

Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.

Respecting Constitutional Identity in the EU

1. Introduction

European concepts of democracy and liberty rest on the principle of equality of citizens. The idea of equality inherent in citizenship entails that the public status of persons should not depend on birth. This is one of the distinct tenets of the French Revolution that have become part of the European political heritage. It concerns not merely a matter of rights pertaining to human beings *qua* humans, but is quintessentially a matter determining the nature of the polity. The precise constitutional and legally binding terms in which the principle of equality of citizens is cast differ from country to country. This is connected with the republican nature of the political community concerned, which in turn is not unrelated to the particular historical political experiences, in particular experiences with forms of monarchy and aristocracy. Thus, the Italian Republic had constitutionally banned the family of former kings from its territory (this constitutional provision was withdrawn per 23 October 2002) and its republican constitution provides that "titles of nobility shall not be recognized".¹ In seven Member States, however, the head of State is in principle a hereditary public office. In these as well as in some other Member States, various titles of nobility are tolerated, with the UK as the extreme case, as it only allows persons carrying certain noble titles as members of one of its Houses of Parliament, to the extent that if the government wants to appoint a citizen to the House of Lords, that person must first be elevated to noble rank.² The status of hereditary titles and the constitutional identity of the State were at issue in the case discussed here. The judgment rendered by the ECJ is the first in which Member State legislation expressing a distinct constitutional identity was accepted as a reason justifying a restriction of the citizen's rights to free movement in connection with Article 4(2) TEU, i.e. the duty for the EU to respect the constitutional identity of a Member State.

2. The facts

¹ Arts. XIII and XIV of the Constitution of the Italian Republic; given the specification in Art. XIV that noble titles which formed part of place-names before 1922 are retained, it follows that in all other cases noble titles cannot be carried as part of the name.

² Since the reforms in the House of Lords Act 1999 the number of hereditary peers in the House is restricted to 90 members (apart from the Earl Marshall and the Lord Great Chamberlain), while these days elevation to the peerage can only be for life and is not hereditary. The Lords Spiritual are regarded Princes of the Church, but whether they are to be considered Peers is unclear. This was of legal consequence as regards the privileges of peerage, like trial by jury, but the possibility of its exercise since the Peerage Act 1963, its scope and even existence is obscure (though the Standing Orders of the House of Lords still refer to it). Concerning their introduction into the House, the Standing Orders of the House of Lords provide in Art. 8: "Bishops to whom a writ of summons has been issued are not Peers but are Lords of Parliament, and shall be introduced on first receiving a writ and also on translation to another See."

As the Court puts it somewhat curtly, Ilonka Sayn-Wittgenstein "is an Austrian citizen" (para 19). She resides in Germany, where she is estate agent in the luxury real estate sector and sells in particular stately homes and castles. She was born as Ilonka Kerekes. At the age of 47, she was adopted by Lothar Fürst von Sayn-Wittgenstein in Germany and under German adoption law. At the moment of her adoption she carried the name Ilonka "Havel, née Kerekes".³

From that moment onwards, she considers herself no longer "citizen Ilonka" but "Ilonka Fürstin von Sayn-Wittgenstein", a name under which she becomes registered in Germany and Austria.⁴ After the Austrian constitutional court had determined that passing on a foreign title of nobility as part of one's name to an Austrian national by one's adoption in Germany (where such carrying of the title is allowed) is unconstitutional, the *Landeshauptmann* of Vienna changed citizen Ilonka's name in the civil registry *ex officio*, removing the words "Fürstin von". According to the Austrian constitutional court, the unconstitutionality of the noble title as part of the name results from the constitutional provision on equality as it has been implemented in an act of parliament with constitutional rank (*Verfassungsgesetz*), the *Adelsaufhebungsgesetz*, which is further implemented in the prohibition to carry the noble particle "von" and "Fürst" and similar Austrian and foreign noble titles.⁵

The case was brought to court, where Ilonka disputed the decision of the *Landeshauptmann* and invoked the right of each European citizen, princess or not, to freedom of movement as protected by Article 21 TFEU. The *Verwaltungsgerichtshof* referred the question whether Article 21 TFEU precludes competent authorities of a Member State refusing to recognize the surname of a national of that State, determined in another Member State, insofar as it contains a title of nobility which is not permitted in the first Member State under its constitutional law.

Six governments intervened in the case at the ECJ, and they did so on the side of the *Landeshauptmann* of Vienna. All were republics: Austria, Germany, Italy, Czech Republic, Slovakia and Lithuania.

3. The Opinion of the Advocate General

³ See Opinion of A.G. Sharpston, para 25.

⁴ The ECJ follows a policy on how to refer to parties who dispute the indication of their name, which the party involved may not always like. Another crass example of this is the famous *Erich Stauder* case in which the ECJ for the first time recognized fundamental rights as principles of EU law, though the issue was Stauder's right to privacy, in particular not to have his name rendered public; Case 29/69, *Erich Stauder v. Stadt Ulm*, [1969] 419.

⁵ *Verfassungsgerichtshof*, 27 Nov. 2003, Geschäftszahl B557/03, Sammlungsnummer 17060. Retrievable at <www.ris.bka.gv.at/Judikatur/> This case concerned a man who had been registered after adoption by a German lady (under German law) under her family name as Prinzessin von Sachsen-Coburg und Gotha, Herzogin zu Sachsen. The man, however, did not want to be called Princess [etc.] Duchess, he wanted to be registered as *Prinz* and *Herzog*. He appealed to the Austrian Constitutional Court against his registration in Austria under the feminine name, basing his action – not unusual in court cases on noble titles and names – on the right to non-discrimination and the equality clause of the Austrian Federal Constitution (*Bundes-Verfassungsgesetz*). The Constitutional Court determined, however, that none of these noble titles could be registered as this would conflict with the constitutional act on the abolition of the nobility.

In her Opinion, Advocate General Sharpston started out from the necessity of Member State authorities who change the name of a person in a registry of civil status on which an EU citizen has relied in the context of his right to free movement and residence under EU law, to comply with EU law in applying national law on names. She concluded that a restriction of free movement rights can in principle be justified by what she variously referred to as "a fundamental constitutional rule" (para 65) "a rule having constitutional status in a Member State, based on fundamental considerations of public policy such as equality between citizens and the abolition of privilege" (para 71), "a fundamental constitutional principle" (ibid.), but subject to proportionality as a binding principle of EU law, even if this leads to inconvenience in the exercise of the rights of free movement and residence in another Member State. In this regard, the Advocate General specified, firstly, that the national court which is to assess the proportionality of the constitutional rule, must take into account that it should not lead to the prohibition of names which would not normally lead others to believe that the person in question holds a noble title or status (as is the case with a family name like Mueller-Graf, King or Baron-Cohen); nor, secondly, should the Member State refuse to recognize that a citizen may legitimately be known in other Member States by another name which would not be permissible under its own law; while, thirdly the Member State must facilitate such a citizen's task in overcoming any difficulties likely to ensue from the discrepancy, for instance by giving an official certificate on the identity of the person involved under his different names.⁶ Moreover, the national court should assess such factors as any legitimate expectation resulting from actions of their own authorities which may have led the citizen to trust that the name was legitimately carried previously (in this case the legal uncertainty existing before the Austrian constitutional court judged on the matter), the length of time over which the name may have been used without challenge by those authorities, and the personal and professional interest which the citizen may have in maintaining the use of a previously recognized name.

Finally, the Advocate General opined that only "a fundamental constitutional principle or other consideration of public policy in the Member State concerned" can justify a prohibition on the acquisition, possession or use of a name in a form which differs according to the sex of the person concerned, such as the change of the masculine *Fürst* to the feminine *Fürstin*. This was explicitly added as a consequence of the Lithuanian Government's "vehement defence of its own differentiated naming system, enshrined as a constitutional value, and the question of [gender] differentiated surnames in Irish was raised at the hearing" (para 70).

The Advocate General did not refer to Article 4(2) TEU or to the concept of national identity inherent in the political and constitutional structure of a Member State directly. She did, however, consider it appropriate to assess whether the justifying constitutional rule or principle is indeed legitimate and fundamental, even if not so necessary that it should apply in all Member States (paras. 59-65), and concluded that indeed it is. While she found it evidently a matter for the EU courts to assess the legitimacy and fundamental nature of the constitutional provision, in her opinion it is for

⁶ In this context it is worth mentioning the Commission's Green Paper of 14 Dec. 2010 (a week before *Sayn-Wittgenstein* was handed down), COM(2010)747 final, "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records".

the competent national courts to assess the proportionality of the fundamental constitutional rule in the particular circumstances of the case.

4. The judgment of the Court

The second chamber of the ECJ, decided the case in a composition of five judges.⁷ It first determined that the situation of the applicant in the main proceedings falls within the substantive scope of European Union law, by establishing that "in her capacity as citizen of the Union", she has made use of the freedom to move to and reside in another Member State, and is therefore entitled to rely on the rights conferred by Article 21 TFEU on all citizens of the Union. Basing itself on statements during the hearing concerning her professional activities, the Court noted that she can also in principle rely on the freedom to provide services (Art. 56 TFEU).

The Court, however, added two significant preliminary observations. It firstly noted that the referring court posed a question on Article 21 TFEU, *irrespective* of whether the person concerned engaged in an economic activity (para 41). Secondly, the ECJ framed the case as one on the legitimacy of invoking national constitutional provisions in cases within the substantive scope of EU law. It did so by stressing that the referring court does not consider it necessary to state in what capacity the applicant in the main proceedings resides in Germany; it

"wishes in essence to ascertain whether reasons of a constitutional nature may authorize a Member State not to recognize all the elements of a name obtained by one of its nationals in another Member State, and *not* whether a failure to recognize a name legally acquired in another Member State constitutes an obstacle to the freedom to provide services guaranteed by Article 56 TFEU." (para 41, emphasis added)

Next, the Court proceeded to determine the existence of a restriction of the citizenship right of free movement and residence. It first pointed out that a person's name is a constituent element of his identity and of his private life, as protected by Article 7 of the Charter of Fundamental Rights and Article 8 of the ECHR, and reasserts that legislation placing a national of a Member State at a disadvantage by the mere use of his right to freedom of movement constitutes a restriction of his free movement citizenship right. In this respect, the Court called to mind earlier case law in which it established that being forced to use different names in different Member States is liable to cause serious inconvenience, and place those concerned at a disadvantage (*Grunkin and Paul*; *Garcia Avello*⁸).

The Court conceded that the only official registration of her name was in Austria and only Austria could issue a passport for her, while all the official documents issued to

⁷ It included one judge from a monarchy (the Swedish judge), and one from a republic which by law recognizes noble titles (Portugal), while it seems that also in Finland noble titles can still be carried.

⁸ Case C-353/06, *Grunkin and Paul*, [2008] ECR I-7639; Case C-148/02, *Garcia Avello*, [2003] ECR I-11613.

her which incorporated "*Fürstin von*" in her name had done so in error. It concluded, however, that – though not as grave as in *Grunkin and Paul* –

"the real risk, in circumstances such as those in the main proceedings, of being obliged because of the discrepancy in names to dispel doubts as to one's identity is such as to hinder the exercise of the right which flows from Article 21 TFEU."
(para 70)

Among the reasons for this conclusion was the fact that in the 15 years between the incorrect registration of her name as containing *Fürstin von* and its correction, many documents, including an Austrian passport and a German driving licence had been issued under a name which included *Fürstin von*, while many other official documents have probably been issued to her under that name, for official records and private dealings ((health and social security records, bank accounts, pension schemes, etc.). The correction of this would cause serious inconvenience and confusion as well as the risk of having to dispel suspicions of false declaration caused by the divergence between the corrected name which appears in her Austrian identity documents and the name which she has used for 15 years in her daily life.

Subsequently, the Court proceeded to review whether there is a justification for the restriction. It started out by accepting

"that, in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law.... The justification relied upon by the Austrian Government by reference to the Austrian constitutional situation is to be interpreted as reliance on public policy." (paras 83-84)

Justifications must be constructed narrowly, however,

"so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society

[T]he specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty" (paras. 86-87)

According to a standard scheme, the Court examined the objectives of the restriction, whether they cannot be attained with less restrictive measures, and whether the restrictive measure is not disproportional, taking the last two points together.

On the legitimacy of the objectives, the Court held that there can be no doubt that the objective adduced by the Austrian Government, that the legislation abolishing the nobility implements the principle of equality of citizens before the law, is compatible

with EU law, because "the principle of equal treatment" is a general principle of EU law, which is also enshrined in Article 20 of the Charter of Fundamental Rights (para 88-89). As to the question whether those objectives cannot be attained by less restrictive measures and whether the measure is proportionate, the Court asserted under reference to *Omega* that

"[91] it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State

[92] It must also be noted that, in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.

[93] it does not appear disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank. By refusing to recognize the noble elements of a name such as that of the applicant ..., 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."

This, then, brought the Court to the conclusion that the refusal by the Austrian authorities to recognize a title of nobility as an element of the surname of its own national as determined at the time of his or her adoption in Germany, cannot be regarded as a measure unjustifiably undermining the freedom to move and reside enjoyed by citizens of the Union, when the inclusion of such a title is not permitted under Austrian constitutional law. The refusal is therefore not incompatible with Article 21 TFEU.

5. Comment

In the following comments we focus on what this judgment contributes to our understanding of constitutional identity as part of national identity and what this tells us about constitutional relationships in the EU. In order to do so, we make a few general remarks about national and constitutional identity, and next discuss the manner in which the Court found it necessary to translate the rule of national constitutional law pertaining to the Austrian national constitutional identity into EU law, and speculate on the reasons why it did so.

5.1 National and constitutional identity

Article 4(2) TEU reproduces a provision from the abortive Treaty on a Constitution for Europe, and is an elaboration of the provision in the Maastricht version of the EU Treaty on the Member States' national identities. It makes explicit that what the EU has the duty to respect concerns "their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

Previously, the provision was more sober and perhaps less evidently constitutional in nature in as much as it merely stated that the "Union shall respect the national identities of the Member States" (Art. 6(3) TEU), without making explicit what aspect of those identities were relevant. The Court had no jurisdiction to apply this Article as a standard for review as Article 46 TEU in the pre-Lisbon version excluded this, and the Court referred to that provision rarely.⁹

This is not to say that it did not take the constitutional identity of a Member State into account at all. Already at the end of the 1980s it had done so in the *Groener* case, which concerned the refusal of exemption from the requirement to know Irish to a Dutch applicant for a position as an art teacher. In *Groener*, the Court gave centre stage to the provision in the Irish Constitution on Irish as the first official language of the country (Art. 8 *Bunreacht na hEireann*) as an expression of what it called "the special linguistic situation in Ireland".¹⁰ Whereas reliance on national identity in the period between Maastricht and Lisbon was never successful, in *Groener* it was. In this judgment, the Court made clear that the language requirement at issue must form part of an actively pursued language policy (in other words, the constitutional provision must be taken seriously and therefore really concern a matter of identity), but also it subjected it to a proportionality requirement in the context of the relevant EC law (Art. 3(1) of Regulation 1612/68).¹¹ National identity was retranslated into the terms of EC law (those of Regulation 1612/68) in order to create a "fit".

The issue of "translation" and "re-translation", the carrying over from one vocabulary into another, is one of the central issues concerning the present provision on national identity. This is true already within the Member State context: the "national

⁹ The most elaborate reference (to Art. F, TEU in the Maastricht version) is in Case C-473/93, *Commission v. Luxembourg*, [1996] ECR I-3207, on a nationality requirement for primary school teachers, which Luxembourg found necessary to protect its national identity (para 32); this was rejected by the ECJ since that objective "can, even in such particularly sensitive areas as education, still be effectively safeguarded otherwise than by a general exclusion of nationals from other Member States" (para 35). The reference to Art. 11 of the Luxembourg Constitution on the nationality requirement for civil and military positions was rebutted by the argument that "recourse to provisions of the domestic legal systems to restrict the scope of the provisions of Community law would have the effect of impairing the unity and efficacy of that law and consequently cannot be accepted", under reference to Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125 (para 38).

¹⁰ Case 379/87, *Anita Groener v. Minister For Education and City Of Dublin Vocational Educational Committee*, [1989] ECR 3967.

¹¹ *Ibid.*, para 21: "It follows that the requirement imposed on teachers to have an adequate knowledge of such a language must, provided that the level of knowledge required is not disproportionate in relation to the objective pursued, be regarded as a condition corresponding to the knowledge required by reason of the nature of the post to be filled within the meaning of the last subparagraph of Article 3(1) of Regulation No 1612/68." The Court added that the granting of exemptions to the requirement had to be non-discriminatory. So the language requirement, flowing from the Irish Constitution, was justified "provided that the linguistic requirement in question is imposed as part of a policy for the promotion of the national language which is, at the same time, the first official language and provided that that requirement is applied in a proportionate and non-discriminatory manner" (para 24).

identities" of which the provision speaks, are themselves expressions of various religious, linguistic and cultural aspects of public life, in as much as they in turn express themselves in political and constitutional structures, i.e. in as much as they are "inherent in their fundamental structures, political and constitutional",¹² the linguistic, cultural and religious phenomena translate into "national identity", which translates into political and constitutional structures.¹³ These national structures next translate into EU law.

We see this in *Groener*, which concerned a translation from Irish constitutional law (Art. 8 Irish Constitution) and its concomitant cultural and linguistic policy into EC law. Translating national constitutional law into European law is a technique which is used from time to time. It was what happened to the protection of fundamental rights in the formative phase of EU fundamental rights protection (*Stauder, Internationale Handelsgesellschaft* and *Nold II*). This operation of translating the national constitutional norms and values into European law was facilitated because it concerned primarily constitutional principles pertaining to an identity that was *common* to, that is to say, shared by, the Member States.¹⁴ Whether and to what extent identities which are *particular* to a Member State can be translated into EU law is less evident. After all, European integration seems (or perhaps we should say: seemed) largely to rest on the idea of a unified law to overcome disunity and conflict: the principle of *effet utile* seemed premised on the notion of the uniform application and effect EU law should have in the various Member States. Translating the peculiarities of national legal orders into EU law is a difficult mission, and all the more so if it means that EU law is given a different effect from one Member State to another. Yet, such a translation is precisely what happened in the famous *Omega* judgment. The particular importance given in Germany to the fundamental rights notion of human dignity (Art. 1 *Grundgesetz*) was retranslated in terms of the public policy exceptions to the free movement of services. Opinions vary

¹² There are some variations in the various wordings of Art. 4(2) TEU in the different language versions. E.g. the German, Danish and Swedish do not use the notion of "inherent" identity, but speak of the identity as it is "expressed", *zum Ausdruck kommt, som den kommer til udtryk, som kommer till uttryck*, in political and constitutional structures. That the English and Finnish use the plural "identities", and the Dutch uses "identity" in the singular, as do the German, French, Italian, Spanish, Danish, Swedish texts, is probably a matter of grammar. The plural "identities" leads, however, to an awkward sentence in English in para 92 of *Sayn-Wittgenstein*, see note 19 *infra*.

¹³ On the extent to which cultural identity may be encapsulated in the notion of national identity, see Von Bogdandy and Schill, "Overcoming absolute primacy: respect for national identity under the Lisbon Treaty", 48 CML Rev. (2011), 1417, at 1427 and the documentation in footnotes 46 and 47. See also Besselink, "National and constitutional identity before and after Lisbon", 6 *Utrecht Law Review* (2010), at 42-44, available at <www.utrechtlawreview.org>. Case C-391/09, *Malgożata Runevič-Vardyn*, judgment of 12 May 2011 (Second Chamber), nyr, para 86 can be read as an indication that culture and national identity are overlapping, in as much as it mentions in one breath Art. 3(3)(4) TEU, Art. 22 Charter of Fundamental Rights of the European Union, according to which the Union must respect its rich cultural and linguistic diversity, and Art. 4(2) TEU, and states that respect the national identity of its Member States "includes protection of a State's official national language". From this it deduced that "the objective pursued by national rules such as those at issue in the main proceedings, 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 Article 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law" (*ibid.*, para 87).

¹⁴ See e.g. Case 44/79, *Hauer*, [1979] ECR 3727, which concerned the right to the freedom of occupation, of which it was hard to say it existed as a constitutional right in other Member States than Germany.

on what the Court did in *Omega*. Some say that the Court simply applied EU law, while others would hold that it recognized and gave effect to German constitutional law in EU law. The Court stated that "it is not indispensable" that a restrictive measure protecting a fundamental rights interest "corresponds to a conception shared by all Member States", and referred to its case law on free movement of services.¹⁵ This would seem to reinforce the idea that it moved entirely in the sphere of EU law. The meaning of what it said, however, is none other than that in different Member States, free movement can be restricted to a different extent, dependent on the importance of certain particular fundamental rights conceptions which must be respected in EU law. On this reading, the ECJ accepted the meaning of German constitutional law (Art. 1 GG) within EU law, to the extent of restricting EU law's uniform scope and application.

5.2. The "translation" of national constitutional law: *Sayn-Wittgenstein* as a judgment on EU free movement law

We now turn to *Sayn-Wittgenstein*. This case is significant in various respects. The recognition of diversity did not primarily concern classic fundamental rights, as had been the case in *Omega*, but a constitutional feature regarding the particular political nature of the Austrian State, which is different from some other Member States. Moreover, as the Court acknowledges (para 41), the case concerns citizenship *outside* the context of the economic freedoms. This highlights the political rather than the economic context of the case.

Also in *Sayn-Wittgenstein* there seems to be a re-translation from a national constitutional norm into EU law. This comes as no surprise since the constitutional prohibition to carry noble titles as part of a family name was questioned in terms of the legitimacy to restrict the free movement of citizens under the primary EU citizenship provisions. The Court proceeded to frame the question as one concerning the justification of a restrictive measure on the basis of "public policy", requiring it to establish the legitimate aim in terms of EU law and the proportionality of the restriction as a matter of an autonomous act of EU law by an EU institution, as it usually does irrespective of the nature of the restrictive measure.

As an aside, it may be noted that this is the first time in which a "public policy" exception to the citizenship rights directly under Article 21 TFEU is construed in this type of case.¹⁶ The Court had already hinted at such a possible exception in *Grunkin and Paul*, suggesting that the right to carry the surname involved in that case might have been justifiably restricted had it been contrary to public policy, which was not argued.¹⁷ *Grunkin and Paul* did not concern a rule of constitutional importance to any of the Member States, but the question whether the child of Mr Grunkin and Ms Paul could be forced to be registered and use a different family name in Germany from the one under which he was known in Denmark. Repeated references by the Court in *Sayn-Wittgenstein*

¹⁵ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609, para 37.

¹⁶ On expulsion and refusal of entry on grounds of public policy, see Arts. 26 et seq. of Directive 2004/38/EC and its case law.

¹⁷ *Grunkin and Paul*, cited *supra* note 8, para 38.

to *Grunkin and Paul* reinforce the impression of the Court translating what is constitutional in national terms into mere EU law in ECJ terms.

This reading of *Sayn-Wittgenstein* may imply a downplaying of the constitutional issue at stake. In fact, some commentators have remarked that the issue of constitutional identity plays only a subsidiary role in this judgment.¹⁸ It is questionable whether this is the only possible and correct reading of the judgment. If the Court really intended to deal with no more than EU free movement law, the judgment would seem to suffer from some weaknesses. It would not least expose itself to the criticism of banalizing what is an important constitutional issue at least in the eyes of one Member State. We mention the following points.

Although constitutional matters concern the *ordre public*, it would seem a trivialization to say that abidance of national authorities by what they consider essential constitutional rules is part of the "public policy" pursued by the Member State. The language employed by the Court, which explicitly recognizes that the constitutional legislation involved is "an element of national identity, [which] may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law", seems unnecessarily restrictive, if we recognize that Article 4(2) TEU simply imposes the straightforward obligation for the EU (and hence the ECJ) to respect the constitutional identity as expressed in the Austrian legislation at issue. From the perspective of this explicit obligation incumbent on the Court of Justice the route via "public policy" would also seem quite indirect.

The Court's assessment of the legitimacy of the objectives served by the restrictive measure in terms of the fundamental right to equality suffers from the same weakness. Of course, the Charter and the Austrian constitutional legislation at issue both serve the objective of guaranteeing equality, but that is the case only at the most abstract level. We may assume, at least, that the Charter does not aim to prohibit expressions of social status as determined by birth or other family affiliation in the particular manner in which it was relevant to the case to be decided; otherwise Member State legislation allowing the carrying of noble titles, or recognizing, creating and conferring new noble titles would be in conflict with the Charter. In this regard the equality clause of the Austrian *Bundes-Verfassungsgesetz* and the Charter serve quite different objectives.

Also the proportionality test which the Court finally applies, does not entail more than positing that the restriction does not need to be identical in different Member States and states no more than that the duty to respect the national identity of the Member States under Article 4(2) TEU, "include[s] [the obligation to respect] the status of the State as a Republic" (para 92).¹⁹ From this the Court immediately concludes that the restriction is "not disproportionate" and that the measure of the Austrian authorities "do[es] not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them" (para 93).

¹⁸ In this sense Von Bogdandy and Schill, op. cit. *supra* note 13, 1424.

¹⁹ The particular formulation in the English language version of the judgment (para 92) is awkward: "the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic"; that the identities of the Member States include the status of republic is only true for some Member States.

In short, the Court does not do what it usually does in cases involving restrictions to free movement. It did not query whether there were alternative ways of protecting the legitimate aim of equality which might be less restrictive or would avoid the "serious inconvenience" to which Ms Sayn-Wittgenstein has been exposed, and which would equally protect Austria as a Republic. Nor did the Court allow for an assessment – either by itself or the competent national court – of issues the Advocate General raised concerning the question whether Ilonka Sayn-Wittgenstein had any legitimate expectation in light of legal uncertainty and what seem like wavering practices by authorities on the registration of names implying noble titles.

Reading *Sayn-Wittgenstein* as merely a case on EU free movement law would indeed make either the reference to Article 4(2) TEU redundant, or reduce its meaning to something like:

"The EU respects the constitutional identities of the Member States, but only if the ECJ finds that this identity is in accordance with substantive EU law."

In that way, Article 4(2) TEU would have little, if any, legal meaning. The reality of the matter is that, in line with the earlier case law on the "inconvenience" of having to use different (or differently spelt) family names when an EU citizen makes use of his freedom of movement, it would not have been easy²⁰ to avoid the conclusion that the free movement right of Ms Ilonka Fürstin von Sayn-Wittgenstein, also known as Fürstin von Sayn-Wittgenstein, formerly known as Ilonka Havel *née* Kerekes, and previous to that as Ilonka Kerekes, had been interfered with.

Also, the Court fully acknowledged that the Austrian legal rule was of a constitutional nature such as to express the national identity of Austria as a Republic.

Perhaps, then, the Court did not deal with the case merely as a free movement case.

5.3. *Sayn-Wittgenstein as a judgment on Member State constitutional identity*

This clears the ground for reading *Sayn-Wittgenstein* as full recognition that the free movement rights of a citizen under EU law may be restricted on the basis of a legal measure which is an expression of national identity inherent in the political and constitutional structure of a Member State.

Significantly, the acknowledgement that the Austrian legal measure was of a constitutional nature such as to express the national identity of Austria as a Republic, is – far from merely a subsidiary argument – the *only* argument used in the context of assessing the proportionality of the prohibition to use noble titles and names, after the Court established that restrictive measures may have different effects for the free movement of citizens in the various Member States (paras. 91-92). That the measure does indeed belong to the constitutional identity, the ECJ seems to accept on the basis of the formal rank of the Law on abolition of the nobility as a *Verfassungs-Gesetz* under Austrian national law, as well as the manner in which it has been interpreted by the

²⁰ But it was not impossible: the intervening governments each submitted arguments to the effect that her registration in Austria as Ilonka Sayn-Wittgenstein did not form an obstacle to her free movement, see paras. 44-50 of the judgment.

Austrian Constitutional Court. Both arguments are arguments from national law. In the absence of any indications of a disproportionate use or implementation of these constitutional sources in the case at hand, the Court reinforces the legitimacy of the reliance on the particular constitutional nature of the measure as such.

But why did the ECJ begin its assessment of the justification of the restrictive measure in purely free movement terms, if these are no more than a thin varnish through which the centrality of Article 4(2) TEU is shining?

5.4. *Constitutional relations in the EU: Who decides on constitutional identity?*

The answer may lie firstly in the development of EU law in light of the relations between constitutional orders within the EU, and secondly in what courts can do within the limits of their jurisdictional powers.

We are still in the early days of recognizing the legal relevance to the EU constitutional order of sources of heteronomy beyond pure fundamental rights issues, that is to say the constitutional rules and principles pertaining to the political and constitutional identity of Member States other than their fundamental rights. With few exceptions, the political and constitutional identity of a Member State has been alien to EU law. That the republican nature of the State is legally relevant in EU law as restricting EU rights would not easily have been recognized forty years ago. Recognizing national constitutional phenomena as legally relevant, would have meant the recognition of "external" legal sources of which one is not in control, and hence as a potential threat to the project of European integration.

We have seen this fear of heteronomy in the early years of EU fundamental rights protection. In essence such protection was derived from substantive human rights sources outside primary and secondary European law. The sources of European Community and Union fundamental rights were heteronomous and could therefore not easily be recognized, precisely because they stemmed from the Member State legal orders, i.e. the constitutions of the Member States and the human rights treaties to which these Member States were party. These "external" sources could initially only be tamed by reading them into EC law itself. Finding them in the "general principles of Community law" lent itself to pretending that EU fundamental rights protection had nothing to do with the Member State legal protection of fundamental rights. By now, the case law of the ECJ on ECHR rights shows that this interpolation via the general principles seems a stage of the past. It should not make us forget, however, that initially the Court itself saw this heteronomy as a threat to the European legal order, witness *Internationale Handelsgesellschaft*:

"The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure".²¹

This sounds like the opposite of what we now find in Article 6(3) TEU as it is applied in the practice of the Court, as well as the opposite of Article 4(2) TEU which imposes the obligation to respect the fundamental political and constitutional structures of the

²¹ *Internationale Handelsgesellschaft*, cited *supra* note 9, para 3.

Member States. Fundamental rights as protected by the constitutions of Member States as well as their constitutional identity inherent in their fundamental political and constitutional structures, were perceived to undermine the autonomy of the Community legal order as well as its very foundation:

"The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question."²²

In the field of fundamental rights protection we are far beyond this position of the early 1970s and 1980s. *Omega* is the best proof of this, as it acknowledged that also if fundamental rights are understood differently from one Member State to another, they can still be legitimate restrictions of EU law. On the other hand, the judgment in *Omega* also shows the persistent need of the Court to frame the issue in terms of EU law itself. Again, *Omega* is from before the Lisbon Treaty, though less than a week before the text of the Constitutional Treaty was signed, in which the Article on constitutional identity was incorporated. So a direct reference to constitutional identity as a legitimate restriction of the free movement of services would not have been feasible.

5.5. Jurisdictional limits between ECJ and national constitutional courts

Historical considerations apart, there may also be jurisdictional explanations for the practice of translating national constitutional principles into the more regular framework of EU law. After all, the ECJ is only competent to adjudicate matters with EU law as the standard of review. This has the natural consequence that cases can only be considered against the norms of EU law. This is no different from the position of national constitutional courts, which are usually only competent to review cases against the standard of the national constitutional legal norms – a role-specific limitation which is sometimes misunderstood by European and international lawyers. Generally, this separation of jurisdictional competence operates satisfactorily. A problem arises if the competences of respective courts overlap. These are the borderline cases where there is a significant potential for conflicts. Overlap may arise if one set of norms is integrated into another set. This may be the case if, within the set of norms of EU law, norms which are found in national legal orders are to be respected and protected.

Clearly, the recognition of the constitutional identity of Member States in Article 4(2) TEU can be viewed as an area of potential overlap. It can be understood to mean that constitutional norms of a Member State which are part of its identity are not merely to be respected and protected by the institutions of that Member State, but also by the institutions of the European Union.

In this light, we can see that the "translation" into the European legal frame of a national constitutional norm is a sort of "vetting". It resembles a judicial version of the dualist system in which each international treaty had to be transformed into national law before it could become effective in the national legal order, but then the other way round: how national law is transformed into a norm of European law. It is the mirror image of

²²

Ibid.

the guards of the national constitutional identity keeping a watch on EU law entering the national legal order: the national constitutional courts. Whereas some of the national constitutional courts have given up the actual vetting of EU law unless something drastic happens which really affects the constitutional essentials (as is basically the position of the BVerfG since *Solange II*, *Bananas* and *Honeywell*),²³ the ECJ vets every and any argument deriving somehow from national law, even when primary EU law tells the EU to respect such national law. Two points must be made in this regard.

On the one hand this practice of the ECJ can be understood as a kind of check on possible abuse. Not everything that is presented as a national constitutional norm really pertains to the constitutional identity of the Member State involved. This prevention of abuse can have a proportionality aspect, in the sense that a disproportionate norm or measure cannot belong to the constitutional identity of a Member State.²⁴ On the other hand, the ECJ's vetting of national constitutional law raises the issue of who is competent to ascertain that we are dealing with an issue of constitutional identity in the sense of Article 4(2) TEU? Is it not the national constitutional authorities, among which not least the national constitutional courts, who decide on the national constitutional identity?²⁵

In this respect we must notice that sometimes the ECJ positively respects constitutional principles of Member States, in other cases it dismisses them. *Omega* and *Sayn-Wittgenstein* can be viewed as an expression of a new equilibrium between the constitutional orders of the EU and the Member States, a very different equilibrium from that of the 1960s to the early 1990s which was based on transfer of sovereign powers and simple hierarchy.²⁶ And yet, in *Michaniki*, which concerned a recent constitutional amendment of the Greek Constitution aiming (in brief) to prohibit media-magnates from dominating or unduly influencing the public procurement sector, the Court chose to ignore the fact that a recent decision by the Greek constitution-making power was at stake, and declared the rule at issue contrary to provisions of secondary EC law and in particular the principle of proportionality in the context of the relevant secondary law, without even hinting at how to consider the constitutional status of the relevant Greek provision.²⁷ This judgment can be read in different ways. It would not seem very convincing to say that the Court tried at all cost to avoid a head-on collision in

²³ The recent judgment of the Polish Constitutional Tribunal, although carrying out a review of Council Regulation (EC) No 44/2001 against the provisions on legal protection of the Polish Constitution, spells out future thresholds for the admissibility of constitutional complaints on secondary EU legislation; see Press Release on Judgment of 16 Nov. 2011, SK 45/09, <www.trybunal.gov.pl/eng/index.htm> (consulted 24 Nov 2011).

²⁴ This is how the rejection by the ECJ (Grand Chamber) of Luxembourg's appeal to national identity under Art. 4(2) TEU in the notaries case, Case C-51/08, *European Commission v. Grand Duchy of Luxembourg*, judgment of 24 May 2011, para 124, can be understood: "As to the need relied on by the Grand Duchy of Luxembourg to ensure the use of the Luxembourgish language in the performance of the activities of notaries, it is clear that the first head of claim in the present dispute relates exclusively to the nationality condition at issue. While the preservation of the national identities of the Member States is a legitimate aim respected by the legal order of the European Union, as is indeed acknowledged by Article 4(2) TEU, the interest pleaded by the Grand Duchy can, however, be effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States."

²⁵ On the issue and some of the points following, see Besselink, *A Composite European Constitution* (Groningen, Europa Law Publishing, 2007), p. 9-12.

²⁶ Cf. Besselink, *supra* note 13.

²⁷ Case C-213/07, *Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Ipourgios Epikratias*, [2008] ECR I-9999.

constitutional terms. True, it went out of its way to grant the Member States a certain discretion for the purpose of adopting measures intended to safeguard the principles of equal treatment of tenderers and of transparency; but at the end of the day it declared the Greek constitutional amendment disproportionate and incompatible with (secondary) EU law. It seems more plausible that the Court found, unlike what was probably its view in *Omega* and explicitly so in *Sayn-Wittgenstein*, the nature of the matter not to belong to the constitutional core of the Greek constitutional order and hence not to its constitutional identity which it is the Court's obligation to respect under Article 4(2) TEU. To put it differently: what is a matter of only secondary EU law cannot easily be comprised under the subject matter making for the constitutional identity of a Member State. As a consequence, the normal categories of proportionality as understood in EU law could be applied to the case. The absence in *Michaniki* of any reference to *Simmenthal*,²⁸ in which the Court ordered national courts to set aside a constitutional rule of Italian law which it judged to stand in the way of direct and immediate effect European law, would lend support to this reading. Viewed in this way, *Michaniki* is compatible with *Sayn-Wittgenstein* in which, as we saw, the mere fact of constitutional rank of the prohibition of noble titles was taken to imply the proportionality of the restriction of free movement.

A further point on jurisdictional matters needs to be mentioned. We have so far pointed out that there is a degree of mutual "vetting" of each other's legal norms by courts, before these can be allowed full effect in the respective legal orders. The ECJ may be a more active censor than national constitutional courts, but *Sayn-Wittgenstein* (and *Omega*) suggests that it is more indulgent and tolerant if the national constitutional court has pronounced on the matter. In the cases mentioned above where an appeal to national constitutional identity was rejected, no national constitutional court had clarified the national status and meaning of the constitutional norm or principle.²⁹

All in all, it is possible to see *Sayn-Wittgenstein* as part of a development in constitutional relations in which the ECJ respects the national constitutional orders as interpreted by national constitutional courts. In this trend we arrive at a new equilibrium between the EU and national constitutional orders, in which mutual respect and constructive inclusion of norms fundamental to the other's legal order prevail over the previous strictly hierarchical conception of these relations as evidenced in *Internationale Handelsgesellschaft* and *Simmenthal*. The ECJ, like some national constitutional courts, still applies a check on the constitutional nature of the national norm invoked in cases submitted to it. This "check" is becoming a more marginal one, as is evident from the extremely "thin" proportionality test in *Sayn-Wittgenstein*, which is also dependent on the availability of authoritative national constitutional court decisions on the meaning of the particular norm or principle involved.

5.6. What about *Winner Wetten*?

This may be a possible interpretation, but one which may be too rosy, and ultimately incorrect. *Winner Wetten* can be put forward as a judgment which is written fully in the

²⁸ Case 106/77, *Simmenthal*, [1978] 629.

²⁹ The Greek Council of State, *Simvoulio tis Epikratias* actually provoked the ECJ to determine the compatibility of a norm as contained in the Greek provision by referring questions on this to the ECJ in the absence of an interpretation by the Greek supreme court of the relevant norm.

hierarchical mode of *Simmenthal*. The case concerned a prospective overruling of betting legislation creating a monopoly which under the circumstances was judged in conflict with the *Grundgesetz*. In its decision, the ECJ in fact uses very strong language, going beyond the language of "disapplying" or even "invalidating" conflicting national law, and speaks of "the *ousting* effect [Fr: *l'effet d'éviction*] which a directly-applicable rule of Union law has on national law that is contrary thereto", suggesting that the national norm is forced out of the legal system, eliminating it into some kind of non-existence.³⁰ Also, the Court found it necessary to "emphasize" that "directly applicable rules of law of the Union which are an immediate source of rights and obligations for all concerned ... must deploy their full effects *in a uniform manner* in all Member States, as from their entry into force and throughout the duration of their validity" (para 54). To clarify the jurisdictional relations between the ECJ and constitutional courts, the Court repeated under reference to *Simmenthal* that "any provision of a national legal system and any legislative, administrative or judicial practice ... which might prevent directly applicable Union rules from having full force and effect are incompatible with the requirements which are the very essence of Union law" (para 56). Just to avoid any misunderstanding of its position in the context of the particular case, the Court stated that "that would be the case if, in the event of a conflict between a provision of Union law and a subsequent national law, the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Union law, even if such an impediment to the full effectiveness of Union law were only temporary" (paras. 56-57)

Moreover, the Court repeated, with explicit reference to *Internationale Handelsgesellschaft*, that "rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law", thus suggesting that *Winner Wetten* concerned a direct conflict between a provision of the national constitution, which should be "ousted" by the normal German courts (para 61).

In short, this judgment by the Grand Chamber, only a few months before *Sayn-Wittgenstein*, seems to suggest that the Second Chamber's judgment in the latter should not be given the reading proposed above, in section 5.5 of this comment. It might indicate that the ECJ is still on classic Kelsian hierarchical lines: EU law, as authoritatively enunciated by the ECJ as most autonomous of European courts, is superior and any national law standing in the way of it is "ousted"; no room for new-fangled ideas such as "multilevel constitutionalism", "constitutional pluralism", and all that.

Indeed, such a reading of *Winner Wetten* is possible. But an alternative reading is possible as well, which salvages a more accommodating approach to constitutional relations in the European Union. We will make an attempt.

Firstly, *Winner Wetten* concerns primarily a conflict between normal legislation, in this case *Länder* legislation, and directly effective EU law, and not a conflict between German constitutional law and EU law. Secondly, quite to the contrary, and the ECJ points it out (para 59), the *Bundesverfassungsgericht* (BVerfG) had explicitly held that is

³⁰ Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, judgment of 8 Sept. 2010, nyr, para 67, by implication also in para 62; annotated by Beukers in 48 CML Rev. (2011), 2005. The language of the "ousting effect" of EU law by the Court is itself extremely rare and so far never as in *Winner Wetten*; it occurred in a trivial (and opposite) sense in Case C-261/96, *Conserchimica*, [1997] ECR I-6177, para 22 ("... does *not* have the effect of ousting the application of earlier national rules", italics added).

was *not* competent to adjudicate the question whether the legislation at stake was compatible with EU law; so the situation was quite different from that referred in *Simmenthal* (as indicated in para 57 quoted above). Thirdly, under German constitutional law, as is evident from the well-known case law of the BVerfG, there is *no* obstacle for an ordinary court to set aside national legislation which is incompatible with directly effective EU law.³¹ The only question arising in *Winner Wetten* was whether under EU law there were exceptions possible to the immediate setting aside of national law in cases in which this would create a legal vacuum and thus legal uncertainty, thus allowing for prospective overruling.³² This is not a matter for national constitutional courts, but for the ECJ alone to decide.

In short, despite its older primacy language, reminiscent of the days in which it felt it had to fight for its position in national constitutional orders, *Winner Wetten* is fundamentally about the division of judicial competence between the ECJ and national constitutional courts and resolves it in a constitutionally unobjectionable manner, just as the Third Chamber (three judges, all of whom sat in *Sayn-Wittgenstein*) had done in the practically identical case a year earlier of *Filipiak*³³ (without reverting to the language of *Internationale Handelsgesellschaft* and *Simmenthal*).³⁴

6. Conclusion

Sayn-Wittgenstein is a significant judgment, illustrating the present relationship between the EU and the national constitutions. It is the first explicit acknowledgement outside the field of fundamental rights protection that national constitutional provisions can affect and restrict the exercise of EU rights. This suggests a less hierarchical approach to national constitutional values than was evident in the early days of fundamental rights (witness the language of *Internationale Handelsgesellschaft*), and also a more relaxed approach to the "autonomy" of the EU legal order.

The ECJ might, in this light, have chosen for a more direct application of Article 4(2) TEU than it did. For the moment it formally submits the relevant national provision to a proportionality test. In this particular judgment that test was the thinnest possible.

³¹ Barring, of course, the exceptional cases in which the relevant EU law substantively infringes the *Grundgesetz* as formulated in the famous *Bananas* and *Honeywell* judgments.

³² In my understanding, the argument of the referring court in *Winner Wetten* on the occurrence of a legal vacuum is not incompatible with the position of the BVerfG in *Winner Wetten* to the effect that the prospective overruling, keeping the unconstitutional legislation provisionally operative, was motivated by deference to the legislature, since this deference was explicitly based on the legislative choice which had to be made on the basis of political preferences between two opposite solutions to the unconstitutionality; differently, Beukers, *supra* note 30.

³³ Judgment of 19 Nov. 2009, Third Chamber; composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting for the President of the Third Chamber, A. Rosas (Rapporteur) and A. Ó Caoimh, Judges, Case C-314/08, *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, [2009] ECR I-11049.

³⁴ Also Case C-53/04, *Cristiano Marrosu and Gianluca Sardino*, [2006] ECR I-7213 may be read in light of a division of labour between ECJ and constitutional courts along the lines of their distinct judicial competence. In this judgment the ECJ came to a substantially similar result as the Italian *Corte costituzionale* as to the compatibility of rules distinguishing between public and private sector labour with the principle of equal treatment under respectively EU and Italian constitutional law. The ECJ took notice of the Italian constitutional ruling (see *Marrosu*, para 16), however it remained silent on this otherwise.

The only argument used to conclude in favour of the proportionality of the Austrian rule of constitutional law was the reference to Article 4(2) TEU itself.

Nevertheless, the very fact of submitting the invocation of a national constitutional rule under Article 4(2) TEU to a proportionality test makes clear that the ECJ considers itself the Supreme Constitutional Court of Europe whenever a national constitutional rule touches on EU law. Should the Court have left the actual proportionality assessment to the national court – as the Advocate General suggested in this case – this would have made evident that ordinary national courts would have to assess the constitutional nature and importance of the national constitution in light of EU law, thus most fundamentally and definitively disrupting what was left of the constitutional autonomy of Member State judicial systems and of their constitutional courts after *Simmenthal*. Either way, *Sayn-Wittgenstein* would have been a recognition of the national constitutions by the ECJ, but also a reassertion of the constitutional primacy of EU law. Time may tell if this will be fully accepted by the national ordinary and constitutional courts. Perhaps this moment may be long postponed, as long as the ECJ steers clear of proportionality test outcomes which contradict national constitutional courts' assessments of the meaning of the relevant constitutional rules. The final result of the latter course of action might be that both the ECJ and the national constitutional courts can claim to be Supreme Constitutional Courts.

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