “constitute an obstacle to retransmissions,”<sup>362</sup> as precluded by Article 2(a) of the Directive. Nevertheless, the judgment requires the national court verify whether the national provision violates the freedom to receive and provide services by preventing “retransmissions per se in the Member State receiving the broadcasts.”<sup>363</sup>

## Analysis

As seen by judgments spanning the time of *Cinetheque* to that of *Schmidberger*, the Court has preferred to take a “hands off attitude”<sup>364</sup> when assessing the rights violation at hand, unless prompted otherwise by a litigating party or the referring national court. However, *Roj TV* departs from this observed trend. In their judgment, the ECJ cites Recital 8 of the Directive’s preamble as a justification for their assertion that it is obligated assess the national legislation from a human rights perspective as well. In this regard, *Roj TV* coheres to the analytical expectations of functional spillover. By contending that freedom of expression serves as a self-justifiable, interpretative principle due to the ratification of the Charter<sup>365</sup>, the Court expands the policy domains within which supranational rights

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<sup>359</sup> Paragraph 52

<sup>360</sup> *ibid.*

<sup>361</sup> *ibid.*

<sup>362</sup> Paragraph 52

<sup>363</sup> Paragraph 53

<sup>364</sup> Weiler, Joseph H.H. “Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space.” P93

<sup>365</sup> Paragraph 33

guarantees can serve as an “an invalidating function”<sup>366</sup> for national measures. Thus, *Roj TV* illustrates how Court’s jurisprudence has the potential to drive forward the dynamics of functional and political spillover. This is because, by virtue of the Charter’s acquisition of Treaty-level status, fundamental rights can be more elastically deployed as an integrative tool in the Court’s legal reasoning.

However, *Roj TV* is notable in that, insomuch as it illustrates the Charter’s creation of an integrative impulse, it also demonstrates that limits can be consciously placed on the integrative effects that such an impulse would have otherwise. At the substantive, jurisprudential level, *Roj TV* fails to exhibit the effects of political spillover. Recall that, in their judgment, the Court acknowledges that Germany’s law has the *potential* to affect retransmissions of television broadcasts from other Member States, a violation of both the freedom to provide services and the freedom of expression. Despite this admission, the Court awards a wide margin of discretion to the German Court in concluding whether or not such discriminatory effects are to be observed, and it fails to provide the national judiciary with any concrete framework under which such determinations are to be made. By doing so, the Court’s judgment creates the possibility for supranational harmonization to occur only *potentially*. As such, the judgment will have a normative impact on Germany’s freedom of expression guarantees only if the German court determines there to be a casual connection between a bias in transnational television retransmissions and the national policy.

In this regard, the integrative outcome of *Roj TV* is very similar to that of *ERT*. In both cases, the Court leaves it at the discretion of the national court to determine whether

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<sup>366</sup> Ibid. P1423

or not remedial action is necessary within the realm of freedom of expression guarantees. At this juncture, it is important to underscore the fact that these cases are twenty years apart. Given that neo-functionalism posits a positive relationship between integration and time, one would expect that the Court take a far less deferential approach in *Roj TV*. In this line of reasoning, *Roj TV* stands in sharp contrast to that of *Familiapress*, where the Court imposed on the Austrian national court the very cumbersome task of conducting extensive market research as a means of ensuring that the national legislation in question did not violate non-market *and* market rights.

What explains the Court's contrasting approaches in deploying the principle of proportionality? A plausible explanation is that, in *Familiapress*, the Austrian law placed a far more explicit burden on the market freedoms *and* freedom of expression claims when compared to contested national provisions at stake in *Roj TV*. In fact, in *Roj TV*, the Court itself acknowledges that the national legislation in question does not, at least on face value, impede intra-Community trade in the manner precluded by Article 2(a) of the Directive. Given the Union's commitment to economic integration, it seems logical that this reality, in the factual context of *Roj TV*, motivates the Court to award the national judiciary much deference in determining whether or not remedial action in the realm of human rights is necessary. Thus, *Roj TV* indicates that, even with the ratification of the Charter, the Court chooses to "not always interfere with the actual merits of the policy pursued,"<sup>367</sup> leaving "considerable latitude to the state to pursue their own devices."<sup>368</sup> This tendency seems to be especially pronounced when the Court is called upon to assess the congruency between

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<sup>367</sup> Ibid. P94

<sup>368</sup> Ibid. P94

a Community obligation and that of a national constitutional norm, such as law on association, as is the case in *Roj TV* and *Schmidberger*.

#### 4.3 Scarlet Extended SA v. SABAM (2011)

##### **Facts of the Case**

From the outset, it should be established that this case deals with freedom of expression as it manifests itself in data protection. Scarlet Extended SA is an Internet service provider (ISP), providing its customers with access to the Internet without offering other services, such as file sharing or file downloading. Sabam is a Belgian management company, which is responsible for authorizing the use of the musical works of authors, composers, and editors by third parties. In 2004, Sabam learned that users of Scarlet's services were downloading works from Sabam's catalogue by means of peer-to-peer networks (also known as torrents) without authorization and without paying royalties. As such, Sabam brought interlocutory proceedings against Scarlet before the highest Court in Brussels, "claiming that the company was the best place, as an ISP, to take measures to bring to an end copyright infringements committed by its customers"<sup>369</sup> Upon application from Sabam, the Belgian Court ordered Scarlet to bring such copyright infringements to an end by making it impossible for its customers to send or receive, in any way, electronic files containing a musical work in Sabam's repertoire. It cited the national legislation implementing Article 8(3) Directive 2001/29 (Information Society Directive), which enables "holders of intellectual property right to apply for an injunction against intermediaries, such as ISPS, whose services are being used by a third party to infringe their rights." Additionally, it deferred to Article 11 of Directive 2004/48 (Copyright Enforcement), which states "Member States shall ensure that, where a judicial decision is

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<sup>369</sup> Paragraph 18

taken finding any infringement of intellectual property, the judicial authorities may issue the infringer an injunction aimed at prohibiting the continuation of the infringement.” Both of these Directives’ preambles emphasize the ensuring the rights set forth by Article 17(2) of the Charter regarding the right to intellectual property.

Scarlet appealed to Belgian court, making four claims: 1) That it was impossible to comply with the ruling’s injunction since the effectiveness and permanence of filtering and blocking systems had not been proved, and that the installation of the equipment for doing so was faced with numerous practical obstacles, such as problems with the network capacity and impact on the network. As such, the injunction would violate Article 16 of the Charter regarding the right to conduct a business. 2) Any attempt to block the files concerned was doomed to fail in the short term because there were several peer-peer software products, which made it impossible for third parties to check their content. 3) The injunction was contrary to Directive 2000/31 (E-Commerce Directive), which states “Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature.”<sup>370</sup> 4) The injunction also violated Directive 2002/58 (E-Privacy), which prevents the processing of personal data and ensures that the individual’s right to privacy and protection of personal data are not compromised, as stipulated by Article 7 and 8 of the Charter. 5) The proposed filtering system has the potential to violate Article 11 of the Charter regarding the freedom to receive and to impart information because it may not be able to distinguish between lawful and unlawful content

Given that both litigating parties cited Community law as justification for their respective claims, the Belgian Court referred the matter to the ECJ.

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<sup>370</sup> Recital 47 of Preamble to Directive 2000/31



### **The Preliminary Question(s) Referred to the Court**

1. Do Directive 2001/29 (Information Society Directive) and Directive 2004/48 (Copyright Enforcement Directive), in conjunction with Directive 2000/31 (E-Commerce Directive), and construed in particular in the light of Articles 8 and 10 of the ECHR, permit a Member States to authorize a national court, before which substantive proceedings have been brought to do the following: 1) To issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right 2) To order an ISP to install, for all of its customers, as a preventative measure, exclusively at the cost of that ISP 3) and for an unlimited period of time, a system for filtering all electronic communications, both incoming and outgoing... in order to identify on its network the movement of electronic files containing ...works of which the applicant claims to hold rights?<sup>371</sup>
2. If the answer to the first question is in the affirmative, do these directive require a national court to impose such filtering obligations in accordance with the principle of proportionality when deciding on the effectiveness and dissuasive effect of the measures sought?<sup>372</sup>

### **The Court's Ruling**

The Court begins its ruling by validating Sabam's legal justification for the injunction. It finds that the relevant articles of the Information Society Directive, in conjunction with the Copyright Enforcement Directive, enable holders of intellectual property to apply for an injunction against intermediaries, such as ISPS, whose services are

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<sup>371</sup> Paragraph 29(1)

<sup>372</sup> Paragraph 29(2)

being used by a third party to infringe their rights.<sup>373</sup> The Court declares, “The rules for the operation of the injunctions...are a matter for national law.”<sup>374</sup> Citing its precedent in *L’Oreal and Others* (2009), the Court asserts that such national rules respect the limitations arising from European Union law. In particular, the E-Commerce Directive, which prohibits Member States from adopting measures requiring an ISP to carry out general monitoring of the information that it transmits on its network.<sup>375</sup>

As such, the Court examines whether or not the national injunction is in accordance with the E-Commerce Directive.<sup>376</sup> The Court thoroughly enumerates the various actions that Scarlet would be required to undertake if such an injunction is validated.<sup>377</sup> It concludes that, in light of its findings, “the injunction would require the ISP to carry out general monitoring, something which is prohibited by the E-Commerce Directive”<sup>378</sup>

It is at this juncture of the judgment that the Court incorporates rights-oriented judicial review into their legal reasoning. The Court states that the validity of the injunction “must also be taken of the requirements that stem from the protection of the applicable fundamental rights, such as those mentioned by the referring Court.”<sup>379</sup> Given the competing rights claims cited by both litigating parties, the Court declares that “a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by... ISPs pursuant to Article 16 of the Charter,”<sup>380</sup> is necessary. Citing its precedent in *Promusicae* (2008), the Court

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<sup>373</sup> Pararaphs 30-33

<sup>374</sup> Paragraph 32

<sup>375</sup> Paragraphs 34-35

<sup>376</sup> Paragraph 37

<sup>377</sup> Paragraph 38

<sup>378</sup> Paragraph 40

<sup>379</sup> Paragraph 41

<sup>380</sup> Paragraph 46

asserts that national legislators and courts are responsible for such a balance.<sup>381</sup> However, the Court also contends that it maintains enough knowledge of the facts to partake in such a judgment exercise as well.

It concludes that, because “the monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also future works that have not yet been created,”<sup>382</sup> “such an injunction would result in a serious infringement of freedom of the ISP to conduct its business.”<sup>383</sup> As such, the national injunction “is to be regarded as not respecting the requirement that a fair balance be struck,”<sup>384</sup> for it exerts a disproportionate burden on Scarlet’s pursuit of the freedom to conduct business, as guaranteed by Article 16 of the Charter. The Court also justifies its reasoning by asserting that the injunction “may also infringe the fundamental rights of that ISP’s customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguard by Articles 8 and Articles 11 of the Charter respectively.”<sup>385</sup> This is because the injunction would involve a systematic analysis of all content and the collection and identification of users’ IP addresses, which are protected as personal data.<sup>386</sup> Similarly, the injunction could potentially undermine freedom of information since that system may not be able to distinguish between unlawful content and lawful content.<sup>387</sup>

Consequently, the Court finds that Belgium’s adoption of the injunction is incompatible with the E-Commerce Directive, and that it violates Articles 17, Articles 8, and

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<sup>381</sup> Paragraph 45

<sup>382</sup> Paragraph 45

<sup>383</sup> Paragraph 46

<sup>384</sup> Paragraph 50

<sup>385</sup> Paragraph 50

<sup>386</sup> Paragraph 51

<sup>387</sup> Paragraph 52

Articles 11 of the Charter. As such, the Court's reply is that EU law precludes an injunction requiring an ISP to install such an extensive filtering system.

## Analysis

*Scarlet Extended SA* reflects the ongoing tension among legislators and courts in balancing copyright with networks commercial interest and customers' freedoms. By ruling that ISP filtering as a means of enforcing copyright is contrary to Community law, the Court makes it more difficult for copyright holders to enforce their rights. The inverse effects of the decision have been welcomed as a ruling guaranteeing a free and open Internet throughout Europe. In this sense, *Scarlet Extended SA* is distinct from the other cases examined in that its immediate consequences are more pronounced. Several Member States', such as Italy, Ireland, and the UK, have proposed measures based on filtering technologies to ensure copyright protection, and a number of national judicial rulings have dealt with such requirements. These national decisions will now have to be assessed in light of the ECJ's judgment. Member States may no longer require as extensive filtering systems as the one that was to be imposed on Scarlet, and if a Member State conceives of a less extensive filtering system, the Court's judgment makes clear that it must nevertheless respect the freedom of conduct a business, the protection of personal data, and the freedom to receive and impart information.<sup>388</sup>

In this regard, *Scarlet Extended SA* illustrates that the Court's rulings can, in fact, result in a significant displacement of nationally conceived rights-oriented norms, just as political spillover posits. Such outcomes have not been identifiable in previous cases this thesis has assessed. This judgment also seems to validate Weiler's assertion that "drafting a

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<sup>388</sup> For further reading see González-Fuster, Gloria. "Chapter 6: EU Fundamental Rights and Personal Data Protection." In *The Emergence of Personal Data Protection as a Fundamental Right of the EU*, 163-212. Geneva: Spring International Publishing, 2014.

new charter, it was said, would give the chance of introducing much needed innovation to our constitutional norms that were shaped by aging constitution and international treaties.”<sup>389</sup> In the context of this particular case, the Court’s deployment of the Charter as a standard of review resulted in strengthening rights protections at the transnational level in novel domains, such as that of the Internet.

The Court’s employment of the principle of proportionality is also notable. The Court cites its precedent in *Promusicae* (2008), asserting that national courts are entitled to “strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.”<sup>390</sup> However, the Court circumvents the precedent’s mandate, proceeding to engage with the principle of proportionality in an intrusive manner. As it did in *Schmidberger* and *Familiapress*, the Court thoroughly considers all of the facts of the case as a means of validating the national courts own value judgment. In the process of doing so, the Court asserts that the Belgian court failed to properly take into account the injunctions potential ability to infringe on third-party customer’s right to protection of personal data and to receive and impart information, a direct violation of Articles 8 and 11 of the Charter respectively. Thus, the Court imposed on the Member State’s national measure an additional standard of rights protection it was to guarantee in order for it to be valid. This signals an expansion of the Court’s jurisdictional limits (functional spillover), as well as a decrease in the degree of deference the Court awards to the national court in remedying a rights violation (political spillover).

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<sup>389</sup> Weiler, Joseph H.H. "Human Rights, Constitutionalism, and Integration: Iconography and Fetishism." P110

<sup>390</sup> Paragraph 44

It is also worth underscoring that *Scarlet Extended SA* serves as another example of how the Charter expands the Court's ability to advance integration within the legal realm. The Court considers a myriad of rights when adjudicating, such as the right to property, the protection of personal data, the freedom to conduct a business, and the freedom to receive and to impart information. Whereas some of these rights are stipulated within the contested Directives' preambles, others (specifically, the freedom of expression) are invoked by one of the litigating parties and the national court at their own accord. Thus, it is clear that "the Charter has improved the centrality and weight of fundamental rights, reinforcing both their visibility in the legal discourse of the Court and their roles as parameters of constitutionality."<sup>391</sup>

#### 4.4 Sky Österreich GmbH v. Österreichischer Rundfunk (2013)

##### **Facts of the Case**

Article 15 of Directive 2010/13 (Audiovisual Media Services Directive) allows television channel operators to acquire exclusive broadcasting rights for events of high public interest. However, other channels must have the ability to access such events for the purpose of short new reports. As such, the owner of the exclusive right must provide other broadcasts with access to its signal to allow them to freely choose the short extracts they desire for their brief television reports. Article 6 of the Directive permits that owners maintain the exclusive rights be compensated for access to their signal, but that this compensation may not exceed the additional costs directly incurred by the owner in providing that access.

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<sup>391</sup> Sanchez, Sara Iglesias. "The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights." P1576

In 2009, the television channel Sky Österreich acquired by legal contract the exclusive right to broadcast Europa Soccer League matches in the 2009/2010 and 2011/2012 seasons in Austria territory. KommAustria, Austria's regulatory audiovisual media authority, authorized Sky Österreich to broadcast via satellite the soccer games on television. Österreichischer Rundfunk (ORF) is Austria's public broadcaster. In 2010, ORF entered into an agreement with Sky Österreich, who granted ORF the right to produce short news report, provided that ORF compensated Sky Österreich with the payment of 700 euro per minute of such reports. Such an agreement was made on the basis of Article 5 of Austria's Federal Law on the Exercise of Exclusive Broadcasting Rights; this law was Austria's national response to the requirements of the EU's Audiovisual Service Media Directive.

Shortly thereafter, KommAustria determined that ORF did not need to grant monetary compensation to Sky Österreich when utilizing its video clips to produce short news reports because the operational costs Sky Österreich incurred in providing ORF with access to its satellite signal were non-existent. ORF and KommAustria cited the explicit wording of Article 6 of the Directive as a justification for their claim. Sky Österreich contested the Directive's financial conditions, pointing out that it had no control in determining the costs associated with providing other broadcasters with access to its satellite signals. Sky Österreich also asserted that KommAustria and ORF failed to take into account the millions of euros it spends every year in acquiring such exclusive licensing and production. Furthermore, Sky Österreich contended that because it had entered into a contract with ORF prior to the Directive's implementation, the debate over remuneration had no legal basis. Finally, because the contract had codified such broadcasting licensing as

an asset, Sky Österreich claimed that Article 15(6) of the Directive violated both his right to property and right to conduct a business, as laid down by Article 17 and 16 of the Charter respectively. Neither litigating party invoked freedom of expression claims.

### **The Preliminary Question(s) Referred to the Court**

1. Is Article 15(6) of Directive 2010/13 compatible with Articles 16 and 17 of the Charter?<sup>392</sup>

### **The Court's Ruling**

The Court first assesses the admissibility of Sky's claim that KommAustria and ORF maintain no legal basis for their denial of remuneration because their contract with Sky Österreich precedes the implementation of the Directive. The Court notes that, when Sky Österreich entered into its contract with ORF in 2009, the requirements of Directive 2007/65 (a former edition of the Audiovisual Media Directive) were already in entered into force, and contained provisions matching Article 15(6) of the current in question.<sup>393</sup> As such, Sky Österreich cannot circumvent the requirements of Article 15(6) based on the established legal position his contractual clause awarded him. By extension, the Court rules that Sky Österreich's right to property, as guaranteed by the Charter, had not been violated.<sup>394</sup>

The Court then moves on to determine the compatibility of Article 15(6) of the Directive with Article 17 of the Charter, regarding freedom to conduct business. The Court agrees with Sky Österreich's argument that because it "cannot decided freely on the price to be charged for access to the signal for the purpose of making short news reports,"<sup>395</sup> the

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<sup>392</sup> Paragraph 24(1)

<sup>393</sup> Pararaph 33-37

<sup>394</sup> Paragraph 38

<sup>395</sup> Paragraph 44



provision in dispute “amounts to an interference with the freedom to conduct a business of holders of exclusive broadcasting rights.”<sup>396</sup> However, the Court notes “the freedom to conduct a business is not absolute, but must be viewed in relation to its social function...may be subject to a broad range of interventions on the public authorities which may limit the exercise of economic activity in the public interest.”<sup>397</sup> Under these circumstances, the Court notes that Article 52(1) of the Charter requires “the principle of proportionality to be implemented,”<sup>398</sup> as a means of assessing whether or not Article 15(6) of the Directive causes a disproportionate burden on the freedom to conduct a business.

The Court notes that the EU legislature was aware that “the marketing on an exclusive basis of events of high interest to the public is...liable to restrict considerably the access of information relating to those events.”<sup>399</sup> As such, the Court argues that the EU legislature inserted Article 15(6) into the Directive as a means of ensuring that the freedom to receive and to impart information is protected. This is because the provision “puts any broadcaster in the position to be able to make short news reports and thus to inform the general public... irrespective of their commercial power and financial capacity.”<sup>400</sup> The Court also justifies its interpretation of the EU legislature’s intentions by citing Recital 48 of the Directive’s preamble; it reads, “...to promote pluralism through the diversity of news production and programming across the EU and to respect the principles recognized by Article 11 of the Charter.”

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<sup>396</sup> Ibid.

<sup>397</sup> Paragraph 45-46

<sup>398</sup> Paragraph 46

<sup>399</sup> Paragraph 51

<sup>400</sup> Paragraph 52

The Court then notes that the Directive maintains several other clauses (e.g. Article 15[3], Article 15[5]) which strive to offset the burden Article 15(6) places on the broadcaster's ability to conduct a business. As such, the Court rules that Article 15(6)'s infringement of the right to conduct a business "is appropriate"<sup>401</sup> and that, "it is apparent that less restrictive legislation would not achieve the objective pursued by Article 15(6)."<sup>402</sup> Consequently, the Court finds that the contested Directive, and by extension the national legislation in question, is proportional in its balancing between the guarantees of Article 11 and Article 17 of the Charter. As such, Sky Österreich's freedom to conduct a business and right to property were not violated.

### **Analysis**

*Sky Österreich* is similar to *Familiapress* and *Scarlett Extended SA* in that the Court is confronted with assessing several competing fundamental rights guarantees. The ECJ must check whether the Directive strikes a fair balance between the right to conduct a business, on the one hand, and the freedom of citizens to receive and impart information vis-à-vis media pluralism on the other.<sup>403</sup>

The Court concludes that ensuring freedom of expression and media pluralism warrants the burden the Directive places on the freedom to conduct a business. The Court justifies its invocation of freedom of expression by quoting Recital 48 of the Directive's preamble, which explicitly cites Article 11 of the Charter. Thus, "the fact that these interests [freedom of expression] are recognized by the Charter is an extra reason for the Court to take them seriously"<sup>404</sup> when adjudicating.

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<sup>401</sup> Paragraph 53

<sup>402</sup> Paragraph 54

<sup>403</sup> Paragraph 59

<sup>404</sup> Hins, Wouter. "The Freedom to Conduct a Business and the Right to Receive Information for Free: Sky

This logic is observable in not only *Sky Österreich*, but also in *Roj TV* and *Scarlet Extended SA*. In both of these former cases, the Court's legal reasoning is explicitly informed by various rights guarantees, some of which are cited in the Directive's preambles. Furthermore, in all three of these cases, the Court awards remedial action towards freedom of expression guarantees despite fact that neither the referring national court, nor the litigating parties invoked the right as an established legal position. In this connection, *Sky Österreich* confirms a trend that has remained constant throughout the case studies examined post-2009: the Charter's legal ratification expands the Court's mandate to engage in rights-oriented judicial review, and it enables rights to acquire a self-justifiable legal position with the EU's legal order. Both of these observable outcomes are indicative of functional spillover.

*Sky Österreich* also exhibits the dynamics of political spillover. The Court makes "a step-by-step assessment of the proportionality of the restriction under Article 52(1) of the Charter,"<sup>405</sup> before concluding the compatibility of the Directive (and by extension its freedom of expression guarantees) with the freedom to conduct a business. The Court's application of the principle of proportionality is informed by the Directive's codification of freedom of expression, as guaranteed by the Charter. *Roj TV* and *Scarlet Extended SA* also exhibited similar legal reasoning; recall that the Court's application of the principle of proportionality was conditioned by the Directive's citation of the Charter. In this connection, references to the Charter in EU legislation create far more opportunities for transnational, normative harmonization to emerge within national legal orders. This is because the Directive's codification of rights enables the Court to more elastically deploy

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Osterreich." *Common Market Law Review* 51, no. 2 (2014): 665-78. P675

<sup>405</sup> Ibid. P666

such rights as additional standards of legality. As a consequence of this, the Court's judgments can institutionalize the Charter's supranational rights within the national policy domains governed by the Directive. Such an outcome coheres with the analytical expectations of political spillover. As a consequence of *Sky Österreich*, EU citizens right to freedom of expression is ensured by securing media plurality as a legitimate interest enabling television broadcasters to create short news reports of popular events, even if a corporation maintains a monopoly of such exclusive broadcasting rights.

In this regard, it is important to note that *Sky Österreich* displaced not only Austria's national conceptualization of the freedom to conduct a business, but also Germany's. In 1988, the Germany Constitutional Court decided that a law allowing broadcasters to transmit short television reports of important news events without having to pay compensation infringed the right to conduct a business, as enshrined by Article 12 of the German Constitution. In 2006, the Austrian Constitutional Court made a comparable decision. "The ECJ does not refer to this history, but one could expect that testing the EU directive against the Charter would give the same result as testing the German and Austrian law"<sup>406</sup> against their Constitutions. However, as it has been seen, "The ECJ did not follow the case law of the Germany and Austrian constitutional Courts."<sup>407</sup> On the contrary, the Court's judgment concludes that denial of remuneration under Article 15(6) of the Directive is justified in its restriction on the freedom to conduct a business on the grounds of ensuring media plurality and freedom of expression. Thus, *Sky Österreich* is similar to *Scarlet Extended SA* in that the Court's judgments normatively impacted the Member States' remedial action towards the right in question. Whereas in *Scarlet Extended SA*, the Court's

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<sup>406</sup> Ibid.

<sup>407</sup> Ibid.

judgment requires Member States to revisit national legislation requiring ISP filtering on the grounds of ensuring freedom of expression (among other rights), in *Sky Österreich*, the Court's ruling altered Austria's conceptualization on the freedom to conduct a business. This normative displacement of the national at the expense of the supranational coheres with the analytical expectations of political spillover.

#### 4.5: Concluding Observations

Chapter three illustrated the evolving and positive relationship between supranational integration and the legal incorporation of rights. It found that, after the ratification of the Treaty of Maastricht and the Treaty of Amsterdam, the Court exhibited a strong preference towards constructing substantive freedom of expression guarantees, which have the potential to transcend national norms (see *Familiapress*). As such, it was projected that such integrative effects would be continued and amplified following the Charter's introduction in 2000. Chapter four was tasked with testing the accuracy of this prediction. Accordingly, this chapter finds that, with the proclamation of the Charter, the operational presence of rights as a normative legal construct has expanded within the jurisdictional bounds of Community law.

The dynamics of functional spillover become evident in every case study examined in chapter four. From the time of *Schmidberger* to that of *Sky Österreich* (2014), the Court's jurisdictional boundaries have evolved in a way that awards human rights a self-justifiable legal logic. In *Schmidberger* and *Roj TV*, the Court adheres to the derogation precedent set by *ERT* (1991), thereby consolidating and entrenching the effects of functional spillover it had created in 1991; recall that *ERT* inaugurated the erosion of Member State competences

within the realm of human rights and in a way that is favorable to supranational integration.<sup>408</sup>

*Scarlet Extended SA* and *Sky Österreich* also evidence the positive and causal relationship existing between the Charter's ratification, jurisdiction, and functional spillover (as a measure of integration). In both of these cases, the Court leverages human rights guarantees as additional standards by which to assess the admissibility of Member State legislation implementing Directives. In *Scarlet Extended SA* and *Sky Österreich*, the Court's legal reasoning is conditioned by the contested Directive's preambles, which explicitly make reference to the Charter.<sup>409</sup>

By validating the rights incorporated in EU legislative instruments, the Court's judgments illustrate how rights have acquired a self-reflexive legal logic that expands their operational role within the jurisdictional bounds of Community law.

This above fore mentioned finding is also buttressed by the fact that, in *Roj TV* and *Sky Österreich*, the Court introduced freedom of expression into its review process at its own accord, and absent any prompting by the litigating parties or the referring national court. The only exceptions to this trend are *Schmidberger* and *Scarlet Extended SA*, and this is because the scope of the national courts' preliminary question accounted for this right. Though the Court's incorporation of freedom of expression in *Roj TV* and *Sky Österreich* is most likely conditioned by the Directive's preambles, scholars have noted, "Progressively, references to the Charter were freed from the mediation of secondary acts. Its value was

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<sup>408</sup> This is because the ECJ now has the ability to incorporate fundamental rights considerations as additional standards of legality when assessing the merits of a Member State's derogation claim. For a more detailed explanation revisit Paragraph 2, Section 3.6 (Concluding Remarks).

<sup>409</sup> In *Sky Österreich*, the contested Directive cites freedom of expression as an applicable right that is to be protected within the policy domains governing audiovisual media services. In *Scarlet Extended SA*, the various Directives refer to the protection of property, the right to privacy, the right to conduct a business, and the right to protection of personal data.

generalized as a reaffirming instrument...independent of explicit mentions in the recitals or provisions of the instruments at issue.”<sup>410</sup> It should be underscored that such a trend cannot be identified in any of the judgments analyzed in chapter three. In *Cinetheque*, *Grogan*, *ERT*, and *Familiapress*, the Court adjudicated on freedom of expression at the request of either the domestic court or one of the litigating parties. Thus, chapter four confirms what chapter three already alluded to: the Court’s mandate to engage in rights-oriented judicial review of national legislation has steadily expanded since the early days of *Cinetheque* (1985), as posited by functional spillover.

Neo-functionalism contends that the effects of political spillover are contingent upon the emergence of functional spillover. Taken together, chapters three and four conclude that the dynamics of political spillover animate the Court’s legal reasoning, though only to a certain degree. As inaugurated in *Familiapress*, the Court has become more willing to reassess Member States’ personal value judgments in their application of the principle of proportionality. In *Schmidberger*, *Scarlett Extended SA*, and *Sky Osterreich*, the Court continues to apply the principle of proportionality intrusively; in all three of these judgments, the Court examines how the national judiciaries carried out their own balancing tests before validating the national court’s claim. The only exception to this is *Roj TV*, and this point will be discussed shortly. What should be underscored is that the principle of proportionality reflects the fundamental balance between a common good and the right of the individual. When the Court reassesses Member States’ application of proportionality in relation to a protected human right, it can be viewed as “a direct encroachment to the

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<sup>410</sup> Sanchez, Sara Iglesias. "The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights." P1571

fundamental boundaries of the member state.”<sup>411</sup> This is because “the material difference between different human rights regimes is, typically, not in the category of rights that are protected but in the manner in which these balances are struck.”<sup>412</sup>

However, such stringent employment of proportionality does not translate into substantive, judicial outcomes. When examined in relation to chapter three, chapter four concludes that, more often than not, the Court’s jurisprudence does not effectively displace the national application of the right in favor of the supranational, thereby not altering the ‘fundamental boundary.’ This phenomenon is often due to either the Court’s preference in leaving a wide margin of discretion to the national court in determining the degree to which the rights violation occurred (*ERT, Roj TV, Familiapress*), its desire to avoid the remedial question by stressing its delineated competencies (*Cinetheque, Grogan*), or its determination that the national measure coheres to the Community’s conceptualization of the right in question (*Schmidberger*). However, it is crucial to note that *Scarlet Extended SA* and *Sky Osterreich* prove to be exceptions to this finding, in that the Court’s decision resulted in the supranational institutionalization of several rights protections within national legal orders. What explains these judgments varying outcomes with regard to normative harmonization? And what do these differences tell us about the Court’s rationale for imposing different value judgments?

Upon closer examination, it becomes apparent that the origins of the contested national legislation, as referred to the Court, directly affect transnational, normative

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<sup>411</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." In *An Identity for Europe: The Relevance of Multiculturalism in EU Construction*. P78.

<sup>412</sup> Weiler, Joseph H.H., and Nicolas J.S. Lockhart. ""Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence." P585



diffusion. In all six of the cases concerning derogation claims (*Cinetheque*, *ERT*, *Grogan*, *Familiapress*, *Schmidberger*, *Roj TV*), the Court decision failed to incite explicit, supranational harmonization with regards to freedom of expression. However, in the two cases referred to the Court on the grounds of Member State implementation of a Directive (*Scarlet Extended SA*, *Sky Österreich*), such effects were observed.

*Scarlet Extended SA* and *Sky Österreich* are a testament to the strong integrative impulse created by legal ratification of the Charter. In both cases, the Court's legal reasoning revolves around the Directives' preambles, which explicitly reference the Charter, and articulates that guaranteeing non-market protections are among one of the Directive's intentions. Thus, when a Member State transposes the Directives into national law, they are to respect the Directive's enumerated fundamental rights as well. In this connection, the creation of political spillover within the human rights domain becomes inevitable when the Court adjudicates on a Member State policy in pursuit of a Directive's imposed obligation.

In *Scarlet Extended SA*, the Court's decision has the effect of forcing several Member State governments to reconstruct their recently inaugurated policies regarding filtering technologies geared towards ensuring copyright protection on the grounds of guaranteeing freedom of expression, protection of personal data, and freedom to conduct a business. In *Sky Österreich*, the Court concludes that the Directive (and by extension the national law) strikes the proportional balance between freedom of expression and freedom to conduct a business. This judgment effectively institutionalized freedom of expression protections within national policy domains governing audiovisual media services. Recall that the ECJ's judgment in *Sky Österreich* contrasts sharply to the Austrian Constitutional Court's past-

case law. Thus, political spillover as a “process of adaptive behavior, that is, the incremental shifting of expectations, the changing of values,”<sup>413</sup> becomes readily apparent in legal disputes stemming from a normative, Community source such as a Directive.

However, this is not so in cases arising from derogation claims. In *Cinetheque*, *ERT*, *Grogan*, *Familiapress*, *Schmidberger*, and *Roj TV*, the Court’s judgment failed to result in the normative diffusion of Community-inspired freedom of expression guarantees. In *Schmidberger*, the Court had the opportunity to craft a broad judgment in which the remedial relationship between freedom of expression and the market freedoms could have been institutionalized at the supranational level. Had the Court chosen to do so, litigating parties and national courts alike could have invoked *Schmidberger* “as a statement of existing law and proceed to make arguments in the next case from that benchmark, thereby shifting their expectations,”<sup>414</sup> thereby further diffusing its normative impact throughout Member States’ legal systems. However, recall that the Court’s judgment established a *very* narrow precedent; the Court enumerated the specific precautions undertaken by Austria prior to the demonstration as among the primary justification for its validation of Austria’s derogation claims. Thus, *Schmidberger* illustrates that, even when the opportunity presents itself, the Court seems to prefer to construct its right jurisprudence on an incremental, case-by-case basis, thereby mitigating its maximal integrative effects. It is notable that the Court opts to *not* engage in such an approach when adjudicating on matters concerning the

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<sup>413</sup> Burley, Anne-Marie, and Walter Mattli. “Europe Before the Court: A Political Theory of Legal Integration.” P55.

<sup>414</sup> *Ibid.* P67

internal market. For years, scholars have commented on the Court's tendency to broadly define the substantive scope of the Treaty's market freedoms.<sup>415</sup>

Additionally, even as fundamental rights have come to occupy a critical space with the Union's jurisdictional framework, the Court has continued its preference of awarding Member State a wide margin of discretion in determining the remedial relationship between the national law derogating from Community obligations and the contested rights violation. This observation is especially relevant in the context of *ERT* and *Roj TV*, two judgments in which the Court acknowledges the *potential* for the Member State policy to violate freedom of expression guarantees, but rules such determinations to be made solely by the referring domestic court. The fact that the Court reaches identical conclusions in both judgments, despite their twenty-year gap, is striking in the paradigmatic context of neo-functionalism. This is because neo-functionalism posits that a positive relationship exists between the progression of time and the expansion of competencies, motivating a shift in favor of supranational decision-making. As such, one would expect the Court to award less deference to the domestic court on matters of fundamental rights over time. Yet, as these case studies illustrate, such integrationist driven judicial behavior has yet to surface in the context of cases concerning fundamental rights and Member States' derogation claims.

The only anomaly to this identifiable pattern is *Familiapress*. Recall that the ECJ established strict set of criteria<sup>416</sup> that the national legislation was to satisfy in order for

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<sup>415</sup> See Vries, Sybe A. De. "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice." *ULR Utrecht Law Review* 9, no. 1 (2013): 169.

<sup>416</sup> The Court forced Austria to conduct extensive market research as a means of determining whether the national law maintains a proportional relationship in protecting press diversity at the expense of freedom of expression and the free movement of goods. By requiring this, the Court forces Austria to become more

Austria's derogation claim to be validated. By extension, it is now more difficult for Austria's law to be exculpated from the Treaty's obligations, and this makes the national law more susceptible to supranational harmonization. Thus, political spillover is apparent in *Familiapress* insofar as supranational preferences are more likely to permeate into the Austria's national legal order. However, *Familiapress*'s display of political spillover is most likely due to the Court's steadfast commitment to ensuring the coherence of the internal market. In the factual context of this case, the Court realized it could protect both freedom of expression *and* the free movement of goods simultaneously, and so it took the opportunity to do so by crafting a stringent derogation framework. In this regard, *Familiapress* shows how the Court may choose to take a stricter approach to rights protection, when doing so also benefits the EU's market relations. Paradoxically, this reality may also explain why the Court took such a deferential approach in applying the principle of proportionality in *Roj TV*. Recall that the Court noted that Germany's legislation does not, at least on face value, impeded intra-Community trade. This reality seems to have compelled the Court to leave questions regarding fundamental rights at the complete discretion of the domestic court. Nevertheless, it should still be stressed that *Familiapress* will cause normative change *only if* the Austrian court determines that the national law does preserve press diversity. In this regard, the maximal, integrative effects of political spillover become contingent upon the national court's ruling.

Despite *Familiapress* being the one exception, the overall pattern is clear: when the Court adjudicates on a Member State measure in application of a Member State policy, it is far more hesitant to engage in rights-oriented judicial review. This preference for awarding

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elaborate in its freedom of expression and press diversity protections, and Austria must factor in supranational considerations, such as that of the free movement of goods.

a margin of deference to the domestic court seems to become even more pronounced when the Court is called upon to assess the congruency between constitutional norms, as manifested in a national policy, in relation to Community law. In addition to *Roj TV*<sup>417</sup>, *Schmidberger* and *Grogan* are also case and point. Recall that in *Schmidberger*, the Court explicitly stated that it was more restrained in its conceptualization of Austria's deployment of the principle of proportionality because the Community violation had its origins in an enshrined constitutional guarantee and stemmed from the activities of private, third party individuals. In *Grogan*, the Court simply leveraged market relations to render the fundamental rights question null, thereby avoiding the contentious debate on the Community's rights relation with the provision of abortion services.

As a whole, these findings illustrate *to what degree* and *under what conditions* a neo-functional paradigm becomes helpful in explaining how the Court's rights-based adjudication enhances European integration. It is clear that, "the judicial practice after Lisbon shows that the enhanced autonomy of the EU system for the protection of fundamental rights has so far not given rise to a stricter application of a uniform standard of fundamental rights towards the Member States."<sup>418</sup> Such an approach to the constitutionalization of rights undoubtedly mitigates the integrative effects that such legal norms could otherwise have. The question that remains is what explains this judicial behavior as manifested in this thesis' empirical findings.

#### 4.6 Judicial Restraint: A Possible Explanation

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<sup>417</sup> The ECJ was to assess the congruency between a national law concerning Germany's constitutional freedom of assembly with that of a Directive's obligations.

<sup>418</sup> Sanchez, Sara Iglesias. "The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights." P1606

Taken together, chapters three and four reveal the Court's overall penchant for judicial restraint within the jurisdictional domain of rights. By extension, these findings also illustrate that nationally entrenched sociopolitical preferences and normative interests animate the Court's calculated judicial behavior, and that this constrains and alters the dynamics of supranational integration.

At this juncture, it seems that the very same political self-interest that characterized the battle between the ECJ and Member States' judiciaries over fundamental rights and the imposition of the doctrine of supremacy during the 1960s continues to endure in the present context.<sup>419</sup> Since the early days of the EU, Member States and their judiciaries have been aware of the fact that "a bill of rights are, in the long run, a powerful vehicle of integration."<sup>420</sup> As such, they possess the ability to erode their constitutional traditions, to threaten their policy sovereignty, and "to undermine their own carefully curated case law."<sup>421</sup> For their part, the Court has been concerned with mitigating the impression of the Union's democratic deficit<sup>422</sup>, ensuring the supremacy of Community law, and maintaining its political legitimacy.

Though the Member States and the Court have been coalescing around the establishment of Community-level human rights jurisprudence since the 1960s, such worries seem to be even more relevant in the present day than they were in then. Since the establishment of two, additional pillars of governance - the Common Foreign and Security Policy and the Justice and Home Affairs - with the Treaty of Maastricht in 1993, the Union's

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<sup>419</sup> Revisit Chapter 2, Section 3

<sup>420</sup> Mancini, Frederico. "The Making of a Constitution for Europe." P608.

<sup>421</sup> Sweet, Alec Stone. "Chapter 1: The European Court and Integration." In *The Judicial Construction of Europe*. P18

<sup>422</sup> See Jensen, Thomas. 2009. "The Democratic Deficit of the European Union." *Living Reviews In Democracy* 1, 1-8. *Academic Search Complete*, EBSCOhost (accessed March 27, 2016).

competencies have expanded into policy domains such as immigration, asylum, security, and data protection. It is by no accident that with the ratification of the Charter in 2009, the Treaty of Lisbon defiantly declared with Article 4(1):

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government....”

Such an acknowledgement is a clear sign of the Union respecting Member States’ conceptualization of their ‘fundamental boundaries,’ and the Charter’s structure also exemplifies this fact. Take, for example, the Charter’s distinction between rights and principles. As discussed in Section 2.5C, the logic motivating the delineation between rights and principles lies in the Charter’s desire to leave a margin of appreciation to Member States’ legislation; “some of the principles, therefore, have a kind of defensive character, and primarily aim at protection national norms (specifically social standards) from a leveling by the side of the Union.” This notion of ensuring Member States sovereign competencies can also be found in Article 52(2) of the Charter, which proclaims:

“The rights recognized by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised *under the conditions and within the limits defined by those Treaties.*”

Such a declaration coheres nicely with the above fore mentioned text of Article 4(1) of the Treaty of Lisbon.

Taken together, these provisions “emphasize that the Charter does not entail an extension of the Union competences, nor of the field of application of Union law, and it conveys the message that the Court is aware of the limitations of the Charter and is

completely willing to abide by them.”<sup>423</sup> In this connection, the Court’s decision to “not always interfere with the actual merits of the policy pursued,”<sup>424</sup> and to leave “considerable latitude to the state to pursue their own devices,”<sup>425</sup> is logical. Such employment of judicial restraint with regards to fundamental rights adjudication simultaneously accommodates and protects the political self-interest of both the ECJ and the Member States’ national judiciaries.

Thus, it is not surprising that this thesis observes a stronger integrative effect in the judgments concerning national legislation implementing EU Directives. “When EU legal instruments explicitly referred to the Charter in their preambles or provisions, this was taken as a signal of commitment by the legislature, meaning that the Charter could be referred to be the judges without the risk of becoming involved in judicial activism.”<sup>426</sup> On the other hand, when assessing Member States’ derogation claims, “the Court has maintained a considerable degree of deference, entrusting the national courts with the task of applying the EU standard of fundamental rights, following the guiding elements provided by the Court of Justice.”<sup>427</sup>

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<sup>423</sup> Sanchez, Sara Iglesias. "The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights." P1858

<sup>424</sup> Weiler, Joseph H.H. "Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space." P94

<sup>425</sup> Ibid.

<sup>426</sup> Sanchez, Sara Iglesias. "The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights." P1571

<sup>427</sup> Ibid. P1606



## **CONCLUSION**

### *Summary*

This thesis has been concerned with assessing the extent to which the ECJ has aided the Union's integrationist project with regards to law. Specifically, it has been tasked with examining the degree to which the Court's evolving human rights jurisprudence has served as a positive, integrative force in the ongoing construction of the EU. It has leveraged a neo-functional paradigm as a means of explaining not only *how* the Court's rights-based adjudication enhances European integration, but also as a means of examining *to what degree* and *under what conditions* it does so.

"Constitutionalism captures, more than anything else, what is special about the process of European integration."<sup>428</sup> As such, chapter one argued that neo-functionalism provides a theoretical explanation for how and why constitutionalization and regional integration converge. It discussed how functional spillovers results in the expansion of Community law into novel and diverse policy domains, providing the Court with the opportunity to adjudicate within the human rights domain. It also discussed how political spillover transforms political attitudes in favor of the supranational, thereby creating the demand for the institutionalization of Community-level of norms, as embodied by legal doctrine.

In this connection, chapter two strove to illustrate how neo-functional spillover requires to the ECJ to create and to coordinate a normative framework for human rights. Because norms codify collective discipline and reflect a Community's shared social purpose, normative construction and diffusion works symbiotically with the processes of is

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<sup>428</sup> Weiler, Joseph. "Chapter 6: The Reformation of European Constitutionalism." P222

constitutionalization. Chapter two also discussed the factors influencing normative construction of human rights (i.e. historical and cultural traditions, the 'fundamental boundary'), and it highlighted the inherent difficulty the Court faces in translating such considerations into a transnational, legal context. The chapter then proceeded to explain how the Court attempts to reconcile this reality by highlighting the various considerations (i.e. jurisdiction, economic competencies) and substantive sources (i.e. the Charter's provisions, ECHR, the Constitutional traditions of the Member States) animating the Court's legal reasoning.

Collectively, these two chapters conveyed how neo-functionalist logic created the demand for the transnational, legal incorporation of human rights at the institutional and normative level. However, what remained to be seen was whether or not this integrative impulse translated into substantive, jurisprudential policy outcomes that effectively expanded the role of supranational human rights adjudication within national legal orders, thereby further facilitating integration.

Chapters three and four concluded that the constitutionalization of fundamental rights buttresses the momentum of integration, insofar as there has been an expansion of supranational governance within this legal domain. By this, I mean that remedial rights protections have expanded their operational role within the jurisdictional boundaries of Community law over the decades. By extension, the Court's ability to partake in right-oriented judicial review has expanded, thereby creating more opportunities for normative harmonization to unfold. This empirical finding coheres with the analytical expectations of functional spillover. However, this thesis finds that functional spillover fails to translate into political spillover at the substantive, jurisprudential level. Neo-functionalism contends

that political actors will “shift their national loyalties, expectations, and political activities to a new and larger center,”<sup>429</sup> thereby resulting in the supranational normative construct transcending the national. Such an effect was observed only when the Court adjudicated on member state legislation implementing a EU directive. When the Court was to assess Member States’ derogation claims in relation to human rights, their judgments failed to institutionalize the supranational protection of that right. As discussed, the Court preferred to award the national courts a wide margin of deference in determining the remedial relationship between the national law, the EU law, and the contested rights violation. This effectively mitigated normative diffusion, and by extension, supranational integration because Member State were free to establish their distinct standards of rights protection. As a whole, these case studies illustrate that the constitutionalization of rights does not always maintain the ability to serve as “an integrative device that tends to displace, by means of the principle of supremacy, the disparities between Member States.”<sup>430</sup>

This empirical finding within the ECJ’s freedom of expression case law is a product of judicial restraint. As such, these judgments’ outcomes illustrate how entrenched sociopolitical self-interest and institutions can work symbiotically to consciously mitigate the integrative effects arising from constitutionalization. This conclusion directly implicates our understanding of neo-functionalist legal logic in relation to right adjudication. Though the Court’s case law, the Treaty’s amendments, and the ratification of the Charter has created more possibilities’ for normative construction and diffusion of right to occur throughout diverse policy domains (functional spillover), the mere presence of

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<sup>429</sup>Haas, Ernst B. *Technocracy, Pluralism and the New Europe*. P367

<sup>430</sup> Bazzocchi, Valentina. "The European Charter of Fundamental Rights and the Courts." In *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*. P167

such opportunities does not guarantee the immediate, transnational institutionalization of such rights within national legal orders (political spillover). Thus, in the legal context of human rights, functional and political spillover does not always work synergistically, “and through positive feedback loops that would...push steadily for deeper integration.”<sup>431</sup>

In this connection, it seems that inter-governmentalist logic provides insight into why the Court takes such a restrained approach to constitutionalization within the legal domain of rights. In a manner similar to neo-functionalism, inter-governmentalism also stresses the importance of Member State preferences. However, inter-governmentalism differs from neo-functionalism in that it maintains a more “static notion of the political interests”<sup>432</sup> animating integration, and it “castigates neo-functionalism for failing to appreciate the enduring importance of nationalism.”<sup>433</sup> In the context of rights adjudication, both the Court and Member States’ judiciaries have maintained this ‘static’ notion of ensuring the autonomy of constitutional rights guarantees at the national level throughout the decades, though for different reasons. As discussed in section 4.6, whereas the Court strives to maintain its political legitimacy and to ensure the supremacy of Community law, the Member States are interested in preserving their hegemony over their enshrined constitutional traditions. These distinct political aims motivate the Court to take a more deferential approach to rights adjudication, and it explains why the Court has chosen to continually construct its rights jurisprudence on a case-by-case basis, as well as to provide domestic courts with a flexible standard of accommodation for remedial protection.

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<sup>431</sup> Sweet, Alec Stone. “Chapter 1: The European Court and Integration.” In *The Judicial Construction of Europe*. P13

<sup>432</sup> Moravcsik, Andrew. “The European Constitutional Compromise and the Neofunctionalist Legacy.” *Journal of European Public Policy* 12, no. 2 (2005): 349-86.

<sup>433</sup> Burley, Anne-Marie, and Walter Mattli. “Europe Before the Court: A Political Theory of Legal Integration.” P57

Paradoxically, this empirical finding coheres with notions of neo-functionalism. This is because neo-functionalism emphasizes utilitarian self-interests, and it argues that political actors turn “to supranational means *when this course appears profitable to them.*”<sup>434</sup> As such, “integration is most likely to occur within a domain shielded from the interplay of direct political interests.”<sup>435</sup> Given that human rights guarantees are inherently political within a transnational context, it is not surprising that this thesis has observed a causal relationship between judicial restraint and the curtailing of the integrative effects arising from constitutionalization. Thus, the integrative logic of inter-governmentalism seems to intersect with that of neo-functionalism *only* in policy domains maintaining firmly entrenched, political preferences, such as those of human rights.

#### *Implications for Future Research*

As a whole, it is clear that the EU’s gradual constitutionalization of rights has produced integrative effects at the institutional level, and this is especially so following the legal ratification of the Charter. As a normative and legal concept, rights have come to occupy an important place within the jurisdictional boundaries of Community law, and they are now more elastically deployed as additional standards of legality, making Member States’ legal orders more susceptible to supranational harmonization within the realm of rights. However, the Court has carefully counterbalanced the Charter’s integrative effect by deferring the remedial scope of its application to Member States’ themselves. By doing so, it can be said that the Court has crafted an unpredictable standard for the scope of its human rights protections. Yet, such a standard for remedial protection can also be seen as simultaneously flexible, one that can be molded and adapted to fit the particularities of

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<sup>434</sup> Ibid. P55

<sup>435</sup> Ibid. P57

each case. Such an approach may prove to be of merit considering the Union's continually evolving competencies, and given the pluralism of constitutional traditions and political interests alike.

In light of the EU's progressive development of competences, future research should track how the Court continues to apply and to interpret Article 51(1) of the Charter, regarding the scope of its application. This is because the notion of "implementation of EU law,"<sup>436</sup> is an open-textured formula, especially so for "situations that are not strictly speaking implementing measures but present a substantial element of connection with EU law."<sup>437</sup> In this connection, future research should also continue to track the Court's approach to the national margin of appreciation, its relationship to producing substantive, legal change within national legal orders, and how this affects the normative uniformity of the EU's legal standard for fundamental rights. By doing so, future research will be able to more readily assess the degree to which the Charter serves as a centripetal force within the EU's autonomous, transnational legal system.

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<sup>436</sup> Article 51(1) of the Charter

<sup>437</sup> Sanchez, Sara Iglesias. "The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights." P1590

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