FUNDAMENTAL RIGHTS AND OTHER INTERESTS: SHOULD IT REALLY MAKE A DIFFERENCE?

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1. INTRODUCTION

When speaking about conflicts between fundamental rights, we have the impression that we speak about something special. We feel that it is more problematic if the right to respect for one's religion is hurt by blasphemous speech, than if an individual economic interest is harmed by the discontinuance of an allowance. The perceived special character of fundamental rights has an important influence on judicial method. Courts appear to be willing to decide a case concerning an infringement of a classic fundamental right, such as a civil or political right, since they feel they can do so on the basis of clear legal standards. On the other hand, they are reluctant to adjudicate claims concerning social or economic interests, as they consider political and policy arguments to be of more importance there. Accordingly, courts generally show a larger measure of deference in the latter type of case than in cases concerning clearly identifiable individual interests or rights.[1]

The question is, however, whether the distinction we make between "classic" fundamental rights and other interests is always reasonable and if it is justifiable to attach far-reaching judicial consequences to the distinction. It is doubtful whether it really is easier to adjudicate fundamental rights cases than claims concerning an infringement of other individual interests. Cases concerning the desirability of an abortion[2] or the permissibility of threatening someone with violence to protect another person's life,[3] would seem to be far more difficult to decide than a relatively straightforward case concerning the loss of milk quota for reasons of

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1 G. De Búrca, The Principle of Proportionality and its Application in EC Law, 13 *Yearbook of European Law* [1993], 105–150, 107, 111.

2 E.g. ECtHR, 20 March 2007, *Tysiąc v. Poland*.

3 E.g. case of *Gafgen v. Germany* (appl. no. 22978/05), to be decided by the European Court of Human Rights.

agricultural policy. In addition, the line between fundamental rights and other interests cannot always be drawn easily. This is true in particular because of the "proliferation" of classic fundamental rights over the last few decades, which has had the result of ever more individual interests being classified as (aspects of) fundamental rights.

Hence, there is good reason to reconsider the view that cases concerning (conflicts between) classic fundamental rights form a special category and deserve special judicial scrutiny. The choice of judicial method and intensity of review should not solely depend on the question whether an individual interest is protected by the European Convention on Human Rights or by other national or international instruments containing enforceable fundamental rights. It is the purpose of this paper to elaborate this thesis on the basis of the case law of the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ) and, where relevant, administrative courts in the Netherlands and the United Kingdom.

First, some background will be provided through a rough sketch of the scholarly debate about the difference between various types of fundamental rights and interests and the value of the proliferation of rights (Section 2.1). Then a general overview will be provided of the proliferation of fundamental rights and the resulting blurring of the line between fundamental rights and other interests, focusing on the case law of the ECtHR and the ECJ (Sections 2.2 and 2.3). In Section 3, the thesis will be elaborated that courts currently distinguish between fundamental rights and other interests in choosing their methods of review, taking the administrative case law in the UK, the Netherlands and the ECJ as examples. On basis of these analyses, a number of conclusions will be reached regarding the difference between "fundamental rights" and interests in the assessment methods of the national and European courts. Also, a tentative effort will be made to formulate an alternative approach (Section 4).

2. PROLIFERATION OF FUNDAMENTAL RIGHTS IN THE CASE LAW OF THE ECtHR AND THE ECJ

2.1. INTRODUCTION: DIFFERENT TYPES OF RIGHTS AND THE NORMATIVE DEBATE ABOUT PROLIFERATION

The rights protected by international treaties such as the European Convention of Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), are mainly "classic" fundamental rights. Such rights are often classified as "first generation rights", which generally can be defined as basic political and civil rights of the individual that can be enforced against the

government.[4] These rights are primarily "negative" in character, which means that they do not so much impose an active duty on the state to provide for rights-accommodating facilities, as a negative duty to *refrain* from interfering with the exercise of such rights by the individual.[5] By contrast, social, economic and cultural rights are often termed "second generation rights". These rights generally qualify as "positive rights", requiring active engagement by the government based on a principle of progressive achievement.[6] Such positive second generation rights are generally considered to be less easily enforceable. They principally place a moral duty on the government to provide a certain level of protection of these rights, defining a social ideal rather than recognising a legal right.[7] Because of the different (legal) character of these second generation rights, they have been laid down in separate human rights instruments (such as the European Social Charter and the International Covenant of Economic, Social, and Cultural Rights), which provide for a different system of enforcement and monitoring and do not envisage an individual complaints procedure.[8]

Although the distinction between positive and negative rights, or first and second-generation rights, might seem to be a rather clear one at first glance, the value of the distinction has always been disputed. It is well accepted that rights from both generations or categories may contain elements of the other[9] and it is

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4 See for the distinction between these generations generally C. Tomuschat, *Human Rights. Between Idealism and Realism*, 24 (Oxford: OUP 2003). Third generation rights (rights of solidarity within groups) will not be discussed in this paper, as they are less relevant to the distinction between "fundamental rights" and other *individual* interests. See more specifically e.g. P. Alston, A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?', 29 *Netherlands International Law Review* 307–322, 309 (1982). It is important to note, furthermore, that the use of the term "generations" has rightly been criticised. Alston has stated, for example, that generations by definition pass away, a new generation constantly replacing the former one. This is clearly not true for the various "generations" of human rights, which appear to co-exist and do not replace each other over time (P. Alston, *supra*, 316). Perhaps it would therefore be better to speak of "categories" or "types" of rights.

5 The classic distinction between positive and negative rights is well explained by C. Fabre, Constitutionalising Social Rights, 6 *The Journal of Political Philosophy* 263–284 (1998).

6 *Cf.* C. Wellman, *The Proliferation of Rights. Moral Progress or Empty Rhetoric?*, 22 (Boulder: Westview Press 1999).

7 Ibid. There is some controversy about this, as it has sometimes been stated that there is a legal 'duty to respect' also with regard to social and economic rights. As far as minimum core obligations are concerned, all states must be able to provide them (C. Tomuschat, *supra* note 4, 47).

8 See D.J. Harris and J. Darcy, *The European Social Charter* (Ardsley: Transnational Publishers 2001). An Additional Protocol to the European Social Charter provides for a collective complaints procedure, however, entitling a number of organisations (e.g. trade unions and NGOs) to lodge complaints with the European Committee of Social Rights (see Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No. 158).

9 See in particular C. Fabre, *supra* note 5, 267–268, explaining that even a right such as the right to be tried by a jury, is not an entirely negative right, since it demands that a whole state

often held that effective protection of "negative" rights may impose active duties upon national authorities.[10] It might even be argued that no sharp distinction can be drawn between the generations at all—it would indeed be more accurate to say that many "classic" fundamental rights also cover aspects of social and economic rights, and vice versa.

Some scholars have, however, made a case for restricting the scope of negative fundamental rights to their very core. In their view, the borderline between political/civil rights and social/economic rights should be drawn much more sharply. An eloquent supporter of this plea is Sir Gerald Fitzmaurice, a former judge with the European Court of Human Rights. He wrote a sharply phrased dissenting opinion in the *Marckx*-case of 1979, where the majority held that the fact that, in Belgium, no maternal affiliation was established directly after the birth of an illegitimate child, constituted a violation of the right to respect for one's family life as protected by Article 8. Judge Fitzmaurice argued that the gist of the European Convention of Human Rights was to protect individuals against the "... whole gamut of fascist and communist inquisitorial practices ...", and he went on to state that "[s]uch, and not the internal, domestic regulation of family relationships, was the object of Article 8, and it was for the avoidance of these horrors, tyrannies and vexations that 'private and family life ... home and ... correspondence' were to be respected, and the individual endowed with the right to enjoy that respect—not for the regulation of the civil status of babies".[11] Thus, Judge Fitzmaurice would rather limit the protection offered by the European Convention of Human Rights to the very core of the various rights, than extend their scope in order to cover other important individual interests. The reason for a plea such as this one is that protection is considered stronger if it is restricted to a limited number of rights of which the importance for the individual is immediately obvious. For this very reason, other scholars have objected to the acceptance of "peripheral" rights as fundamental rights, stating that such acceptance might be counterproductive,[12] or distort the usefulness of human rights as an ordering concept.[13] Some have even argued that the proliferation of (moral) rights "encour-

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apparatus be established. See further also I.E. Koch, Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective, 10 *International Journal of Human Rights* 405, 406 (2006), C. Tomuschat, *supra* note 4, 46 and C. Wellman, *supra* note 6, 26.

10 This perspective is especially visible in the case law of the European Court of Human Rights; *cf.* the well known case of *Plattform "Ärzte für das Leben" v. Austria*, ECtHR 21 June 1988, Series A, vol. 139.

11 ECtHR 13 June 1979, *Marckx v. Belgium*, Series A, Vol. 31, dissenting opinion Judge Sir Gerald Fitzmaurice, para. 7.

12 *Cf.* C. Wellman, *supra* note 6, 6.

13 P. Alston, *supra* note 4, 315.

ages an egoistic pursuit of self-interest and the neglect of social responsibilities",[14] and courts and legislatures should therefore be cautious of widening the definition of rights to encompass an ever-growing number of less important interests.

The debate about first and second generation rights, and the debate about "core rights" and "peripheral rights", form the background for this section's discussion of the way in which the case law of the ECtHR and the ECJ has gradually developed over the last fifty years. The focus will be placed on the question whether a "proliferation" of fundamental rights—and the concomitant blurring of the line between civil/political and social/economic rights—is indeed visible in European case law. Firstly, an overview will be given of the case law of the ECtHR (section 2.2), and subsequently the case law of the ECJ will be addressed (section 2.3).

2.2. THE EUROPEAN COURT OF HUMAN RIGHTS

2.2.1. Positive Obligations and the Proliferation of Convention Rights

The European Convention of Human Rights is a "classic" fundamental rights instrument in the sense that it only contains provisions relating to civil and political rights, such as the right to life, the prohibition of torture, the freedom of expression and the right to property. Indeed, in drafting the Convention, the States agreed that only negative obligations would be imposed, the main purpose of the Convention being to prevent State authorities from interfering with individual rights and liberties.[15] In that respect, it might have come as a surprise to at

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14 See further C. Wellman *supra* note 6, 3 and M.A. Glendon, *Rights Talk. The Impoverishment of Political Discourse* (New York: The Free Press 1991), in particular 171. Some arguments against proliferation of rights have been refuted by arguing that they are primarily based on the fallacies of the theory of communitarianism (e.g. J. Mahoney 2007, *The Challenge of Human Rights. Origin, Development and Significance*, 92 (Malden: Blackwell 2007)). The aim of this paper is not, however, to engage in the moral debate regarding the desirability of the expansion of fundamental rights. Instead, we intend to show the actual occurrence of a proliferation of legal rights and the consequences thereof for legal protection of such rights. For that reason, the discussion between communitarians and non-communitarians will not be dealt with in this paper.

15 See P.H. Teitgen, Introduction to the European Convention on Human Rights, in: R.S.J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* 3–14, 10 (Dordrecht: Martinus Nijhoff, 1993), clarifying that this was precisely the reason that some borderline rights, such as the right to property and the right to free education, were not included in the Convention itself, but in the First Protocol. Interestingly, the States are still reluctant to accept positive obligations under the Convention, as clearly appears from the drafting history of Protocol 12 to the Convention (containing an independent prohibition of discrimination), which entered into force on 1 April 2005. The Explanatory Report to the Protocol expressly states that the Protocol embodies a primarily negative obligation for the states, i.e. the obligation not to discriminate and to refrain from making unjustified distinctions between individuals or groups (Explanatory Report, para. 24–26). See further J.H.

least some of the States that the ECtHR ruled in its 1979 decision in the *Marckx* case that the State authorities' obligations were not merely negative in character, but could also sometimes require active engagement:

> *"By proclaiming in paragraph 1 the right to respect for family life, Article 8 signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2. As the Court stated in the 'Belgian Linguistic' case, the object of the Article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities (judgment of 23 July 1968, Series A no. 6, p. 33, para. 7). Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."*[16]

The *Marckx* decision started off a long line of case law in which the European Court of Human Rights consistently imposed positive obligations on the States actively to protect the rights contained in the Convention. In developing and applying its doctrine of positive obligations, the Court has brought many social and economic individual interests under the scope of the Convention. This is perhaps best visible in the case law with respect to Article 8 of the Convention, which contains the right to respect for one's private and family life and one's home. Nowadays, this right not only affords protection against such clear interferences as unwarranted searches or against criminal punishment because of one's homosexual orientation, but it also applies in many cases which could be considered as coming purely under administrative law. Various judgments of the Court can be mentioned to illustrate this development.

Firstly, a group of cases can be mentioned that relate to individual interests connected with environmental protection. One of the first cases about this subject to come before the Court was the case of *López Ostra*.[17] Mrs López Ostra and her family lived close to a plant for the treatment of liquid and solid waste, which, owing to a malfunction, released gas fumes, pestilential smells and contamination, which caused health problems and nuisance to the López Ostra family and other families living nearby. The town council reacted by ordering cessation of part of the activities of the plant, but nuisances continued to endanger the health of the families living close by. At first glance, this would seem to be a purely administrative law case concerning environmental law and industrial planning policies, and serious failure by the government effectively to enforce the relevant regulations. The case clearly touches on important individual interests, such as

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Gerards, Protocol No. 12 – The Dutch Debate, in: S. Lagoutte (ed.), *Prohibition of Discrimination in the Nordic Countries: The Complicated Fate of Protocol No. 12 to the European Convention on Human Rights* 37, 43 (Copenhagen: Danish Institute of Human Rights, 2005).

16 *Marcxk v. Belgium*, *supra* note 11, para. 31.

17 ECtHR 9 December 1994, *López Ostra v. Spain*, Series A, Vol. 303-C.

public health and the interest to remain free of nuisance, but these come a long way from the central interests as defined by Judge Gerald Fitzmaurice in his dissent in the *Marckx* case. Indeed, the individual interests come rather close to the rights laid down in social rights instruments, such as the right to protection of the environment and the right to health. Nevertheless, the Court recognised the importance of the interests concerned, stating that severe environmental pollution might affect individuals' well-being and prevent them from enjoying their homes in such a way as to impact adversely upon their private and family life.[18] It then found that the town council had violated its positive obligations to protect the right to private life, since it had not succeeded in striking a fair balance between the town's economic interests and the effective enjoyment of Mrs López Ostra's right to respect for her home and her private and family life.[19]

The *López Ostra* case makes clear that the Court is willing to accept important individual interests as part of the fundamental rights protected by the Convention, even if they are chiefly social or environmental in nature.[20] It may be argued, however, that in this case the environmental pollution was so severe and dangerous that there was an obvious link between the nuisance caused and the effective enjoyment of private life. For that reason, the Court's decision may not be regarded as highly surprising. Notably, however, the Court has extended the reasoning developed in *López Ostra* to cases where there is a less clear-cut relationship between the interests concerned and the rights protected by the Convention. A good example is the case of *Moreno Gómez*, which concerned noise pollution caused by the exploitation of discotheques and nightclubs in a residential neighbourhood in Valencia.[21] Mrs Moreno Gómez complained to the town council about sleeping problems, yet nothing was done to enforce the existing noise level regulations or reduce the nuisance. Once again, this case would not seem to concern real fundamental rights, but rather seems to constitute a local planning case to be decided according to national administrative law. For that reason, it is interesting to see that the ECtHR decided to declare the case admissible and held that *"[t]he individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area."* It went on to state that, for Article 8 to be applicable to the individual interests concerned, it was required that the nuisance caused by the noise attained a "minimum level of severity". The Court found that the volume of the noise at stake in *Moreno Gómez*—at night and beyond the permitted levels—and the fact that it continued over a number of years, did indeed attain this level of severity. By failing to enforce

18 *López Ostra v. Spain*, *supra* note 17, para. 51.

19 *Id.*, para. 58.

20 This has often been confirmed in later cases concerning the same subject. See e.g. ECtHR 9 June 2005, *Fadayeva v. Russia*.

21 ECtHR 16 November 2004, *Moreno Gómez v. Spain*, Reports 2004-X.

the noise regulations, the town council had breached its positive obligations under Article 8 of the Convention.

It appears from this decision and similar judgments concerning noise levels[22] that the Court is willing to comprise a wide range of individual interests under the scope of the Convention, at least if a minimum level of severity of the interference has been attained. The focus of the review thereby seems to have shifted from the character and weight of the actual interests and rights, to the seriousness of the infringement of these interests. As a consequence of this approach, the Court has been able to deal with many cases, which do not so much concern classic civil or political rights, as "softer" (though still important!) individual interests of a rather social or economic nature. It can only be concluded that a proliferation of the rights protected by Article 8 ECHR is clearly visible here.[23]

Similar developments are visible elsewhere, especially in the area of social security and health law. Although the Court has been somewhat reluctant to recognise new rights in this area, it has certainly created some important positive obligations for the States. Once again, the relevant criterion in this regard seems to be the existence of a "direct and immediate link" between the social measures sought by the individual and the effects for his own private life and well-being. This is illustrated by the Court's admissibility decision in the case of *Marzari*.[24] The case was brought by a severely disabled man who did not have adequate and suitable accommodation to meet his special needs. According to the applicant, the State had not lived up to its obligation to provide such accommodation and,

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22 E.g. ECtHR 21 February 1990, *Powell and Rayner v. the United Kingdom*, Series A, Vol. 172, and ECtHR Grand Chamber 7 August 2003, *Hatton and Others v. the United Kingdom*, Reports 2003-VIII.

23 It is clear, though, that the scope of Article 8 is not unlimited. In the area of environmental law and urban planning, this appears from cases such as *Kyrtatos* (ECtHR 23 May 2003, *Kyrtatos v. Greece*, Reports 2003-VI). The complaint in this case concerned a number of Greek planning decisions, which would result in a destruction of the natural environment where the applicants were living—a wetland area, or, as the Court called it, a swamp. In its decision, the Court noted that the threshold for the applicability of Article 8 was the presence of an actual harmful effect on a person's private and family sphere. Evidence of a general deterioration of the environment would not be sufficient to prove this effect, as the Convention was not designed to provide general protection of the environment. The Court thus made clear that not every environmental interest is protected by the Convention—a clear and direct link to one's own situation of living would need to be established. This seems to be an altogether reasonable and acceptable limitation, although the Court added the rather puzzling obiter dictum that its conclusion might have been otherwise if "*... for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the individual's own well-being.*" This addition still seems to leave an opening for other environmental law cases to be brought before the Court—as soon as individual harm is demonstrable, no further questions seem to be asked as to the classification of the relevant interests as real "fundamental" rights.

24 ECtHR 4 May 1999, *Marzari v. Italy*.

consequently, it had infringed his rights under Article 8 of the Convention. The Court agreed with the applicant:

> *"... although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual."*

The Court thus found in this case that the interests of the applicant were protected by Article 8, even though it finally held that the local authorities had made sufficient effort to find adequate housing as to discharge their positive obligations in respect of the right to respect for the individual's private life.

It may be derived at the least from a case such as *Marzari*, that the Court is sometimes prepared to bring primarily social interests under the scope of the classic right of respect for one's private life.[25] If compared to the situations mentioned by Judge Sir Gerald Fitzmaurice in his dissenting opinion to the *Marckx* decision, the case law of the Court seems to have come a long way indeed.

2.2.2. Evolutive Interpretation and the Proliferation of Fundamental Rights

It has been shown in the above that the doctrine of positive obligations constitutes an important vehicle to bring social, economic and environmental individual interests within the reach of the Convention rights. However, the doctrine of positive obligations is not the only instrument that is used by the Court to widen the scope of the Convention. An additional tool in this regard is the principle of evolutive and dynamic interpretation. According to a well-known Court formula, the Convention is a "living instrument", which must be interpreted in the light of "present day conditions".[26] In practice, this means that the Court will add new aspects to the scope of a Convention right as soon as it has become clear that such aspects have become accepted throughout the Council of Europe to be part of the notion of "fundamental rights".[27] Moreover, the Court has used the phrase to add

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25 It must be admitted, though, that the Court has refined its position in a later case by holding that "... *Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in exceptional cases where the State's failure to adopt measures interferes with [the] individual's right to personal development and his or her right to establish and maintain relations with other human beings or the outside world*" (ECtHR 8 July 2003, *Sentges v. the Netherlands*). It is not very clear in what kind of situation the Court will accept the presence of such an exceptional case, however, as it often avoids the issue by judging that the authorities have complied with their obligations anyway.

26 See e.g. ECtHR 7 July 1989, *Soering v. the United Kingdom*, Series A, Vol. 161, para. 87.

27 See further on this S.C. Prebensen, Evolutive Interpretation of the European Convention on Human Rights, in: P. Mahoney (ed.), *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal* 1123–1137, 1128 (Köln: Heymanns, 2000). The best known

valuable new dimensions to rights in order to create more uniformity within the European Union, by means of its method of autonomous interpretation.[28] This has even happened in those cases where a common ground as to the correct understanding of a certain phrase or provision does not (or not yet) exist. With respect to notions that are central to the European Convention, a lack of common ground may even be regarded by the Court as a reason for autonomous interpretation, since unreasonable differences in the level of protection of fundamental rights must be avoided. Good examples of this can be found in the case law concerning the notion of "civil rights and obligations" as contained in Article 6 of the Convention,[29] the notion of "property" as contained in Article 1 of the First Protocol,[30] or the notion of "family life" as contained in Article 8.[31]

In searching for an autonomous interpretation of Convention notions, the Court has often opted for a rather wide definition of the rights at hand. It has thereby interpreted some classic fundamental rights notions so widely as to extend their scope to aspects of economic and social rights. A recent example is the case of *Stec*, in which the question was raised whether welfare benefits, such as unemployment or old age benefits, constituted "property" in the sense of Article 1 of

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example in this regard is a series of cases concerning legal recognition of gender transformation. In its first case about the subject, *Rees*, the Court held that there was not yet any European common ground which would justify a further reaching interpretation of the right to respect for privacy, which would also cover the need to adapt a birth register to someone's new gender (17 October 1986, *Rees v. the United Kingdom*, Series A, Vol. 106, para. 37). In later cases it held on to this judgment, finding that the legal developments were not yet sufficient to justify a different interpretation (see ECtHR, 27 September 1990, *Cossey v. the United Kingdom*, Series A, Vol. 184, ECtHR, 25 March 1992, *B. v. France*, Series A, Vol. 232-C, and ECtHR 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, Reports 1998-V). In 2003, however, the Court concluded that by that date a clear development was visible into the direction of legal recognition of gender transformations, which was sufficient to warrant a new interpretation of the Convention so as to include a right to recognition of one's "new" gender (ECtHR 11 July 2002, *Christine Goodwin v. the United Kingdom*, Reports 2002-VI, para. 74–75). Thus, the growing international legal consensus constituted an essential basis for a new, evolutive interpretation and an extension of the protection offered by the Convention.

28 On the concept of autonomous interpretation, see G. Letsas, The Truth in Autonomous Concepts: How to Interpret the ECHR, 15 *European Journal of International Law* 279–305, 282 (2004).

29 A good example is the case of *Pellegrin v. France*, in which the Court held that "*... it is important, with a view to applying Article 6 para. 1, to establish an autonomous interpretation of the term 'civil service' which would make it possible to afford equal treatment to public servants performing equivalent or similar duties in the States Parties to the Convention, irrespective of the domestic system of employment and, in particular, whatever the nature of the legal relation between the official and the administrative authority ...*" (ECtHR 8 December 1999, *Pellegrin v. France*, Reports 1999-VII, para. 63).

30 See in particular ECtHR 23 February 1995, *Gasus Dosier- end Fördertechnik v. the Netherlands*, Series A, Vol. 306-B, para. 53; see also the case of *Stec v. the United Kingdom*, *infra* note 43, to be discussed hereinafter.

31 See already EComHR, decision of 10 December 1977, *Marckx v. Belgium*.

Protocol No. 1.[32] This is a highly disputed issue, as benefits of this kind are often completely funded by public means or through general taxation. The classification of such benefits as "property" would clearly deviate from the traditional understanding of the notion. Indeed, in the context of social security, property could formerly only be found to exist if the individual himself had actually paid for the benefits allowed.[33] In the case of *Stec*, the Court held that the distinction between various funding methods had become increasingly artificial and that it would be preferable to hold Article 1 applicable to all of these situations. Even more important to the topic of this paper are the following considerations of the Court:

> *"In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid—subject to the fulfilment of the conditions of eligibility—as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable. ... Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."*[34]

It is abundantly clear from these considerations that an evolutive and autonomous interpretation of the Convention may lead to a reduction of the importance of the classic distinction between first and second-generation rights, and may lead the Court to bring social and economic interests within the scope of the Convention. The same development is visible with respect to other Convention rights too, such as the right to respect for one's private and family life. For example, the Court recently decided in its judgment in *Niedzwiecki* that *"[b]y granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision"*.[35] In its judgment in *Sidabras and Dziautas*, the Court even recognised a right to access to private employment as part of the right to respect for one's private life, even though this is traditionally a right that can be found in international treaty instruments protecting social and economic rights.[36]

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32 *Stec v. the United Kingdom*, *infra* note 43.

33 ECtHR 16 September 1996, *Gaygusuz v. Austria*, Reports 1996-IV, para. 39.

34 *Id.*, para. 51, 52.

35 ECtHR 25 October 2005, *Niedzwiecki v. Germany*.

36 ECtHR 27 July 2004, *Sidabras and Dziautas v. Lithuania*, Reports 2004-VIII.

Developments such as these are not only visible with respect to social rights and interests, but they can also be noted in administrative law areas such as that of state responsibility in planning policy cases. A relevant example is the case of *SCEA Ferme de Fresnoy*, which concerned the limitation of the applicant's possibilities for the exploitation of his property, for reason of the close proximity of two buildings protected as monuments.[37] The French authorities refused a number of building permits as the planned buildings would harm the appearance of the monuments. The Court regarded the refusal of the building permits and the lack of compensation as an infringement of the applicant's right to property. Although it is certainly not unreasonable to apply the right to property to cases such as this one, to do so clearly blurs the difference between planning policy cases concerning "normal" financial interests and cases where the classic right to property really is at stake. Indeed, the reasoning contained in a case such as *Ferme de Fresnoy* allows for many more cases concerning purely financial and economic interests to be encompassed by the European Convention of Human Rights.[38]

2.2.3. Conclusion

The preceding analysis of a number of cases decided by the ECtHR illustrates that the classic distinction of civil and political rights on the one hand and social and economic rights on the other has gradually lost part of its practical importance.[39] Indeed, the Court recognised as early as 1979 (in its *Airey* decision),[40] and expressly confirmed in later cases (e.g. *Stec*) that the distinction is not always relevant. The Court interprets the Convention rights in an evolutive and often autonomous manner and it often imposes positive obligations on the States to protect the Convention rights as effectively as possible. By doing so, it has frequently stretched the scope of the various provisions to encompass a wide variety of individual interests, which sometimes seem to be far removed from the actual core of the protected rights. Purely financial, commercial, economic and social interests are now protected by the right to property, while many environmental and social interests are covered by the right to respect for one's private life, at least when they have been severely affected. It may certainly be positively valued that the ECtHR grants such strong legal protection to individual interests of so many

37 ECtHR 1 December 2005, *SCEA Ferme de Fresnoy v. France*.

38 *Cf.* e.g. ECtHR 11 October 2005, *Anheuser-Busch v. Portugal*, in which the ECtHR applied Article 1 of Protocol No. 1 to intellectual property in a case concerning purely commercial interests of a multinational.

39 See also I.E. Koch, *supra* note 9, 408–409, mentioning that the Court is not entirely consistent in its approach and giving various examples of cases in which the Court has refrained from giving an extensive interpretation that would bring social or economic rights under the scope of the Convention. While this is certainly true, it cannot detract from the general development towards an extension of the scope of the rights that is visible in the Court's case law.

40 ECtHR 9 October 1979, *Airey v. Ireland*, Series A, Vol. 32, para. 26.

kinds. Yet, as will be shown in section 3 of this paper, these developments also entail practical difficulties, especially where (national) case law still attaches procedural value to the special character of fundamental rights.

2.3. THE EUROPEAN COURT OF JUSTICE

A proliferation of fundamental rights is also visible in the case law of the European Court of Justice. This may not be obvious at the outset, especially since it is well known that the European Court of Justice has developed its case law regarding fundamental rights only in a relatively late stage.[41] It is clear, however, that the ECJ strongly reacts to the decisions taken by the ECtHR, usually following the Strasbourg Court's findings as regards interpretation and level of protection.[42] To the extent that a development towards a widening of the scope of fundamental rights is visible in Strasbourg, the case law of the Luxembourg Court will therefore usually show a parallel development.[43] An analysis of the case law of the ECJ would thus not seem to add very much to the analysis in the preceding section. However, there is more to the fundamental rights case law of the European Court of Justice than the recognition of certain rights as fundamental principles of community law on the basis of the Strasbourg case law. To some extent, an autonomous development of a proliferation of fundamental rights can be perceived, particularly where the importance and meaning of the economic principles underlying the EC Treaty are concerned.

An excellent illustration of this development is provided by the case of *Schmidberger*, decided by the ECJ in 2003.[44] The case concerned the damage suffered by

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41 See e.g. F.G. Jacobs, Human Rights in the European Union: the Role of the Court of Justice, 26 *European Law Review*, 331–341, 332 (2001) and M. Avbelj, European Court of Justice and the Question of Value Choices. Fundamental Human Rights as an Exception to the Freedom of Movement of Goods, Jean Monnet Working Paper 06/04, 25 (2004) www.jeanmonnetprogram.org/papers/04/040601.html (last accessed on November 5, 2007).

42 Some good examples are ECJ 6 March 2001, *Connolly* Case C-274/99P, [2001] ECR I-1575 and ECJ 22 October 2002, *Roquette Frères*, Case C-94/00, [2002] ECR 9011. See also D. Spielmann, Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities, in: P. Alston (ed.), *The EU and Human Rights*, 757–780, 777 (Oxford: Oxford University Press, 1999).

43 See in particular D. Spielmann, *supra* note 42, 776. Interestingly, the ECJ sometimes goes even further than the ECtHR does. An example may be found in the case law about pensions for individuals who have undergone a gender transformation. The ECJ held that unequal pension ages for women and men in this context constituted a prohibited discrimination under European law (ECJ 26 April 2006, *Richards* Case C-423/04, [2006] ECR I-3585), whereas the ECtHR accepted a difference in pensions based on age and gender as sufficiently justifiable (ECtHR 12 April 2006, *Stec and Others v. the United Kingdom* and *cf.* ECtHR 23 May 2006, *Grant v. the United Kingdom*).

44 ECJ 12 June 2003, *Schmidberger*, Case C-112/00, [2003] ECR I-5659. Particularly relevant is also ECJ 14 October 2004, *Omega Spielhallen*, Case C-36/02, [2004] ECR I-96/09.

a transport company as a result of a blockade of the Brenner motorway on the border between Austria and Italy. The blockade was caused by a demonstration by an environmental protection group, which was permitted by the Austrian authorities because of the group's freedom of assembly. Given the importance of the decision, it is worthwhile to quote the relevant passages of the ECJ's judgment in full:

> *"76. In the present case, the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty.*
>
> *77. The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.*
>
> *78. First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 Rewe-Zentral (Cassis de Dijon) [1979] ECR 649.*
>
> *79. Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued ....*
>
> *80. Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed...*

81. In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests."

The Court's reasoning in *Schmidberger* is highly important to a proper understanding of the position of the notion of "fundamental rights" in the Community context. It may be derived from it that the ECJ places the "right" to free movement of goods on the same level as the fundamental rights to peaceful assembly and freedom of expression.[45] On a more abstract level, the judgment may thus be understood as meaning that the four freedoms constitute "fundamental rights" as much as civil and political rights do.[46] This equalisation of the four freedoms with fundamental rights is the more interesting as the freedoms are primarily economic in character, having been created to guarantee free trade within the internal market in the first place.[47] Thus, *Schmidberger* marks a development into the equalisation of civil and political rights with economic and free trade rights and interests.[48]

Several other Community principles have equally developed from primarily economic principles or concepts into fundamental rights. Particularly interesting in this regard is the development of the prohibition of discrimination, especially gender-based discrimination. It is well known that the principle of equal pay for

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45 The relevant passages have caused some controversy. According to some commentators, the Court established that, as a general principle, fundamental rights prevail over fundamental freedoms; see M.Avbelj, *supra* note 41, 49–50. Others have stated that no principled hierarchy between fundamental rights and freedoms can be derived from the case, as the Court expressly states that the requirements arising from the fundamental rights and those arising from a fundamental freedom should be reconciled (see in particular J. Krzemińska, Free Speech Meets Free Movement—How Fundamental Really is 'Fundamental'? The Impact of Fundamental Rights on Internal Market Law, (3) *ZERP Diskussionspapier* 13, (2005), www.zerp.uni-bremen.de/english/home.html, (last accessed at November 5, 2007)). The latter reading seems to fit in best with the way the Court has presented its argumentation.

46 Of course, the *Schmidberger* case (*Schmidberger, supra* note 44) is not new in mentioning the fundamental character of the four freedoms—there are many precedents in which this is already said (see further M. Koskenniemi, The Effect of Rights on Political Culture, in: P. Alston (ed.), *The EU and Human Rights*, 99–114, 106 (Oxford: OUP 1999)). The case is new, however, to the extent that the classic fundamental right to assembly was directly invoked as a justification of an impediment to free trade (as contrasted to invoking the right as part of an accepted exception clause, such as public policy or public health), necessitating the Court to define its position towards the issue of conflicting fundamental rights and freedoms. See in particular A. Biondi, Free Trade, A Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights, 1 *European Human Rights Law Review* 51–61, 57 (2004).

47 Although there seem to be different views on the precise aim of the free movement provisions, as is explained well by M. Poiares Maduro, *We, the Court. The European Court of Justice & the European Economic Constitution*, 53 (Oxford: Hart, 1998).

48 *Cf.* A. Bogdandy, The European Union as a Human Rights Organization?, 37 *Common Market Law Review* 1307, 1326 (1997), M. Avbelj, *supra* note 41, and J. Krzemińska, *supra* note 45, 5–6. See in particular also M. Poiares Maduro, *supra* note 47, 167–168.

men and women was inserted in the EEC Treaty because of economic reasons, rather than fundamental ideas relating to the ideal of gender equality.[49] However, the ECJ soon came to acknowledge that the provisions concerning gender equality also had an important fundamental rights character.[50] In its *Schröder* case (2000), the ECJ even expressly accepted that the economic aim of preventing distortions of competition had grown to be secondary to the social aim of the principle, *i.e.* the protection of the fundamental right to equality.[51] On the one hand, this would seem to exemplify the gradual evolution of economic interests into fundamental rights, which would underscore the thesis that a proliferation of human rights can indeed be discerned in the Court's case law. On the other hand, the express acknowledgement of the fundamental character of the principle of equal pay may also be understood to imply that the Court still perceives a principled difference between human rights and economic interests, at least in the context of equal treatment law. The situation is even more complex, however, since it is still questionable whether the Court has really made a full shift towards the recognition of equal treatment as a fundamental right rather than a purely economic principle. Some recent judgments would seem to disclose that the Court is still not always willing to provide a broad interpretation to fundamental equal treatment principles, if such would negatively affect free trade and other economic freedoms.[52] The fundamental character of the equality principle within Community law can therefore still be doubted. The same is true for other fundamental principles that have gradually been recognised by the ECJ. Some critics have even stated that the ECJ does not protect fundamental rights for their own sake, but uses them instrumentally to accelerate the process of legal integration of the Community.[53]

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49 See C. Barnard, The Economic Objectives of Article 119, in: T.K. Hervey and D. O'Keeffe (eds.), *Sex Equality Law in the European Union* 322–327 (Chichester: John Wiley & Sons, 1996). This market-unifying role has been even more important with respect to the prohibition of nationality discrimination—see e.g. G. More, The Principle of Equal Treatment: From Market-Unifier to Fundamental Right?, in: P. Craig and G. de Búrca (eds.), *The Evolution of EC Law* 522 (Oxford: OUP 1999) and G. De Búrca, The Role of Equality in European Community Law, in: A. Dashwood and S. O'Leary (eds.), *The Principle of Equal Treatment in E.C. Law* 6 (London: Sweet & Maxwell 1997).

50 ECJ 8 April 1976, *Defrenne v. Sabena*, Case 43/95, [1976] ECR 455.

51 ECJ 10 February 2000, *Schröder*, Case C-50/96, [2000] ECR I-743, para. 56–57.

52 See in particular ECJ 11 July 2006, *Sonia Chacón Navas*, Case C-13/05, not yet published. It is far from certain how the ECJ's case law in this regard will develop. Some other recent judgments, such as *Mangold*, would seem to indicate a more fundamental rights oriented approach; see ECJ 22 November 2005, *Mangold* Case C-144/04, [2005] ECR I-9981.

53 See e.g. J. Heliskoski, Fundamental Rights versus Economic Freedoms in the European Union: Which Paradigm?, in: M. Koskenniemi, J. Petman and J.A.M. Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for Matti Koskenniemi*, 417–443, 429 and 448/229 (Leiden: Nijhoff, 2003) and M. Koskenniemi, *supra* note 46, 107; see also in particular J. Coppel and A. O'Neill, The European Court of Justice: Taking Rights Seriously?', 29 *Common Market Law Review* 669–692, 670 (1992).

More generally, it may be noted that economic principles and fundamental rights cannot always be strictly separated in the ECJ's case law. Over the years, the European freedoms have lost part of their purely economic character and have gained in political meaning. Poiares Maduro has argued, for example, that Article 30 and the rules on free movement are essential instruments in the distribution of power within the constitutional order of the Union.[54] In his view, the free movement rules are so closely connected to the constitution of the EC/EU that they have acquired a character that is comparable to that of democracy-related fundamental rights. The result of this analysis would be that the free movement provisions and economic principles underlying the European treaties should be regarded by now as *political* fundamental rights, rather than purely economic rights.[55] The relatively recent inclusion of the freedom of movement and residence of EU citizens as a "citizen's right" in the EU Charter of Fundamental Rights, would seem to confirm this view.[56]

If Maduro's analysis is correct, it is questionable whether one could really speak about a proliferation of fundamental rights in the European context, in the sense that all kinds of economic and social interests are increasingly recognised as fundamental in character. After all, in this reading, the four freedoms should be regarded as new political and civil rights, rather than as enforceable economic and financial interests. The scope of the rights would then perhaps be somewhat wider than before, but the newly recognised aspects belong to the very core of these rights, rather than the periphery. Nonetheless, it is questionable whether this analysis may be used to prove that no real extension of the scope of fundamental rights is visible in the EU. Regardless of their important political function, the four European freedoms remain primarily economic and financial in nature and they have little to do with the core aspects of fundamental rights, such as democracy, individual autonomy and human dignity. Moreover, the four freedoms and principles hardly seem to offer enforceable rights to individual persons, except perhaps for the freedom of movement. To the contrary, the four freedoms primarily represent certain public interests (such as the interests of interstate trade), or to the most protect the financial interests of enterprises and companies (such as the applicant company in the *Schmidberger* case discussed above). As a result, they can still be separated from *human* rights.

The position and meaning of fundamental rights within the case law of the ECJ are thus not very clear. It may not be surprising that Hepple has critically stated that "the normative hierarchy of national constitutional rights, international and European conventions of human rights, and the economic freedoms

54 M. Poiares Maduro, *supra* note 47, 167.

55 Id., 168.

56 Article 45 forms part of Chapter 5, "Citizen's rights", which also contains such rights as the right to vote and the right to petition.

which form the foundation of the Community, has become confused and ambiguous."[57] Some proliferation of fundamental rights may certainly be perceived, regardless of the interpretation of the four freedoms and regardless of the ECJ's analysis and application of the various fundamental rights. It has been pointed out already that the ECJ has been willing to follow suit of the ECtHR's case law where the interpretation of Convention rights is concerned.[58] If an extension of the scope of these rights is visible in the Strasbourg context, it will be reflected in the Luxembourg case law, albeit sometimes in a more economically tinted fashion. Furthermore, the lack of clarity as to the precise meaning of the European notion of fundamental rights already indicates that it is difficult to distinguish clearly between fundamental rights, individual economic and social interests, and societal economic interests. To the extent that the ECJ has marked certain individual and societal economic interests as "fundamental", this may certainly be regarded as a sign of the proliferation of classic fundamental rights.

3. JUDICIAL ASSESSMENT OF CASES CONCERNING FUNDAMENTAL RIGHTS AND OTHER INDIVIDUAL INTERESTS

3.1. INTRODUCTION

Where fundamental rights have been codified, for example in international treaties or national constitutions, it is to some extent logical that a difference is made between fundamental rights and individual interests. After all, the applicability of the relevant constitutional or treaty provisions and, consequently, the applicability of a set of assessment criteria connected to the provisions is determined by the classification of an individual interest as a fundamental right. With the European Court of Human Rights, the applicability of a Convention provision even determines its competence to consider an individual application. If the individual claim cannot be brought under one of the fundamental rights contained in the Convention, the application does not concern a "violation of the rights set forth in the Convention" as intended in Article 34 of the Convention, and it will be declared inadmissible by the Court. The difference between "fundamental rights" (as protected by the Convention or a national constitution or national legislation) and other individual interests thus appears to be of clear practical relevance and importance. However, even though there is some force in the distinction, it is not pertinent to all cases. Much depends on the organisation of the legal system and

57 B. Hepple, Social Values and European Law, 48 *Current Legal Problems* 39, 46 (1995), *cf.* also J. Krzemińska, *supra* note 45, 6.

58 *Cf.* e.g. M. Koskenniemi, *supra* note 46, 106–107.

the competences of the judiciary. In most national legal systems, and also in a supranational system such as that of the EU, at least some examples may be given of situations where there is less reason to distinguish between fundamental rights cases and cases concerning other individual interests. This is particularly true for cases with an administrative law character, i.e. cases brought against a public authority because of its alleged responsibility for an infringement of an individual interest. Such cases frequently concern conflicts of rights or (public or individual) interests. In some administrative law cases, even a true and direct conflict between fundamental rights will be at stake, for example because the legislature or a public authority has adopted a measure to protect "core" fundamental rights, but which results in an infringement of fundamental rights of others. An important example from the case law of the ECtHR is the case of *Evans*, which concerned a statutory rule in the UK to the effect that both interested parties in IVF treatment were allowed to withdraw their consent at any time before the embryos were used.[59] In the case at hand, Ms Evans' partner withdrew his consent when their relationship ended, while IVF treatment with the fertilised embryos would have been the only chance for Ms Evans to have children of her own. Hence, the legislative rule had the result of protecting the interest of Ms Evans' partner not to become the father of her children, to the disadvantage of the interests of Ms Evans. In the legal proceedings following the withdrawal of consent, Ms Evans sought a declaration of incompatibility under the English Human Rights Act 1998 (HRA), alleging that the act breached her rights under the HRA. The case thus clearly concerned a conflict between the rights and interests of two individuals, which actually arose within a horizontal legal relationship. Yet, Ms Evans did not bring a case against her former partner, who was directly responsible for the harm done to her, but she directed a complaint against the legislation governing the conflict. The example of *Evans* may thus serve to illustrate that many cases concerning conflicts of rights are actually "vertical" in character, concerning the relation between the government and the individual rather than the relation between two private individuals. As the following sections will demonstrate, it is precisely in such vertical relationships that a distinction is often made between fundamental rights and other individual interests, and it is precisely here that the value of the distinction is open to doubt.

In this section, some insight will be given into the legal situation in the UK and the Netherlands, where an abundance of case law and legal scholarship is available concerning the distinction between fundamental rights and individual interests (section 3.2). Subsequently, the approach taken by the European Court of Justice will be considered (section 3.3). It is the more interesting to do so as the ECJ does not have to deal with specific constitutional protection for fundamental

59 ECtHR 7 March 2006 (Chamber Judgment), *Evans v. The United Kingdom*.

rights alone, which means that it has had significant opportunities to consider the relevance of distinguishing between fundamental rights and other interests.

3.2. NATIONAL COURTS: THE EXAMPLE OF THE UNITED KINGDOM AND THE NETHERLANDS

3.2.1. The UK

In the UK, a well-established distinction is made between judicial review in fundamental rights cases and other cases concerning acts by public authorities. The distinction finds its basis in the perceived availability or lack of legal standards to decide such cases. This is made clear, for example, by De Búrca, who has argued that decisions taken by public authorities normally imply a political choice, i.e. a choice not "involving any 'legal' standard upon which a court could or should decide". Such political choices must be made by the elected body or a public authority in the first place. This is different, De Búrca contends, if a decision affects an individual fundamental right:

> *"... [T]he protection for certain recognized interests—generally those such as traditionally protected civil liberties and human rights, and other legally acknowledged values and interests—is generally categorized as a judicial task, something which a non-elected body free from the varying political influences of the moment is best placed to ensure."*[60]

This understanding of the justiciability of fundamental rights, as contrasted with other interests, also finds clear expression in the administrative case law. Gener-

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60 G. De Búrca, *supra* note 1, 107. *Cf.* also P. Craig, *Administrative Law*, 4th ed. 592 (London: Sweet & Maxwell 1999), stating the following reason for the application of a proportionality test in fundamental rights cases: *"If we recognize certain interests as being of particular importance, and categorise them as fundamental rights, then this renders the application of proportionality necessary or natural, and easier... The reason why this is so is that a difficult aspect of the proportionality calculus has already been resolved: one of the interests, such as freedom of speech, has been identified and it has been weighted or valued. We do not have to fathom out this matter afresh on each and every occasion, precisely because the fundamental nature of the right has been acknowledged."* It is highly questionable whether this is really true, especially considering that fundamental rights increasingly seem to cover individual interests which are primarily social and economic in nature. The valuation of these interests is then clearly not as simple as is presupposed in the quoted explanation. In addition, it does then not seem fully reasonable to apply a proportionality test to each case in which a fundamental right is at stake, while omitting such a test if the administrative action has affected a different interest. Craig seems to admit this, stating at p. 600 that it must be recognised that there will be difficult borderline cases concerning the application of the Human Rights Act, and the nature of the test which is to be applied should not differ radically depending upon which side of the borderline a case is said to fall.

ally, a so-called test of "*Wednesbury* unreasonableness" is applied to acts of public authorities that infringe individual interests.[61] According to this test, administrative action will only be unlawful if it is irrational, which means that if it "is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."[62] This (rather circular) definition discloses that the courts will generally defer to the public authorities—the standard of unreasonableness is generally pitched very high.[63] An administrative act really must be absurd or "arbitrary and capricious" before it will be struck down by an English court.[64] Indeed, Lord Greene mentioned in *Wednesbury*, "*... to prove a case of that kind would require something overwhelming...*".

The application of this test to administrative action has important consequences for the choice of standards and the burden of proof. The *Wednesbury* test places the burden on the individual challenging the administrative act to demonstrate that it is substantively unreasonable.[65] Furthermore, it implies that no specific test of proportionality will be applied.[66] Such a test is common in Community law and the case law of the European Court of Human Rights and requires that the courts examine whether an interference is suitable and necessary to achieve a certain legitimate aim, and if the administrative decision reflects a reasonable balance of interests.[67] According to English case law, the application of a test of proportionality would mean that a court would have to consider the relative weight accorded to a variety of interests and considerations, assess the balance of the various interests involved in the decision and judge whether the administrative action was really necessary.[68] The courts are not considered to be

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61 *Cf.* W. Wade and C. Forsyth, *Administrative Law*, 9th ed. 353–354 (Oxford: OUP, 2004).

62 *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223 at 233. A more revealing formulation of the test has been given by Lord Diplock, who held that the test of Wednesbury unreasonableness "*... applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*" (*Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 410 per Lord Diplock); see also Lord Greene: "*... there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority*" (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223 per Lord Greene).

63 W. Wade and C. Forsyth, *supra* note 61, 364.

64 W. Wade and C. Forsyth, *supra* note 61, 354.

65 *R. v. Secretary of State for Trade and Industry, ex parte Lonrho Plc* [1989] 1 WLR 525 at 539H-540B and see M. Fordham and T. De la Mare, Identifying the Principles of Proportionality, in: J. Jowell and J. Cooper (eds.), *Understanding Human Rights Principles* 27–89, 32 (Oxford/Portland: Hart 2001).

66 W. Wade and C. Forsyth, *supra* note 61, 366.

67 See e.g. J. Rivers, Proportionality and Variable Intensity of Review, 65 *Cambridge Law Journal* 174–201, 178 (2006).

68 See *R. v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 28 *per* Lord Steyn (para. 27), *R. v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 and *R. v. Chief Constable of Sussex ex parte International Trader's Ferry Ltd.* [1999] 2 AC 418 *per* Lord Slynn. See also G. Wong, Towards the Nutcracker Principle: Reconsidering the

sufficiently equipped to apply such an exacting test, which might even require them to substitute their own judgment for that of the administrative authority.[69] Instead, the courts generally only assess the reasonableness of the act as a whole, on the basis of such formulae as have been quoted above. As a result, the test of *Wednesbury* unreasonableness is notoriously weak in its intensity of review, which means that only few administrative decisions harming individual interests will be held to be unacceptable.[70]

This is all very different for cases in which the Human Rights Act (HRA) applies. This Act was introduced in 1998 to incorporate the European Convention of Human Rights in national law and, consequently, contains virtually identical rights as the Convention does. It appears from the legislative history of the HRA that the Act will be interpreted and applied in a way that is consistent with the case law of the European Court of Human Rights, including an application of the various tests and standards developed by the Court.[71] Admittedly, the HRA test is often applied quite deferentially, producing the same results as *Wednesbury* unreasonableness would have done.[72] Review under the HRA is different, however, to the extent that it is often up to the government to prove the reasonableness of the interference.[73] Moreover, the HRA test is carefully subdivided in different parts to enable the court to judge various aspects of the interference and its

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Objections to Proportionality, 2000 *Public Law* 92–109, 94 and W. Wade and C. Forsyth, *supra* note 61, 366.

69 *R. v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696, 610, *per* Lord Lowry.

70 *Cf.* M. Fordham and T. De la Mare, *supra* note 65, p. 32. This must be nuanced, however, to the extent that some variation in the intensity of review is visible (in particular in cases concerning fundamental rights before the HRA entered into force) and the threshold is sometimes pitched less high. On this, see P. Craig, *supra* note 60, 582–583. In general, however, the test is applied in a rather deferential manner.

71 See Lord Irvine of Lairg, The Development of Human Rights in Britain under an Incorporated Convention on Human Rights [1998] *Public Law* 221, 229, 232; also G. Wong, *supra* note 68, 95, indicating that application of the test of proportionality is now also visible in the case law.

72 W. Wade and C. Forsyth, *supra* note 61, 368. The English test was severely criticised for that reason by the ECtHR, which held that the test applied would not constitute an "effective remedy" for the applicant in the sense of Article 13 of the Convention, as the threshold is "... *placed so high that it effectively excluded any consideration by domestic courts of the question of whether the infringement of the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention*" (ECtHR 27 September 1999, *Smith and Grady v. the United Kingdom*, Reports 1999-VI, para. 137).

73 M. Fordham and T. De la Mare, *supra* note 65, 68; P. Craig, *supra* note 60, 561.

proportionality.[74] For this reason, the HRA test is more elaborate, and it is usually more favourable to the individual than the *Wednesbury* test is.[75]

Interestingly, scholars in the United Kingdom have demonstrated that the HRA test is now applied in many cases where formerly *Wednesbury* unreasonableness would have been chosen.[76] Perhaps partly because of this, the marked difference between *Wednesbury* unreasonableness review and the HRA test has caused intense debate on the question whether a more elaborate set of criteria (in particular a tripartite test of proportionality) should also be applied to administrative law cases where no fundamental rights are at stake. The reason for some scholars to favour such an approach lies precisely in the illogical distinction that is presently made between cases concerning fundamental rights and cases concerning administrative conduct falling outside this area—the distinction is termed "arbitrary" and "artificial" and is arguably founded on no principled consideration at all.[77] Even some Law Lords have pleaded for a more general application of the proportionality test—Lord Slynn, for example, stated that "trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing."[78] This view is held ever more widely, and support to retain the distinction between *Wednesbury* unreasonableness and the HRA test of proportionality seems to be decreasing.[79]

These developments would seem to underscore our thesis that there is, in practice, no good reason to apply radically different legal standards to cases concerning "normal" individual interests than to cases dealing with "real" fundamental rights. There might be good cause, of course, to opt for variable intensity in the application of such standards. After all, the proportionality test can be applied very strictly, indeed requiring some judicial activism, yet it can also be applied rather deferentially, as is sometimes done by the ECtHR.[80] According to

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74 *Cf.* M. Fordham and T. De la Mare, *supra* note 65, 44; N. Blake, Importing Proportionality: Clarification or Confusion? [2002] *European Human Rights Law Review* 19–27, 20; P. Craig, *supra* note 60, 585; Lord Irvine of Hairg, *supra* note 71, 234. See also.*R. v. Secretary of State for the Home Department, ex parte Daly*, *supra* note 65, para. 27.

75 *Cf.* W. Wade and C. Forsyth, *supra* note 61, 367; M. Fordham and T. De la Mare, *supra* note 65, 67.

76 P. Craig, *supra* note 60, 99.

77 In particular G. Wong, *supra* note 68, 96.

78 *R. (Alconbury Development Ltd.) v. Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, para. 51. *Cf.* also Lord Irving of Hairg, *supra* note 71, 234 and Lord Steyn, 2000–2005: Laying the Foundations of Human Rights Law in the United Kingdom, 4 *European Human Rights Law Review* 349–362, 358 (2005), (stating that it is possible that the principle of proportionality may be applied "in appropriate contexts beyond the four corners of the 1998 Act).

79 See W. Wade and C. Forsyth, *supra* note 61, 371. In 1999, Craig even tentatively predicted that *Wednesbury* would cease to operate as an independent test in its own right in the future (P. Craig supra note 60, 598).

80 *Cf.* P. Craig, The Courts, the Human Rights Act and Judicial Review,117 *Law Quarterly Review* 589–603, 596 (2001) and J. Rivers *supra* note 67, 202; see also. *v. Secretary of State for the Home*

many scholars, if such a variable approach were favoured, proportionality might also be applied outside the specific context of HRA cases.

3.2.2 The Netherlands

Just like the English courts, Dutch administrative courts usually distinguish clearly between cases concerning "normal" individual interests, and cases concerning fundamental rights. As a matter of principle, the Dutch administrative courts show strong deference to public authorities that have been accorded discretionary powers. The reason for this is the desire to respect the constitutional position of the administrative bodies and prevent a situation whereby the courts would substitute their judgment for that of the administration.[81] In its important *Maxis-Praxis* decision, the Administrative Law Division of the Council of State, one of the three administrative high courts in the Netherlands, stated that an administrative decision may only be annulled if the case discloses such manifest unfairness in the weighing of interests, that no reasonable authority could have taken the contested decision.[82] This test is usually referred to as a negative test of reasonableness ("*niet onredelijk*") or a prohibition of arbitrariness ("*verbod van willekeur*"), and it only demands a very low intensity of review to be applied. For this reason, the test is also often termed "marginal review" ("*marginale toetsing*").[83]

The choice for marginal review frequently results in a lack of sound judicial reasoning. In many cases, it is difficult to grasp the grounds which have led the administrative court to hold that the contested decision was "not unreasonable".[84] Furthermore, the Dutch administrative courts only rarely apply the principle of proportionality and its elements of suitability, necessity and proportionality in the strict sense. Although elements of proportionality are sometimes mentioned—such as the necessity of a certain measure or its suitability—the test is usually

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Department, ex parte Daly [2001] UKHL 28 *per* Lord Steyn, para. 28.

81 Administrative Law Division (*Afdeling Bestuursrechtspraak*), decision of 9 May 1996, *Jurisprudentie Bestuursrecht* 1996/158 ("*Maxis-Praxis*"). See also J. Schwarze, *European Administrative Law*, Revised 1st ed. 701 (London: Sweet & Maxwell, 2006).

82 Administrative Law Division (*Afdeling Bestuursrechtspraak*), decision of 9 May 1996, *Jurisprudentie Bestuursrecht* 1996/158. See also Administrative Law Division (*Afdeling Bestuursrechtspraak*), decision of 20 July 2005, LJN-number: AT970 (see www.rechtspraak.nl).

83 An overview of the meaning of the various terms has been given by B.W.N. De Waard, Marginale toetsing en evenredigheid, in: *Getuigend Staatsrecht. Liber Amicorum A.K. Koekkoek*), 363–377, 368 (Nijmegen: Wolf, 2005) (in Dutch).

84 See (in Dutch) e.g. I.C. Van der Vlies, Kwantum-belangenafweging, 1997 *Ars Aequi* 46, 46–47 and J.H. Gerards, Het evenredigheidsbeginsel van art. 3:4 lid 2 Awb en het Europese recht, in: T. Barkhuysen, W. Den Ouden and E. Steyger, *Europees Recht Effectueren* 73–113, 99 (Alphen a/d Rijn: Kluwer 2007).

restricted to a very general review of the contested measure or decision.[85] Finally, marginal review implies that the onus is on the individual to demonstrate the unreasonableness of the administrative decision or measure.[86] Since many individual complainants find it difficult to do so, the chances of success for individual litigants are mostly fairly low.[87]

If one of the fundamental rights contained in the ECHR has been invoked, the situation is very different.[88] In that situation, the administrative courts will test the facts of the case against the standards and criteria for review as developed by the European Court of Human Rights.[89] This usually means that a tripartite test of proportionality is applied, rather than a general test of unreasonableness. This almost automatically results in more detailed and elaborate judicial reasoning. After all, all three elements of the test of proportionality then have to be addressed separately, which means that it is necessary for the courts to pay attention to such factors as suitability and necessity of the decision to obtain the aim pursued, and the balance of interests that has been struck by the public authority. Moreover, in cases concerning fundamental rights, it is up to the government to demonstrate that the interference is justified and that all standards for reasonableness have been met.

Perhaps somewhat surprisingly, the application of the Convention standards does not necessarily entail a higher level of intensity of review. This is witnessed by an important Dutch case concerning pig farmers.[90] Their interests were harmed

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85 J.H Gerards, *supra* note 84, 100. This is different in cases where European law is invoked, since the ECJ test of proportionality is then duly applied by the courts; see e.g. The Netherlands, Supreme Court (*Hoge Raad*) 15 December 1998, *Nederlandse Jurisprudentie* 1999/553. See in particular on this, J.H. Jans et al, *Inleiding tot het Europees bestuursrecht* 197 (Nijmegen: Ars Aequi Libri, 2002) and, for an overview in English, J. Schwarze, *supra* note 81, 701.

86 Y.E. Schuurmans, *Bewijslastverdeling in het bestuursrecht. Zorgvuldigheid en bewijsvoering bij beschikkingen* 120 (Deventer: Kluwer 2005).

87 E.g. A.Q.C. Tak, Rechters met slappe knieën, 2002(20) *Nederlands Juristenblad.*

88 It may be mentioned here that there is no statutory act similar to the UK Human Rights Act 1998 in the Netherlands. A number of human rights (both civil/political and social/economic rights) have been laid down in the Dutch Constitution, but Article 120 of the Constitution prohibits the Dutch courts from constitutional review of legislation. Articles 93 and 94 of the Constitution, however, stipulate that Dutch legislation will not be applicable if it is in conflict with international treaty provisions that have direct effect. The Dutch courts are competent to test statutory regulations against provisions of the ECHR or the ICCPR, and they do so rather often. Thus, the ECHR and the ICCPR constitute a primary source of law to the judiciary in the Netherlands, which may explain that the ECHR and the ICCPR are also often invoked by litigants in proceedings which do not so much concern statutory regulations as individual decisions by public authorities. See for an overview in English of the relevant case law and literature, L.F.M. Besselink 2004, *Constitutional Law of the Netherlands* (Nijmegen: Ars Aequi 2004), Chapter 5 and 7.

89 J.H. Gerards, Rechterlijke belangenafweging in het publiekrecht, 2006(4) *Rechtsgeleerd Magazijn Themis* 147–159, 149.

90 The Netherlands, Supreme Court (*Hoge Raad*) 16 November 2001, *Jurisprudentie Bestuursrecht* 2002, No. 2.

by statutory rules about the number of pigs a farmer was allowed to keep ("pig rights"—"*varkensrechten*") in order to reduce manure levels. The rules included a strong overall reduction of the pig rights allotted to each farmer, which negatively affected the pecuniary position of a large group of farmers. The farmers alleged that the regulations interfered with their right to property as protected by Article 1 of Protocol No. 1 to the ECHR, an argument that was accepted by the Dutch courts. As a result, the courts had to investigate whether the regulations had struck a fair balance between the various interests involved, as is required by the case law of the ECtHR. The Dutch Supreme Court (*Hoge Raad*) stated, however, that the legislature should be allowed a large measure of discretion in regulating this complex socio-economic field. The presence of a fair balance should not be strictly scrutinised and some form of marginal review should be applied instead. The result of the test applied by the Supreme Court thus did not differ much from the outcome that would have been reached by the application of the normal test of unreasonableness. Yet, the Supreme Court's judgment clearly differed from many regular administrative law judgments, to the extent that its reasoning was much more elaborate. The Supreme Court scrupulously detected and defined the various relevant interests and it investigated the balance that had been struck between them rather closely. In addition, it not only applied an abstract review of the statutory act at hand, but it also investigated whether sufficient attention had been paid by the legislature to individual cases in which the regulations might cause extreme hardship.[91]

The pig rights case would seem to demonstrate two different things. Firstly, it makes clear that the applicability of a fundamental right really makes a difference to the set of criteria applied by the Dutch courts and the quality of their reasoning. Secondly, it shows that there is little substantive difference between the interest at stake in a case such as this one (i.e. a pecuniary interest protected by the right to property) and other social or economic interests, and, as a result, between the outcomes reached by the application of two distinct sets of standards. It might be expected that cases such as this one would have triggered some debate about the appropriateness of certain standards of review and the difference between interests and fundamental rights, along the lines visible in the United Kingdom. Remarkably enough, no such debate has developed as yet. To the contrary, distinguished scholars have recently stressed the continuing relevance of the distinction between cases concerning fundamental rights and cases coming purely under

91 See further on this (in Dutch) the case comments by L.F.M. Verhey, Verbod van constitutionele toetsing, in: E.C.H.J. Van der Linden. and F.A.M. Stroink, *Jurisprudentie Bestuursrecht Select* 515–563, 560 (The Hague: Sdu, 2004) and J.E.M. Polak, Herstructurering Varkenshouderij', in: P.J.J. Van Buren, J.E.M. Polak, and R.J.G.M. Widdershoven, *AB Klassiek*, 5th ed. 448–459, 458 (Deventer: Kluwer 2003).

administrative law.[92] Their main argument in this regard is that fundamental rights cases can usually be decided on purely legal grounds, whereas typical administrative law cases require political or policy judgments to be made.[93] In the Netherlands, therefore, fundamental rights will continue to be regarded as a special category, warranting the application of different standards of review.

3.3. THE EUROPEAN COURT OF JUSTICE

Finally, the European Court of Justice (ECJ) has adopted a different approach in assessing interferences with fundamental rights and interests. In almost all of its cases, whether concerning fundamental rights or not, the ECJ will apply a test of proportionality, usually consisting of at least a test of suitability and necessity.[94] Unlike the courts in the two national legal systems discussed above, the ECJ does not show any variation in the standards for review between cases concerning fundamental rights and cases concerning other interests. Nonetheless, some difference is visible, namely with respect to the intensity with which the test of proportionality is applied.[95] The ECJ generally opts for very marginal review in cases where the Community institutions have wide discretionary powers, especially if they have to act in an area which entails political, economic and social choices and in which they are called upon to undertake complex assessments.[96] In these cases, the ECJ's deferential position may be explained by a combination of respect for the discretionary powers of Community institutions and a lack of expertise. Consequently, the ECJ will only intervene if a decision or measure is "manifestly inappropriate"[97] or if it is apparent that the relevant institution "manifestly

92 See e.g. A.J. Nieuwenhuis, B.J. Schueler, and C.M. Zoethout, (2005), Slotbeschouwing, in: A.J. Nieuwenhuis, B.J. Schueler and C.M. Zoethout (eds.), *Proportionaliteit in het publiekrecht* 219, 224 (Deventer: Kluwer 2005) (in Dutch).

93 Ibid.

94 See e.g. T. Tridimas, *The General Principles of EC Law* 89–90 (Oxford: OUP, 1999). The ECJ does not seem to have developed a clear proportionality formula which it consistently applies, but it rather seems to work with a variety of definitions which it seems to use rather arbitrarily. For an overview of the various formulae, see in particular O. Koch 2003, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, 199 (Berlijn: Duncker & Humblot, 2003). The third element of the full test of proportionality (proportionality in the strict sense) is usually absent from the ECJ's test, although it is visible in some cases (e.g. ECJ 12 January 2006, *Agrarproduktion Staebelow GmbH,* Case C-504/04, [2006] ECR I-679, para. 35 and CFI 1 December 1999, *Boehringer,* Joined Cases T-125/96, [1999] ECR II-33427, para. 73 and 76).

95 *Cf.* P. Craig, *EU Administrative Law* 660 (Oxford: OUP, 2006).

96 ECJ 12 July 2005 *Alliance for Natural Health* Joined Cases C-154/04 and C-155/04, [2005] ECR I-6451, para. 52. See also e.g. CFI 3 February 2005 *Chiquita Brands International, Inc.,* Case T-19/01, [2005] ECR II-315, para. 228 and ECJ 9 September 2004 *Spain and Finland / European Parliament and Council,* Joined Cases C-184/02 and C-223/02, [2004] ECR I-7789, para. 56.

97 See *Alliance for Natural Health,supra* note 96, para. 52.

exceeded the bounds of its discretion".[98] In this context, the ECJ is inclined to show particular restraint if no Community interests have been harmed (such as the four freedoms), but merely national or individual economic interests have been affected.[99] For all of these cases, it has been concluded that applicants will find it difficult to convince the ECJ that a measure is manifestly disproportionate.[100]

The ECJ also shows restraint in the situation where a Community interest has been harmed by Member State action, but where the action was meant to realise goals on which there is no clear European consensus, or where the primary power for regulation lies with the national authorities.[101] This will be the case, for example, if a national government tries to justify a restriction of trade by reasons of public policy, as happened in the case of *Omega Spielhallen*.[102] The case concerned a German prohibition on laser games, which was considered necessary to protect human dignity. The resulting German interpretation of the notion of "public policy" is not widely supported by other Member States, yet the ECJ held that the national authorities had a margin of discretion to determine if their conception of public policy necessitated restrictive measures.[103]

In cases such as *Omega Spielhallen*, the ECJ will apply a rather marginal type of review, although it will often pay close attention to the evidence brought

98 ECJ 17 July 1997 *SAM Schiffart*, Joined Cases C-248/95 and C-249/95, [1997] ECR I-4475, para. 69. See further also G. De Búrca, *supra* note 1, 112.

99 See e.g. ECJ 13 April 2000 *Karlsson* Case C-292/97, 2000 [ECR] I-2737, para. 60. For the latter example, see M. Avbelj, *supra* note 41, 70, stating that limitations of economic rights are normally subject to very deferential review by the ECJ, except for the situation where the economic interests of an individual plaintiff run parallel to one of the four freedoms; the involvement of a community freedom implies that the Court will intensify its review.

100 See, with references to the ECJ's case law, P. Craig, *supra* note 95, 660.

101 See e.g. J. Snell, *Goods and Services in EC Law. A Study of the Relationship Between the Freedoms* 212–213 (Oxford: OUP, 2002); for an example, see ECJ, 15 June 1999 *Heinonen*, Case C-394/97, [1999] ECR I-3599, para. 43. See also J. Langer and J. Wiers, Danish Bottles and Austrian Animal Transport: The Continuing Story of Free Movement, Environmental Protection and Proportionality, *Review of European Community and International Environmental Law* 9 188–192, 188 (2000).

102 *Omega Spielhallen, supra* note 44.

103 Id., in particular para. 31 and 37–39. See also ECJ 24 March 1994 *Schindler*, Case C-275/92, [1994] ECR I-1039, para. 61 and ECJ 21 September 1999 *Läära*, Case C-124/97, [1999] ECR I-6067, paras. 36–39. Similar discretion has been left to the Member States in other policy areas too, such as that of public health. See e.g. ECJ 28 September 2006 *Ahokainen and Leppik*, Case C-434/04, not yet published, para. 31. Even more discretion is left in cases where the Member State has taken certain measures in accordance with the precautionary principle, i.e. where it is shown that uncertainties continue to exist in the current state of scientific research and preventive measures seem to be necessary to protect public health. See in particular ECJ 14 July 1983 *Sandoz*, Case 174/82, [1983] ECR 2445, para. 19 and, more recently, ECJ 23 September 2003 *Commission / Denmark*, Case C-192/01, [2003] ECR I-9693, para. 43. See also, however, P. Craig 2006, *supra* note 95, 706, arguing that these cases may equally well be regarded as instances where the Court, having surveyed the evidence, believed that the Member State's action was warranted.

forward by the parties and provide well-reasoned decisions. Restraint and deference thus have a somewhat divergent result in the EU context than is visible with the courts in the UK and the Netherlands—the main similarity being the standard of review and the intensity thereof.

The ECJ generally applies a far stricter test in other types of cases. In particular, the ECJ pays closer attention in cases concerning interferences with individual rights which it has found to belong to the fundamental principles of Community law, especially if the interference is considered a serious one.[104] Different from the case law in national systems such as the Netherlands and the UK, this rule of intensification is not clear-cut. The sole fact that a fundamental right has been affected does not necessarily result in stricter scrutiny—especially in cases concerning property rights, the ECJ would often seem to apply a rather general test which does not differ much from that applied with respect to other interests.[105] In this regard, the ECJ's equal treatment case law is clearly of interest. In section 2, it has been shown that the Community principle of equal treatment has gradually evolved from a primarily economic interest into a classic human right. However, perhaps surprisingly, this does not seem to have brought about a real change in the assessment of equal treatment cases. This is understandable as far as cases about nationality discrimination are concerned, as they have always been subjected to stricter scrutiny because of the fundamental value of free trade within the internal market.[106] Further intensification of the test would seem to be hardly possible here. As regards gender discrimination, the situation is different. Yet, the ECJ's position is ambiguous. Sometimes the ECJ applies a relatively strict test (which would be in accordance with the fundamental value of the notion of gender equality), whereas in other cases (e.g. cases concerning social security), it opts for a deferential position vis-à-vis the national authorities and applies a general

104 *Cf.* G. De Búrca, *supra* note 1, 146; J. Schwarze, *supra* note 81, 862; P. Craig, Judicial Review, Intensity and Deference in EU Law, in: D. Dyzenhaus, *The Unity of Public Law* 334–356, 343 (Oxford: Hart, 2004).

105 See e.g. ECJ 10 December 2002 *British American Tobacco*, Case C-491/01, [2002] ECR I-11453. In this case, the ECJ first examined whether the proportionality principle had been infringed. In this context, it established that the Community legislature must be allowed a broad discretion and that measures could be affected only if they were manifestly inappropriate—indeed, these formulae indicate a low level of intensity of review (para. 123). The Court then examined the complaint about the fundamental right to property. In this regard, it referred to its findings as regards the principle of proportionality, holding that the restrictions on the right to property did not amount to a disproportionate and intolerable interference, impairing the very substance of the right (para. 149 and 153). The result was a relatively low intensity of review, notwithstanding the fact that the complaint concerned a fundamental right. See also P. Craig, *supra* note 95, 676.

106 See J.H. Gerards, *Judicial Review in Equal Treatment Cases*, 331 (Leiden/Boston: Martinus Nijhoff, 2005) and the opinion of A-G. Jacobs to the *Phil Collins* case (Joined Cases C-92/92 and C-326/92 [1993] ECR I-5145, paras. 9–11). See also J. Schwarze, *supra* note 81, 705.

test of reasonableness.[107] Also with regard to other grounds of discrimination, such as age, the ECJ has made clear that the Member States enjoy a certain margin of discretion.[108] The classification of equality as a fundamental individual right thus seems to have been of limited consequence to the intensity of the ECJ's review. In fact, the opposite seems to be true: if the equality principle is not so much invoked as a fundamental right, as in its function as a principle supporting and facilitating the internal market, the ECJ's test generally seems to be stricter and more elaborate. Indeed, it transpires from the ECJ's case law that rigorous scrutiny is usually applied with respect to interferences with one of the four freedoms, which, as demonstrated in section 2.3, the ECJ has consistently termed fundamental rights or principles.[109] In cases concerning restrictive trade measures or decisions, the ECJ requires that they be justified by "overriding social interests", thus setting high standards for the demonstration of proportionality.[110] The ECJ obviously will accept such measures less easily, regardless of whether they also affect individual fundamental rights.

Thus, the ECJ's case law does not really disclose a principled distinction between fundamental rights and other interests as regards the choice for its methods of assessment and its intensity of review. Rather, it seems to pay close attention to such factors as the presence of discretionary powers or the harm that is done to fundamental Community interests such as the four freedoms and

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107 Compare e.g. ECJ 30 March 1993 *Thomas* Case C-328/91, [1993] ECR I-1247, para. 8, with ECJ 14 December 1995 *Nolte* Case C-317/93, [1995] ECR I-4625; see also J.H. Gerards, *supra* note 106, 309. For the somewhat ambiguous relationship between the ECJ and the non-discrimination principle, see e.g. M.H.S. Gijzen, *Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law* 20 (Antwerp: Intersentia, 2006), explaining that the ECJ still often bases itself on the 'comparative model of justice' that seems to stem from the economic context of the EU equality principle, but also stating that in recent times a development of constitutionalisation of the principle has been visible.

108 E.g. *Mangold, supra* note 51, para.63, stressing that the Member States enjoy broad discretion in the area of social policy. Apparently, this is true even if the Member State has made a distinction based on a ground protected by the European non-discrimination directives. It must be mentioned, however, that in *Mangold* the ECJ proceeded to examine the grounds for the discrimination and found that it went beyond what was appropriate and necessary. Accordingly, the test seems to disclose a somewhat heightened level of review, though further case law will have to confirm this. See further J.H. Gerards, *supra* note 85, section 1.3.10.B.

109 See e.g. ECJ 11 May 1999 *Monsees* Case C-350/97, [1999] ECR I-2921; *cf.* T. Tridimas, *supra* note 94, 90 and J. Schwarze, *supra* note 81, 704. This is not always true, however, as, for example, in cases where the states are offered a large measure of discretion because of the weighty public interests they aim to protect by restricting free trade; see e.g. *Heinonen, surpa* note 101, para. 43. See also J. Snell, *supra* note 101, 212–213 and J.H. Jans, Proportionality Revisited, 27(3) *Legal Issues of Economic Integration* 239–265, 250–251 (2000).

110 It is precisely with regard to such trade restrictions, for example, that the ECJ is willing to apply a "least restrictive means" test, examining whether the national authorities could not have reverted to other measures which would affect the internal market and free trade to a far lesser extent. For an example, see ECJ 23 November 1999 *Arblade*, Joined Cases C-369/96 and C-376/96, [1999] ECR I-8453, para. 78.

unhampered interstate trade. Indeed, the intensity of the ECJ's test of proportionality seems to depend on a complex interaction between a variety of factors, which may differ for each individual case.[111]

3.4. CONCLUSION

In this section, an overview has been provided of the way in which the courts in three different legal systems deal with the distinction between fundamental rights and other individual interests. All of these courts have the power to decide cases of both types, and they all have the possibility freely to vary the intensity of their scrutiny and the standards of review according to the type of case before them. As has been demonstrated, the courts in both the United Kingdom and the Netherlands clearly distinguish between "regular" administrative law cases and cases concerning fundamental rights. In the latter type of case, a more elaborate test is carried out and the national courts' reasoning is usually more detailed and specific, even though the level of intensity is not always high. In the former type of case, a general test of arbitrariness or manifest unreasonableness is applied, which has its effects for the burden of proof, the application of the test of proportionality and the level of detail of the statement of grounds for the judgment. Remarkably enough, the distinction is still considered fully reasonable and acceptable in the Netherlands, whereas there seems to be considerable debate on the issue in the United Kingdom.

The ECJ's case law shows a completely different picture. No principled distinction between fundamental rights and other interests is discernible here. Instead, the ECJ bases its intensity of review and its methods of assessment on the substance of the interests at stake and on the way in which administrative and legislative powers have been defined. As a consequence, the ECJ's case law is somewhat less transparent—it is sometimes difficult to trace the exact reason for a certain level of review or set of standards in its judgments. On the other hand, the approach has the advantage that less attention is paid to the label of fundamental rights. Also, the methods of assessment are usually closely fitted to the substance of the interests at stake. Indeed, this raises the question whether it would not be possible and desirable for other courts to adopt the ECJ's approach, at least to the extent that they are able to decide freely on their own standards of assessment and intensity of review. It is this question that that will be addressed in section 4.

111 See G. De Búrca, *supra* note 1, 147, where she gives an overview of relevant factors.

4. THE LEGAL DISTINCTION BETWEEN FUNDAMENTAL RIGHTS AND INDIVIDUAL INTERESTS - IS THERE AN ALTERNATIVE?

The discussion of the proliferation of fundamental rights in section 2 reveals that many individual interests currently qualify as fundamental rights. Indeed, because of the extension of the scope of enforceable fundamental rights, it has become increasingly difficult to define an individual interest as a right or "merely" as an interest. This again raises the question whether it is justifiable to uphold the still existing differences in the judicial methods and intensity of review applied in cases concerning one or the other type of interest.

Before this question is addressed in more detail, it should be stressed that the concept of fundamental rights (or human rights) is of enormous importance to society. Human rights policies and adjudication are dearly needed to guarantee individual freedom and equality, in western societies as much as elsewhere. The simple fact that the proliferation of fundamental rights has given rise to a certain debasement of the currency of such rights,[112] should not be regarded as a reason to throw overboard the entire concept of fundamental (or human) rights, or degrade the value of the moral claims on which such rights are based. The thesis submitted in this paper certainly does not tend to the abolition of the concept of fundamental rights. It is argued, however, that to the extent that it has become increasingly difficult to distinguish between fundamental rights and other individual interests, the distinction between the two categories is artificial and should not be used as the determinative factor in judicial decision-making. In cases concerning conflicts between rights and interests, this means that courts should not automatically attach special weight to individual interests qualifying as "fundamental rights", as compared to other individual interests.

There is the more reason to raise this issue, because a further rise of "borderline cases" is to be expected in the future. In academic literature, an increase is expected in the acceptance of new fundamental rights, reflecting novel aspects of various conditions of human life relating to food, environment, and resulting from technological advances in mass communications, information technology, and reproductive techniques.[113] It is highly probable that these future developments will even further soften the borderline between fundamental rights and what are currently called "individual interests", especially in the field of social, economic and cultural rights. Good reason may be found in this to reconsider the procedural and substantive distinctions that are still often made in adjudication. The discussion in section 3 has shown that the invocation of a fundamental right

112 *Cf.* J. Mahoney, *supra* note 14, 71.

113 Id., 97 and K.E. Mahoney and P. Mahoney, *Human Rights in the Twenty-First Century: A Global Challenge* (Dordrecht: Martinus Nijhoff, 1993).

often forms a simple trigger for the courts to apply an elaborate, sophisticated and rather strict test of justification, while they adopt a highly relaxed and deferential approach as soon as a "mere" individual interest is at stake. It has also been shown that the distinction is sometimes hardly avoidable because of the presence of legal or procedural restraints—such is the case, for example, for the ECtHR, which will simply not have jurisdiction if no fundamental right is at stake. If there is any possibility for change of judicial method, however, it seems to be appropriate to make use of it to reduce the discrepancy in legal standards and intensity of review.

In this regard, it is important to note that the case law discussed in section 3 shows little substantive difference as to the methods used to deal with fundamental rights and fundamental interests. It is relevant here to recall a remark by Koskenniemi that the "identification, meaning and applicability of rights are dependent on contextual assessments of 'proportionality' or administrative 'balancing' through which priorities are set among conflicting conceptions of political value and scarce resources are distributed between contending social groups."[114] Generally speaking, and leaving aside specific legal tests and provisions which leave the court with little opportunity to engage in free exercise of proportionality review, a court will always have to assess whether a concrete infringement of the individual interest or right was *reasonable* or, especially in cases concerning conflicts between rights, whether the infringement was *justified* by the need or desire to protect another individual right or interest. In so doing, it will investigate whether the interference was necessary and proportionate, as the ECJ does, or, as the Dutch and English courts do, whether it was manifestly unreasonable.[115] The criteria relevant to this investigation are generally comparable. The main differences are visible in the strictness or intensity of their application, the application of detailed sub-criteria of the proportionality principle, and the division of the burden of proof. For example, the criteria of suitability, necessity and proportionality in the strict sense, or the fair balance test as applied by the ECtHR, all imply a sophisticated and elaborate test of the reasonableness of the interference. It is exactly this test that the national courts appear to apply as soon as a fundamental right is at stake. By contrast, the discussion of the Dutch and English courts' practice, and to some extent also that of the ECJ, demonstrates that these courts will usually only apply a negative and rather abstract review when dealing with interferences with "normal" individual interests. Thus, as soon as an infringement of a fundamental right has been established, the *character* and *intensity* of the test change, even though the general criterion of "reasonableness" remains the same.

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114 M. Koskenniemi, *supra* note 46, 99.

115 See above, section 3; *cf.* also G. Wong, *supra* note 68, 101, explaining that the test of proportionality and the test of manifest unreasonableness are relatively close.

It is exactly here that the problematic side of the distinction between fundamental rights and individual interests becomes apparent. After all, the differences described imply that important individual interests which cannot be classified as a fundamental right will be less carefully scrutinised than interests which *do* qualify as a fundamental right, even though such a difference is not justified by the character and weight of the interest at stake. Similarly, in examining the balance struck between conflicting rights and interests, more weight will generally be attached to a fundamental individual right than to another individual interest, even though the interests concerned may be of similar weight and value. Hence, it is submitted that the test to be applied must be fitted more closely to the real substance of the individual interest at issue.[116] The fact that an interest is classified as a fundamental right should never be decisive, even though it might raise a presupposition as to the importance of the underlying individual interest. A court should always look further than this classification alone. Before engaging in an assessment of the substance of the complaint, it should determine the real importance of the individual interest at stake.[117] This implies, firstly, that it should determine whether the harmed interest belongs to the core or rather to the periphery (or penumbra) of a fundamental right. A court can do so by referring to the text and context of fundamental rights provisions, as interpreted by the European Court of Human Rights or other fundamental rights bodies. In this regard, a court might compare the case at hand to cases already decided, placing the interests at stake on a scale ranging from core interests to peripheral interests, and, by close comparison, positioning the concrete interest somewhere on the scale.[118] Furthermore, a court could well make use of a teleological system of interpretation. Whether or not an interest constitutes a "core" right may then be determined by estimating its importance to reaching the main goals of the protection of a particular fundamental right: securing human dignity, enhancing individual autonomy and liberty, or preserving democratic values. The more clearly the concrete interest at stake is related to such a main goal, the more important it will be for the court to critically review an interference. The result of such judicial exercises may be that some individual interests will be found to be highly important, even if they are not usually regarded as constituting an aspect of a "classic" fundamental right. For example, if an individual has an interest in being granted a medical device which would obviously enhance his autonomy and dignity, it will not do to

116 *Cf.* also G. Wong, *supra* note 68, 96.

117 *Cf.* also J. Rivers 2006, *supra* note 67, 205.

118 In some respects, this method is similar to one that is known in the Netherlands as the "method of comparison", which itself is compara.ble to the method of "analogous interpretation". See in particular on the Dutch method G.J. Wiarda, *Drie typen van rechtsvinding*, 107 (Deventer: Tjeenk Willink 1999), and C.E. Smith, *Regels van rechtsvinding*, 168 (Den Haag: Boom, 2005); the method of analogous interpretation is clearly set out by N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, 206 (Oxford: OUP, 2005).

judge that the interest is not expressly covered by a classic fundamental right and the interference should therefore only be marginally reviewed. Instead, it should be admitted that an important individual interest has been interfered with, and a detailed and careful test should be applied to find out whether the device could reasonably be refused. This should not be taken to mean that a court could never defer to the administration or the legislature, or apply a relatively low intensity of review. Given the importance of the interest at stake, however, the court should at the least pay attention to such aspects as the necessity and appropriateness of a measure or decision, and it should not place the entire burden of proof upon the individual applicant.[119]

In cases where it occurs that a peripheral interest is affected, judicial review normally may be more relaxed. Especially if an interference has been caused in a highly complicated policy context, or if it is the result of the exercise of wide discretionary administrative powers, there may be good reason to revert to a general test of "manifest unreasonableness".[120] However, such a large measure of deference should not be chosen too easily. As illustrated by the case law of the European

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119 Various possibilities for varying the intensity of review while taking careful account of the need to provide for a carefully reasoned and elaborate test may be found with J.H. Gerards, *supra* note 106, 675. The criteria developed there apply to the principle of equal treatment, but they may also be used in other cases concerning infringement upon an individual interest. *Cf.* also G. Wong, *supra* note 68, 104: "*... an incorporation of proportionality by no means constitutes judicial licence for wanton disregard for the prerogatives of the administration.*"

120 It might be stated that the presence of wide discretionary powers may also be relevant with respect to core rights, and that it also might justify a more relaxed test in that context. In this regard, it is important to note that the interplay of intensity-determining factors is rather complex. In this context, reference may be made to an important overarching criterion that has been defined by the US Supreme Court in its famous *Carolene Products* footnote (US Supreme Court 25 April 1938, 304 U.S. 144, 152, footnote 4). In this footnote, it is suggested that the democratic process of decision-making typically offers sufficient possibilities for the rectification and amendment of improvident decisions. For that reason, and especially if wide discretionary powers have expressly been granted to administrative bodies or legislators, the courts should normally be reluctant to interfere. Simultaneously, the Supreme Court notes that there may be shortcomings in the process, which may cause legislators and administrative bodies to act contrary to the Constitution. In certain factual situations which come before the courts, there may be good cause to consider the results of democratic decision-making with special distrust, as the process itself seems to be flawed. According to the footnote, such factual situations would seem to be present if core democratic rights have been restricted, since such restrictions affect the essence of the self-correcting mechanism of the democratic system, or if measures are taken that violate other rights which are closely related to human dignity and autonomy. In these situations, more probing and intensive judicial scrutiny is justifiable. Thus, the criterion defined in the *Carolene Products* footnote must be taken to mean that the courts will always have to consider if there are any factual circumstances in the case before them that could reasonably raise doubts as to the neutrality and well-functioning of the democratic process of decision-making. Such doubts will almost always be justified if core fundamental rights are affected, but they may also be present in cases where no such rights are at stake. A complex set of interacting factors may be designed in order to justify an assumption of malfunction, and, accordingly, an intensification of the test. Such a set of factors may not only be used by the courts to decide upon the use of an intensive or a marginal test, but they may also justify an

Court of Human Rights, the seriousness of the interference may also be of some relevance.[121] If a relatively minor individual interest has been severely harmed, e.g. by huge financial consequences or the creation of an irrevocable situation, there may still be reason for the court to consider the reasonableness of such effects with great care. Possibly some intermediary level of review, or a "neutral" test, could be applied to such cases.

The general approach sketched here could obviously be given far more detail and body. Indeed, interesting approaches, which may also be suitable to cases concerning conflicts between individual rights and interests, have already been described and employed, both in academic literature and in case law.[122] In the United States, for example, various "levels" of scrutiny are applied and elaborate multi-tiered tests have been developed for dealing with cases concerning constitutional rights.[123] The case law of the European Court of Human Rights on the scope of its margin of appreciation also offers interesting perspectives that can be used by national courts in defining their level of review.[124] Building on such general notions and ideas, a far more acceptable judicial approach to the examination of cases concerning conflicts between rights could be created, the methods and standards applied by the courts and the intensity of their review being really based on the substance of the interests at hand. The often-artificial distinction between fundamental rights and interests, just like that between various types of fundamental rights (political, civil, social, economic), is then replaced with a real valuation of the character and importance of the interest or right at hand. Of course, the inclusion of certain rights in international human rights treaties and national constitutions and legislation will always remain relevant, as it gives a clear indication of the perceived importance of the rights in question. Nonetheless, the courts should always reach further than this. Only then will they be able to apply a suitable test, and only then will they be able to really balance conflicting interests in a satisfactory manner.

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intermediary level of intensity of review. See further on this, especially relating to the principle of equal treatment, e.g. J.H. Gerards, *supra* note 106, Chapter 7.

121 *Cf.* also J. Rivers, *supra* note 67, 205.

122 For the principle of equal treatment, see e.g. J.H. Gerards, *supra* note 106, Chapter 7.

123 *Id.*, Chapter 5.

124 See e.g. E. Brems, The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, 1996 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240–350, 240 and Y. Arai-Takahashi *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerpen: Intersentia, 2002).