Words Travel Worlds: Language in the EU Internal Market, Linguistic Diversity and the National Identity of the Member States

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Abstract: The case law overview of the decisions of Court of Justice of the European Union underlines the role language and national constitutional identity play in the free movement rights of persons. While the Treaties adhere to respect for cultural and linguistic diversity (Art. 165(1) TFEU), at the same time protection of the own language may cause restrictions on free movement rights and on the idea, which stands behind the internal Market and EU citizenship rights. The author will map how these rights interact and interplay on the border of the EU and the national competences and interests. The contribution will focus on the role that language has with regard to the free movement of persons, whether economically active or not. What role does language play in the European free movement and how should cultural diversity and national constitutional identity be balanced with language barriers is the key question of the analysis.

Keywords: EU citizenship, Language, Internal market, Linguistic diversity, National identity.

1. Introduction

"Language is wine upon the lips" Virginia Woolf wrote in "Jacob's room" (1922). Language is important for the access to the law, to healthcare, to the identity of citizens. Language is something we share with other human beings; it creates identity and sense of belonging. It might be compared with wine, it is also a precondition for the full development of citizenship, in the sense of membership of a community. Language might therefore be compared to water, as a basic need for individuals. For the free movement of persons in the European Union language can be a barrier as well as an opportunity to share ideas, to meet new people and travel the European Union. Crossing a border often means also crossing a language border. Or in some situations, individuals do not move but find themselves part of a minority language within their own country. As diverse as wines can be, the languages of the European Union are diverse and while diversity needs to be respected the Union strives also for unity and abolishing of borders between persons in the EU. In this contribution we will focus on the role language has with regard to the free movement of persons, whether economically active or not. What role does language play in the European free movement and how should cultural diversity and national constitutional identity be balanced with language barriers? We will discuss the EU policy on language and culture (par. 2), the case law of the Court of Justice (par. 3), the balance between free movement and constitutional national identity (par. 4) and we conclude

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the paper with our observations (par. 5). The main question is how the national identity (Art. 4 (2) TEU) is balanced with the free movement rights of EU citizens in the context of language.

2. Cultural and language diversity in the EU

The European Union's (EU) motto is "United in diversity", referring to the EU's ambition for peace and prosperity, while at the same time being enriched by the Member States' different cultures, languages and traditions.[3] The linguistic diversity is part of the European identity and due to the focus on migration, the diversity of languages is growing.[4] Since free movement of persons is one of the fundamental freedoms in the EU, migration within the Union by EU citizens is promoted by EU policy. Therefore, also languages cross the internal borders. The EU now includes 24 official languages[5], with Irish as the most recent official status.[6] Language is importantly connected to education, to identity and to state competences. The field of education is also important for the language competences of the EU and the Member States. Art. 165(2) of the Treaty on the Functioning of the European Union (TFEU) provides that 'Union action shall be aimed at developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States', while fully respecting cultural and linguistic diversity (Art. 165(1) TFEU). The EU has a supporting competence with regard to education, meaning that the EU contributes to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action. The Erasmus+-Program is an example of the exercise of this competence. Education, can, however, not be harmonised by the European Union (Art. 165(4) TFEU). These Treaty provisions show that linguistic diversity is a value worth preserving at the EU level and at the level of the Member States, while the vertical division of competences between EU and its' Member States is at the same time sensitive in this area. This interaction between EU competences and Member States competences is also visible in the linguistic policies. The Member States can still coordinate by the "open method of coordination" (OMC)[7] their policies with regards to multilingualism and their policies to enhance the effectiveness of language teaching in schools.[8]

The European Commission used the OMC method when it announced its' aim to work together with Member States to ensure that citizens should speak two languages other than their mother tongue.[9] This aim falls under the creation of the European Education Area by 2025. This EEA should enhance the cooperation between Member States and stakeholders, so that EU citizens could benefit better from education and trainings.[10]

Multilingualism was not expressly mentioned as a fundamental value of the EU, but respect for linguistic diversity has become one of the fundamental principles of European integration. The multilingualism policy aims to protect Europe's rich linguistic diversity, concretised in the Charter

[3] Art. 3(3) TEU, see *EU motto,* https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en.

[4] B. DE WITTE, *Language Law of the European Union: Protecting or Eroding Linguistic Diversity?* In R. CRAUFURD SMITH (ed.), *Culture and European Union law*, 2004, p. 211.

[5] Consolidated text: Regulation No 1 determining the languages to be used by the European Economic Community.

[6] R. PHILLIPSON, *Myths and Realities of European Union Language Policy*, in *World Englishers*, 2017.

[7] E: we kunnen eventueel in de voetnoot zetten: Presidency Conclusions, Lisbon European Council, 23 and 24 Mar. 20000, par. 37. OMC involves: fixing guidelines for the Union, establishing quantitative and qualitative indicators and benchmarks as means of comparing best practice, translating these European guidelines into national and regional policies by setting specific targets, and periodic monitoring evaluation and peer review organised as "mutual learning processes".

[8] Council Conclusions on multilingualism and the development of language competences, 2014.

[9] European Commission, *European Education Area, About Multilingualism,* https://education.ec.europa.eu/focus-topics/improving-quality/about/about-multilingualism-policy.

[10] European Commission, *The European Pillar of Social Rights in 20 Principles,* https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

of Fundamental Rights, as Art. 21 of the Charter prohibits discrimination on grounds of language. In other provisions linguistic protection is visible as well. Art. 22 of the Charter, for instance, creates an obligation for the EU to respect linguistic diversity. According to Art. 41 of the Charter every person has the right to communicate with the institutions of the Union in one of the official languages of the European Union.

The nature of the EU as a multilingualist Union is something to celebrate, but it also has a downside, since it can constitute an obstacle to the full enjoyment of the freedom of movement.[4] There are at least three issues of conflict to be determined. First, linguistic barriers can be determined in the context of the exercise of free movement rights by EU citizens. From a traditional industrial economy, a shift to a knowledge economy took place.[11] The ability to work in another language is been seen as a strength for workers. Therefore, companies require workers to have these second language skills.[12] Second, linguistic minority groups form part of the multitude of languages in the European Union. In the Member States language minority groups need language recognition and protection. The European Union includes more than a hundred minority linguistic communities.[13] The exercise of free movement can be hindered by the protection of minority linguistic groups. At the same time minority rights are sometimes set aside to the protection of the official language of the Member States. Lastly, we see a line of case law on languages, free movement and the spelling of names. It is up to the Member States to regulate the use of nobility titles and the construction of names, but while doing so they need to respect EU law principles. How a name is spelled or pronounced is impacted by the linguistic rules the Member States have. In that case law the Court of Justice focusses on the serious inconveniences for EU citizens, who are exercising free movement rights, as a consequence for spelling requirements and identity issue. How a name is spelled is key to the identification of an individual, and consequently is impacts the private and family life of EU citizens. Hence, the recognition of how a name is spelled is essential for both the national identity of a Member State and of EU citizens, while at the same time it is essential for the free movement rights of EU citizens.[14]

The EU legislature and the Court of Justice of the European Union (ECJ or Court) have a cautious, diplomatic, and pragmatic approach towards national language regimes.[15] This is because language belongs to a sensitive area of law, in light of the division of competences and sovereignty of Member States. However, Member States are not free to protect their language if this impedes the internal market and free movement rights of EU citizens.[8] This holds true for the internal market as a whole, including the free movement of goods, services and capital. In this paper, we will focus on the free movement of persons, either economically active or not economically active.[16] To achieve the fundamental EU aim of the establishment of the internal market, the removal of measures that hinder economic freedoms is needed. According to Art. 4(2) TEU, the *Union* shall respect Member States' national identities, "inherent in their *fundamental* structures, political and constitutional, inclusive of regional and local self-government". This national identity clause has been used as a justification for language policies that hindered free movement rights, which we discuss below.

Art. 4 (2) TEU is dual in nature; Member States may invoke their national identity as a derogation to free movement rights. At the same time the EU legislature has to take into account the national identity of the Member States in its actions and while adopting legislation. EU acts could be

[11] V. DOVALTL, *Language as an Impediment to Mobility in Europe (an Analysis of Legal Discourse)*, in P. STUDER, I. WERLEN (eds.), *Linguistic Diversity in Europe*, Berlin, 2014.
[12] B. DE WITTE, *Language Law of the European Union: Protecting or Eroding Linguistic Diversity?*, *op. cit.*, p. 211.
[13] S. VAN DER JEUGHT, *EU Language Law*, Groningen, 2015, p. 94.
[14] A. MICKONYTÉ, *The Right to a Name Versus National Identity in the Context of EU Law: The Case of Lithuania*, in *Review of Central and Eastern European Law*, 2017.
[15] Opinion of Advocate-General Emiliou of 8 March 2022 in the Boriss Cilevičs case, C-391/20, ECLI:EU:C:2022:638.
[16] See on the free movement of goods and language requirements: S. VAN DER JEUGHT, *Regulatory Linguistic Requirements for Product Labelling in the Internal Market of the European Union: How the curious Case of the Irish Dog demonstrates the Need for a More Coherent EU Language Policy*, in *Comparative Law and Language*, vol. 1, 2022.

challenged by relying on national identity, as a violation of Art. 4 (2) TEU. The European institutions are under the obligation to interpret and apply EU acts in accordance with the national identity.[17]

When the article was first established in the Treaty of Maastricht it provided that "the Union shall respect the national identities of the Member States".[18] After Lisbon Art. 4(2) TEU has been amended. It seems to have a broader scope, referring to the *fundamental*, constitutional and political structures of the Member States.[19] Part of the national identity is the linguistic identity and culture of a Member State. The wording of Art. 4 (2) TEU shows that this article may only be invoked by the Member States regarding *fundamental* or core elements of the national identity. Art. 4(2) TEU remains broad and somewhat abstract. It does not grant the Member States the absolute right to derogate form EU law, it is more a balancing provision.[20] As such the national identity remains undefined in the case law of the Court of Justice, the Court did not (yet) elaborate on the concept. The national identity clause goes hand in hand with the EU constitutional identity, which includes the core values in Art. 2 TEU and Art. 3 TEU.[21]

3. Language in the case law of the Court of Justice

We will discuss in this section the development of language in the free movement of persons in the case law of the Court of Justice. While, as will be seen, language is being framed by the Court in the context of national identity of Member States, the concept of what constitutional identity is, is still not clearly defined. This creates room for the Court to allow Member States' protectional measures, but the limits of such grounds are difficult to set. While national identity as a concept exists in EU Treaty law, the case law on national identity is limited, it seems that the Court is hesitant to use the concept.[22]

The first case in which language protection was balanced with the aim of the internal market freedom to move and work in another Member States is the case of *Groener*.[23] The case revealed how language requirements could lead to indirect discrimination and could violate the free movement of workers (Art. 45 TFEU and Regulation 492/11). Such indirect discrimination may be justified with a legitimate aim if it is proportional and necessary.[24] In turn the proportionality and non-discrimination limits the discretion of Member States to promote their language.[25] Regulation 492/11 on the free movement of workers explicitly provides that 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'.[26] In *Groener* this provision was invoked, successfully, by the Irish authorities (as discussed hereafter). By that case law the constitutional identity of Member States was invoked as a ground for justification of free movement, thereby creating language as a barrier to free movement—in some cases. In this case law the different forms of protection are visible and collide: the protection of one own language at the one hand and protection of citizens who should be able to exercise their free movement rights on the other.

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[17] G. DI FREDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards* in *European Public Law*, 2019, p. 365.

[18] Art. 6 (3) TEU.

[19] H. VAN EIJKEN, *Case note: Case C-319/09 Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn v. Vilniaus Miesto Savivaldybės Administracija and Others, Judgment of the Court (Second Chamber) of 12 May 2011*, in *Common Market Law Review*, 2012, p. 820.

[20] Opinion of Advocate-General Emiliou of 8 March 2022 in the Boriss Cilevičs case, *op. cit*.

[21] L. F. M. BESSELINK, *National and Constitutional Identity before and after Lisbon*, in *Utrecht Law Review*, 2010.

[22] E. GLOOTS, *National Identity*, in *EU Law,* Oxford, 2015.

[23] ECJ, judgment of 28 November 1989, Groener v. Minister for Education, case 379/87, ECR 3967.

[24] ECJ, judgment of 22 October 2014, Blanco and Fabretti v. Agenzia delle Entrate, joined cases C-344 and 367/13 EU:C:2014:2311.

[25] ECJ, judgment of 22 December 2010, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, case C-208/09, ECLI:EU:C:2010:806, par. 90.

[26] C. BARNARD, *The Substantive Law of the EU, the Four Freedoms,* Oxford, 2019, p. 241.

3.1. Language as a shield: protection of own language in the context of the free movement of persons

The case of *Groener* concerned a Dutch art teacher who was refused a permanent appointment at a design college in Ireland (Dublin). Her request was refused, because she did not hold a certificate of proficiency in the Irish language (The *Ceard-Teasta Gaeilge)*. An exemption for the language requirement could have been made by the minister for candidates from outside Ireland, but only if there are no other fully qualified candidates for the position, which was not the case.[27] However, Groener did not need to use Irish when she would be teaching art. Notably, the Court of Justice did not check whether the requirement was needed by the nature of the position but rather focussed on the question of whether the language requirement could be justified. As the Irish government argued this language requirement is part of its national policy to promote the use of the Irish language as a means of expressing national identity and culture.[28] For the implementation of such policy, education is important, as the Court recognised, therefore, the language requirement was compatible with Art. 3 (1) Regulation 1612/68, provided that the level of knowledge required was not disproportionate in relation to the objective pursued.[29] The Court did rule that according to the principle of non-discrimination the Member States may not demand that the knowledge of the language is acquired on territory of the Member State at stake.[30] The Court of Justice clearly stated that language requirements may be requested, in order to protect the language of a Member State. The Court referred in that regard to the official first language of the Member State. In that context, the Court held that "it is not unreasonable to require them to have some knowledge of the first national language", "provided that the level of knowledge required is not disproportionate in relation to the objective pursued".[31] The Court considers that the role of teachers in education and language is essential, especially with regard to language regimes. It was also important that Irish Gaelic was the national and first official language in Ireland, the Court added. It seems therefore that the national identity could only be invoked because it concerned a profession that was connected well to language regimes and that it concerned the official first language. The judgment is important as it balances free movement and protection of language. It is clear that the Court tried to strike a fair balance, in order to protect free movement and abolish discrimination, while at the same time giving Member States some room to have protectionary measures.

The Court dealt with a restriction of the freedom of establishment on the basis of language requirements in the private sector in the *Haim II* case. An Italian national, Mr. Haim, had a diploma in dentistry, which was recognised in Belgium as equivalent to "*the diplôme legal Belge de licencié en science dentaire"*. He wanted to work on a social security scheme in Germany, but the German rules of admittance to such a scheme require a non-national to have sufficient knowledge of the national language before he is allowed to qualify as a dental practitioner under a social security scheme. According to the Court, the reliability of the communication between the dental practitioner and the patient can constitute an overriding reason of general interest as long as the requirement is proportional to the aim pursued.[32] Appropriate knowledge of the language of the Member State is needed for dialogues with patients, compliance with rules of professional conduct and the relevant dentistry law in the Member State of establishment. The Court considered that "it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language".[33] In this approach the Court also includes consumer (or patient) protection together the free movement and the language interests.[34] Moreover, the Court seems to protect also the interest of those migrants

[27] ECJ, Groener judgment, *op. cit*., par. 6.
[28] ECJ, Groener judgment, *op. cit*., pars. 18–19.
[29] ECJ, Groener judgment, *op. cit*., par. 21.
[30] ECJ, Groener judgment, *op. cit*., par. 23.
[31] ECJ, Groener judgment, *op. cit*., pars. 20–21.
[32] ECJ, judgment of 4 July 2000, Haim II, ECLI:EU:C:2000:357, pars. 59–60.
[33] ECJ, Haim II judgment, *op. cit*., par. 60.
[34] I. URRUTIA, *Approach of the European Court of Justice on Accommodation of the European Language Diversity in the Internal Market: Overcoming Language Barriers or Fostering Linguistic Diversity?*, in *Columbia Journal of European Law*, 2012, p. 258.

who speak a different language in another Member States. Hence, even though the case was a free movement, the *obiter dicta* embrace also multilingual and multicultural aspects.

The case of *Angonese*[35] concerned free movement of workers, as was the case in *Groener*. The Court of Justice confirmed the national competence of the Member States to conduct their own language policy. The case concerned an Italian bank, which recruited only persons with a certificate of bilingualism (German and Italian) which was issued in Bolzano. Angonese, an Italian national, was not admitted by the bank to the competition, even though he submitted other evidence of his linguistic knowledge. According to the Court this requirement violated Art. 45 TFEU, since the measure did not comply with the principle of proportionality. The Court stressed that "even though requiring an applicant for a post to have a certain level of linguistic knowledge may be legitimate and possession of a diploma such as a certificate may constitute a criterion for assessing that knowledge, the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, must be considered disproportionate in relation to the aim in view".[36] Hence, even though the Court accepted the linguistic knowledge requirement, the principle of proportionality demands that it should be possible to submit other proof of the language knowledge.

The cases discussed above have a public character, in the sense that it is the government deciding which language is used by its institutions. In addition to that line of case law, the case of *Las*[37] concerns the private relationship between individuals and language requirements. In that case the Court did not accept the protection of one of the official national languages of Belgium as a justification ground, because of the principle of proportionality.[38] The case concerned a Flemish decree that required all cross-border employment contracts between an employee and an employer to be drafted in Dutch. Non-compliance with the decree meant nullity of the contract. Belgium argued that the decree aimed to protect an official national language, protect employees and ensure effective supervision by the national authorities.[39] However, these justification grounds did not meet the proportionality requirements and were therefore contrary to EU law.[40] Furthermore, parties in a cross-border contract do not necessarily have knowledge of the official language(s) of a Member State. In this case, the employer was a Singaporean national with no knowledge of the Dutch language.[41] Therefore, in order to ensure the establishment of free and informed consent between the parties, they must be able to draft their contract in a language other than the official language of that Member State.[42] The Court held that, in principle Member States may justify such measures because of the protection of their language and that of workers but prohibiting an alternative translation of all parties understanding that language is, according to the Court, not proportional. The fact that the contract would be void seems a strict sanction, in relation to the aim of protecting the Dutch language. The Court explicitly referred to diversity of languages and national identity in its' judgement, stating: "the Union must respect its rich cultural and linguistic diversity. In accordance with Art. 4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those States".[43]

This case diverges from the other judgments, since Dutch is an official language that is not common to the entire territory of Belgium, but only of its constituent parts, Flanders. Moreover, as observed above, the measure was applicable in a civil procedure and did not concern state authorities. The decree at stake had a regional nature as it was adopted by the Flemish authority. The Advocate General in his opinion argued that the protection of an "official language, whether national or regional, is an objective of general interest which the Court has accepted as a legitimate justification

[35] ECJ, judgment of 6 June 2000, Angonese, case C-281/98, ECR I–4139.
[36] ECJ, Angonese judgment, *op. cit*, par. 44.
[37] ECJ, judgment of 16 April 2014, Las v. PSA Antwerp, case C–202/11, ECLI:EU:C:2013:239.
[38] ECJ, Las judgment, *op. cit*., par. 24.
[39] ECJ, Las judgment, *op. cit*., par. 24.
[40] ECJ, Las judgment, *op. cit*., par. 33.
[41] See on this case also M. Finck, *Case Comment: Las v PSA Antwerp NV (C–202/11),* 2014, https://eutopialaw.wordpress.com/2013/04/29/case-comment-las-v-psa-antwerp-nv-c-20211/.
[42] ECJ, Las judgment, *op. cit*., par. 31.
[43] ECJ, Las judgment, *op. cit*., par. 26.

for adopting a policy for the protection and promotion of a language".[44] The Court confirmed this line of case law again, as the Advocate-General suggested. The Court also recognized the "social protection of employees" and the "facilitation of the related administrative controls" as overriding interest, which might be invoked by the Member States.[45]

In the recent case *Boriss Cilevičs* the question was whether Latvian legislation institutions of higher education offering courses only in the official national language was allowed in the internal market. The Court ruled that the Latvian legislation makes it less attractive and more difficult for higher institutions based in other Member States to exercise the freedom of establishment as guaranteed by Art. 49 TFEU. When exercising the national competence regarding education, Latvia must comply with the free movement provisions. In principle, the objective of promoting and encouraging the use of one of the official languages of a Member States, can constitute an overriding reason. Interestingly, the Court leaves the final decision to the Latvian constitutional court as it provides the elements of interpretation that may be useful for them to carry out that analysis. When assessing the suitability of the measure, the Court mentions that two private higher education institutions have a special status as their operation is governed by special laws. This means that since the provided legislation does not apply to them, their education can be in another official EU language. It follows that this derogation arrangement can also apply to any other institution in a similar situation. In the view of the Court, the exceptions do not hinder attainment of the objective and the implementation is consistent. Without the exceptions, the legislation would exceed what is necessary and proportionate for attaining the objective of promotion and defence of that language. The Court does not leave a broad discretion for the national court to decide on the assessment of the proportionality test. It shows that on the one hand the Court is lenient in the sense that constitutional identity and protection and promotion of an official language is accepted, while on the other hand, the Court is strict in watching whether the measure at stake is proportional. Similar case law is seen in the field of EU citizenship and the revocation of nationality, which is also a very sensitive area of law to operate for the Court.[46]

Interestingly, Advocate General Emiliou in his opinion in this case that monolingualism de facto imposed in a Member State, is not the diversity and richness the EU desires to promote in an "ever closer union" among the peoples of Europe. However, the focus of the Court is on the rights and freedoms mentioned in the referred questions. It is remarkable that the Court does not discuss the position of the Russian speaking linguistic minority in this case. While this is very sensitive for various reasons, the rights of minority groups are at stake as well. The Advocate-General did go into that matter and argued that national courts might be less in favour of providing protection to individuals from a minority language group. We will discuss this hereafter as well.

3.2. Protection of minority languages

The *Bickel and Franz and Grauel Rüffer* case show that the prohibition of discrimination on the basis of Art. 18(1) and 21 TFEU can have an indirect impact on linguistic laws and policies of the Member States.[47] Non-discrimination on the grounds of language is prohibited by Art. 21 of the Charter. However, the scope of this provision is limited to EU institutions and bodies and to the Member States only when they are implementing Union law.[48] Art. 18 (1) TFEU provides the general prohibition on the grounds of nationality. As seen in the *Bickel and Franz*[49] case, this provision may have an indirect impact on the linguistic laws and policies of the Member States. Even more, this case showed that European integration is not solely economic.

[44] Opinion Advocate-General Jääskinnen of 12 July 2012 in the Las case, C–391/20, ECLI:EU:C:2012:456, par. 55.

[45] ECJ, Las judgment, pars. 27–30.

[46] ECJ, judgment of 12 March 2019, M.G. Tjebbes and Others v Minister van Buitenlandse Zaken, ECLI:EU:C:2019:189.

[47] ECJ, judgment of 24 November 1998, Bickel and Franz, case C–274/96, ECR 7637.

[48] Art. 51 EU Charter of Fundamental Rights.

[49] ECJ, Bickel and Franz judgment, *op. cit*.

According to a presidential decree the authorities in Bolzano, had to use the language of the citizens of Bolzano concerned. The decree aimed to protect the minority of German-speaking citizens in this province by allowing them to use German with the judicial and administrative authorities. Mr Bickel, an Austrian lorry driver, and Mr Franz, a German tourist, were prosecuted for criminal offenses in Bolzano. They requested to conduct the criminal proceedings in German, however, only German-speaking residents of Bolzano could invoke these provisions. German-speaking nationals of other Member States are at a clear disadvantage.

First of all, the Court had to consider whether the choice of language in criminal proceedings falls within the scope of the Treaty and whether therefore Art. 18 TFEU would apply. The Court held that this is the case. Every citizen of the Union that exercises its right to move and reside freely in another Member State, based on Art. 21 TFEU.[50] When EU citizens exercise their free movement rights, they may not be treated differently than nationals of the host state with regard to the use of language in criminal proceedings.[51]

The Italian rules discriminated non-residents, and therefore the rule concerned indirect discrimination, which has to be justified by the Member State.[52] According to the Court of Justice, the protection of an ethno-cultural minority can constitute a legitimate aim. The proportionality test, however, was not fulfilled. In this case the Court stated that "Protection of cultural minority residing in the province in question does not constitute a valid justification in this context. Of course, the protection of such a minority may constitute a legitimate aim. It does not appear, however, from the documents before the Court that that aim would be undermined if the rules in issue were extended to cover German- speaking nationals of other Member States exercising their right to freedom of movement".[53] The Court recognises the protection of minority groups, but at the same time focuses on free movement and non-discrimination. If protection of minority language is possible while ensuring access to other—non-residents in this case—the less restrictive measure should be adopted.

The case of *Rüffer* concerned civil proceedings, also in the province of Bolzano, Italian citizens were only allowed to use German in the civil court, when they were residing in Bolzano.[54] The Court confirmed that in civil proceedings the *Bickel and Franz* judgment also applies.[55] It follows that all EU citizens are entitled to rely on linguistic provisions in all judicial proceedings.[56] Because German-speaking citizens should not be discriminated against because of their place of residence.[57] The Court rejected the Italian statement that greater use of the language rules would lead to more costs since aims of a purely economic nature cannot constitute pressing reasons of public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty.[58] The case confirmed the way the Court in *Bickel and Franz* reasoned that the language in criminal proceedings would fall under EU law, because of the application of Art. 18 and 21 TFEU. In a free movement situation, and when language rights are granted to own nationals who are residing, such language rights should not be rejected for those EU citizens who have exercised their free movement rights.[59]

3.3. Regulation of names in the member states and European citizenship

The use of nobility titles and the construction of names are significantly connected to language regimes. These national rules on names or titles in relation to free movement, protection of

[50] ECJ, judgment of 2 February 1989, Cowan, case C–186/87, ECLI:EU:C:1989:47.
[51] ECJ, Bickel and Franz judgment, *op. cit.*, par. 26.
[52] ECJ, Bickel and Franz judgment, par. 27; ECJ, judgment of 15 January 1998, case C–15/96, Kalliope Schoning-Kougebetopoulou v. Freie und Hansestadt Hamburg, ECR I-47, par. 21.
[53] ECJ, Bickel and Franz judgment, *op. cit.*, par. 29.
[54] ECJ, judgment of 27 March 2014, Grauel Rüffer, case C-322/13, ECLI:EU:C:2014:189, pars. 7–8.
[55] ECJ, Grauel Rüffer judgment, *op. cit.*, par. 19.
[56] ECJ, Grauel Rüffer judgment, *op. cit.*, par. 20.
[57] ECJ, Grauel Rüffer judgment, *op. cit.*, par. 21.
[58] ECJ, Grauel Rüffer judgment, *op. cit.*, par. 25; ECJ, judgment of 17 March 2005, Kranemann, case C–109/04, ECLI:EU:C:2005:187, par. 34.
[59] See on this case also S. PEERS, *Minority languages and court proceedings: the possibilities and limits of EU law*, http://eulawanalysis.blogspot.com/2014/03/minority-languages-and-court.html.

constitutional identity, equal treatment and Union citizenship were ruled by the Courts in the cases *Konstantinidis*[60], *Garcia-Avello*[61], *Grunkin and Paul*[62], *Sayn-Wittgenstein*[63] *and Runevič-Vardyn*[64] are of importance. In these rulings, the Court uses the so-called "serious inconvenience" test to determine whether a national rule on the regulation of names restricts free movement of Union citizens.[65] These cases occur in the context of free movement too, but they have a particular angle, since the Court approaches it in terms of serious inconveniences, rather than a restriction to free movement.

The way Member States regulate the spelling of names was impacted by the Court for the first time in Konstantinidis. Christos Konstantinidis, Greek masseur and assistant hydrotherapist residing in Germany. He stated that the transliteration by the local Registry Office of his name Χρήστος Κωνσταντινίδης to "Christos Konstadinidis" was hindering his business and social relations, since the formulation was distorting the pronunciation. Therefore, he requested to respell his name as "Konstantinidis". In the German marriage register his name was was transliterated as "Hréstos Kónstantinidés" according to the Convention on the Representation of Names and Surnames in Registers of Civil Status. His birth certificate was transliterated accordingly. Remarkably, Advocate General Jacobs stepped away from a purely economic approach and created room for the human rights aspect of a name.[66] He stated, "Community law does not regard the migrant worker (or the self-employed migrant) purely as an economic agent and a factor of production (…); it regards him as a human being who is entitled to live in another Member State 'in freedom and dignity'". The Advocate General observed several human rights instruments and the constitutions of the Member States. This led to the conclusion that there is a principle that a State must respect not only the physical well-being of the individual, but also his dignity, moral integrity, and sense of personal identity. He concluded that there is no doubt that a Member State violates these "moral rights" when it obliges an individual to abandon or modify his name. Such violation of a fundamental right can only by a fundamental and urgent reason.

The Court did not follow the reasoning of the Advocate General as it relied on an economic approach. The provision of the right of establishment constitutes one of the fundamental legal provisions of the Community (Art. 52 EEC, now Art. 43 TFEU). Accordingly, the Court continued that "By prohibiting any discrimination on grounds of nationality resulting from national laws, regulations or practices, that article seeks to ensure that, as regards the right of establishment, a Member State accords to nationals of other Member States the same treatment as it accords to its own nationals".[67] Transcription rules are incompatible with the right of establishment if their application causes a national of another Member State such a degree of inconvenience that it would interfere with his freedom to exercise the right of establishment. This could be the risk that potential clients confuse him with other persons.[68]

In *Garcia-Avello* the Court stated for the first time that there was a connection between national laws on names and the right of free movement and residence as resulting from EU citizenship. According to national law, it was not possible for the Garcia Avello children with dual nationality, to register their two surnames in Belgium. The Court ruled that a Member State cannot simply apply its national law on persons with dual nationality, Spanish and Belgian in this case. The discrepancy in surnames would create serious inconveniences on professional and private levels for the individuals concerned and restrict the right of free movement of persons. The Court's approach was economic as no direct link to the protection of human rights principles was made.

[60] ECJ, judgment of 30 March 1993, Konstantinidis, case C–168/91, ECR I–1191.
[61] ECJ, judgment of 2 October 2002, Garcia Avello v Belgium, case C–148/02, ECLI:EU:C:2003:539.
[62] ECJ, judgment of 14 October 2008, Grunkin and Paul, case C–353/06, ECLI:EU:C:2008:559.
[63] ECJ, judgment of 20 December 2010, Sayn-Wittgenstein v Landeshauptmann von Wien, case C–208/09, ECLI:EU:C:2010:806.
[64] ECJ, judgment of 12 May 2011, Malgožata Runevič-Vardyn, case C–319/09, ECLI:EU:C:2011:291.
[65] See on this test also A. YONG, *The Rise and Decline of Fundamental Rights in EU Citizenship*, London, 2019, pp. 97–100.
[66] Opinion of Advocate-General Jacobs of 9 December 1992 in the Konstantinidis case, C–168/91, ECR I–1993.
[67] ECJ, Konstantinidis, *op.cit*., pars. 12–14.
[68] ECJ, Konstantinidis, *op.cit*., pars. 15–16.

In the case of *Grunkin and Paul*[69], the double surname of the son of two German nationals living in Denmark was under debate. While according to Danish law it was possible to grant such a double name, this was not accepted by the German registry office. The office refused to recognise the surname given to him in Denmark, because granting a double name was not in accordance with German law. The Court found the refusal incompatible with Art. 21 TFEU, since it would create a "serious inconvenience" to the son, who at that time was already 10 years old. The Court refers to the possible confusion of identity, especially to official documents, which would have different surnames.

The Court directly mentioned Art. 4(2) TEU in *Sayn-Wittgenstein*.[70] That case concerned the recognition of a noble title (Fürstin), which was granted to Sayn-Wittgenstein according to German rules. However according to Austrian law on abolishing noble titles and a ruling of the constitutional court, the title could not be accepted in Austria. This meant that the free movement was hindered, since Sayn-Wittgenstein exercised services in Germany in luxury estate sale. While the case does not concern language as such, it does show how identity and spelling of names could conflict with the exercise of free movement. The Court of Justice ruled that Art. 7 and 8 of the European Convention of Human Rights (ECHR) protect the identity and private life of individuals and that a name is a fundamental element of that. This ruling reveals that the Court also included human rights, explicitly referring to the ECHR, and does not only has an economic approach. The Court acknowledges the fact that the Austrian measure would fall under a legitimate aim to restrict free movement rights, with reference to Art. 4(2) TEU, it also held that the measure was not in violation of proportionality. Hence, it ruled that "By refusing to recognise the noble elements of a name such as that of the applicant in the main proceedings, the Austrian authorities responsible for civil status matters do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them".[71]

In the case of *Runevič-Vardyn* the Court ruled that "the objective pursued by national rules (…) designed to protect the official national language by imposing the rules which govern the spelling of that language, constitutes, in principle, a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence provided for in Art. 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law".[72] The Court is hesitant concerning the position and protection of linguistic minorities in this case. The Member State has the competence to regulate the entries of its nationals in official identities. Significantly in this case the Member State could rely on a linguistic justification, which protected the official language. At the same time the linguistic minority rights of the minority group was not addressed.[73] In a similar vein the Court did not address the same question on minority groups and language in the more recent case *Boriss Cilevičs*. While the Court chose to rule the case on the basis of free movement, the question is how the fundamental rights of minority groups are protected. Especially since the Advocate-general, in that case, did explicitly address minority rights.

4. A balancing act: where free movement and language meet

We have seen the different challenges that occur when EU citizenship, and especially free movement, meets language requirements or obstacles. While protecting a language can be beneficial from a language perspective, free movement creates exchange of culture and languages as well.

[69] ECJ, Grunkin and Paul judgement. Already in 2005, the Stadt Niebüll referred questions on this particular case, but those preliminary questions were not answered, since the reference was declared inadmissible, because the Stadt Niebüll was not a judicial body in the sense of Art. 267 TFEU, see ECJ, judgment of 27 April 2006, Standesamt Stadt Niebüll, case–C–96/04, E.C.R. I–03561.

[70] ECJ, Sayn-Wittgenstein, par. 92. Previously the Court referred to national identity in the ECJ judgment of 2 July 1996, Commission v. Luxembourg, case C–473/93, E.C.R. I–03207, par. 35.

[71] ECJ, Sayn-Wittgenstein*, op. cit*., par. 93.

[72] ECJ, Runevič-Vardyn, *op. cit*., par. 87.

[73] H. VAN EIJKEN, *Case Note: Case C–319/09 Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn v. Vilniaus Miesto Savivaldybès Administracija and Others, Judgment of the Court (Second Chamber) of 12 May 2011*, cit., pp. 809–826.

Especially in border regions, such as Bolzano (Italy), but also Limburg (the Netherlands), languages and borders are part of the daily life of EU citizens. A language can be perceived in that way—sometimes—as a border.

In the European Union cultural diversity and constitutional identity are part of the primary values of the European Union, while at the same time free movement of EU citizens is endorsed by the Treaties and secondary legislation. How can these two values be balanced? And who decides on what belongs to the national identity of Member States?

The Member States often base their linguistic rules on the need to protect cultural diversity or national identity. Between these conflicting rights and values, an ongoing balance is needed in the multilingual and multicultural context of the EU. The question is how to reconcile the value of linguistic diversity within the European Union and the national constitutional identity, also in connection with human rights protection. Under this question, it is vital to recognize the difficulty for minority groups and minority groups and languages. Whereas in certain groups knowledge of language is a difficulty, access to rights, including the right to free movement, but also political rights and the right to education are an immense obstacle.

The national identity as a shield to protect one language from free movement, in a way, is still not clarified. National identity, is, as Advocate General in the case of *Boriss Cilevičs*, points out, a matter for national deliberations and should be examined by a national court. At the same time, constitutional identity should be about the core values of a Member States,[74] to which language belongs. The Court maneuvers between the national identity and the free movement cautiously, trying to grant discretion to national courts, while at the same time seeking to protect free movement. In *Runevič-Vardyn*, in *Las*, as well as in *Boriss Cilevičs* the protection of the official language was the reason for the Member States to invoke national identity as a legitimate aim to restrict free movement.[75] It is interesting to see that the Court in *Las* is much more hands-on to fill in proportionality than in *Runevič-Vardyn* and *Boriss Cilevičs*. The tension between the protection of the Member States' official language could be an obstacle to minority rights, as it might exclude persons to have access to the legal system or the identity in case of spelling of names. This tension is still unsolved and should be reconciled with the value of linguistic diversity.[76]

Looking at the case law of the Court it is clear that the EU national linguistic requirements, such as language skills or a different name regulation, are restrictions to the exercise of the free movement rights, which need to be justified. Language protection or promotion is invoked by the Member States as legitimate aim to protect the fundamental right of language, linguistic rules are in that sense framed as a public interest and fundamental right.[77] Language is at the crossroad of—sometimes—opposing values and interests. To find a balance, the Court uses its traditional reasoning scheme of restriction, justification, and proportionality.[78] It seems, however, that fundamental rights are not that explicitly present in the case law. The Court balanced free movement with national fundamental interests, as it does usually in free movement cases. We have seen that fundamental rights are sometimes explicitly mentioned, but in other cases the Court is reluctant to take a human rights approach to linguistic diversity.

5. Conclusion

While each wine has its' own flavour and wine-making process, also languages consist of different ingredients and may have a different background, while also having some common

[74] G. DI FEDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, p. 365.
[75] G. DI FEDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, *op. cit*., p. 395.
[76] O. DUBOS, V. GUSET, *European Law and Regional and Minority Languages*, in F. IPPOLITO, S. IGLESIAS SÁNCHEZ (eds.), *Protecting Vulnerable Groups: The European Human Rights Framework*, Oxford, 2015, p. 128.
[77] E. PULICE, *EU Multilingualism and Rivalries of Rights: from Barriers to Plurilingualism*, in S. DE VRIES, E. IORIATTI, P. GUARDA, E. PULICE (eds.), *EU Citizens' Economic Rights in Action*, Cheltenham, 2018, p. 262.
[78] S. VAN DER JEUGHT, *EU Language Law*, cit., p. 265.

grounds—if one view letters as the grapes for instance. Language is much connected with identity, and culture and is also a precondition for citizens' participation in society, either national or European.

Since language is a precondition for participation it also may create a gap between EU citizens. The fundamental idea behind the free movement of EU citizens is also the exchange of views and to creation a space where citizens can use opportunities within the European Union. The right to vote for municipal elections (Art. 22 TFEU) is just an example of cross-border integration opportunities. Cross-border movement stimulates the exchange of culture, language, and views and creates a dialogue between different EU citizens. As was stated back in 1979 in the Tindemans report "The proposals for bringing Europe nearer to the citizen are directly in line with the deep-seated motivations behind the construction of Europe. They give it its social and human dimensions. They attempt to restore to us at the Union level that element of protection and control of our society which is progressively slipping from the grasp of State authority due to the nature of the problems and the internationalization of social life. They are essential to the success of our undertaking: the fact that our countries have a common destiny is not enough. This fact must also be seen to exist".[79] About the case law on language and the internal market we have seen how language protection may be used as a legitimate aim to restrict free movement, taking into account the proportionality of the rule. A hardcore language requirement will therefore probably not be accepted, because that would constitute indirect discrimination on grounds of nationality. However, the Court takes national protection of the official languages seriously, albeit it is framed as a free movement restriction rather than a fundamental right *an sich*. Linguistic diversity or protection of a language is not an absolute right, but it is weighed in light of the freedoms of the internal market.

If we analyse the Court's case law, it becomes clear how language and identity are intertwined. The fact that the spelling of a name may be different in another Member State than in the Member State of nationality may constitute "serious inconveniences" for EU citizens to travel to the other Member States and to identify themselves. At the same time, the Court is lenient toward the Member States if national constitutional provisions are invoked as a legitimate aim. The Court seeks a balance between respect for cultural-linguistic diversity and free movement rights. As seen in *Konstantinidis*, *Garcia Avello* and *Grunkin-Paul* the Court's approach to the "serious inconvenience test" was at first very economic. This was in line with the economic arguments and the alleged infringed articles the parties invoked. The moral rights of individuals were already recognized by AG Jääskinnen in his opinion in *Konstantinidis*. The Court made room for human rights in its approach in *Sayn-Wittgenstein* and *Runevič-Vardyn*, as it pointed out that a person's name is a constituent element of his identity and private life. In *Runevič-Vardyn*, the Court interpreted Art. 22 of the Charter and 3(3) TEU in favour of the official state language. By doing so, the approach of the Court is more reasonably balanced between the protection of linguistic diversity and the free movement of persons. Hence, in the case law of the Court of Justice, we see how the case law regarding language started from a more economic perspective, which changed after Lisbon in a more protectional approach since at the Treaty of Lisbon Art. 4(2) TEU was introduced. In some cases, we see a more human rights approach of the Court, albeit still within the free movement context.[80] However if we consider the case law of the Court overall it is clear that free movement as a fundamental freedom is the approach of the Court rather than a fundamental rights approach. We see therefore the importance of the market-approach in these cases very strongly.

Important is that the interest of the Member States to protect their own language does not interfere too much with the diversity of languages. As the Advocate-General stated "It is not in the interest of the Member States, nor of the European Union, to create monolingual (or bi- or trilingual) 'islands' within the European Union".[81]

Language can enable citizens to participate, even in a foreign EU Member State in politics, criminal proceedings, and administrative procedures. However, Member States may have good

[79] Tindemans report, 1975, https://www.cvce.eu/content/publication/1997/10/13/284c9784-9bd2-472b-b704-ba4bb1f3122d/publishable_en.pdf.

[80] See also E. MEYERMANS SPELMANS, *The Balance between Linguistic Diversity, in the EU and Free Movement of Persons*. A thesis submitted in partial fulfilment of the requirements for the degree of LL.M. at Utrecht University, Master Track: European Law, July 2022.

[81] Opinion of Advocate-General Emiliou of 8 March 2022 in the *Boriss Cilevičs case*, *op. cit*.

reasons to protect their language and therefore set language requirements. Important to note is that the exchange of culture also enhanced diversity and the exchange of culture. It is the balance that counts.

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