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EU Citizenship before the CJEU: On the importance of the application of the proportionality principle

by

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Abstract

Courts use the proportionality principle to ensure the legitimacy of their decisions. According to Harbo (2010), the CJEU is interpreting the principle in different ways, determined by the different areas of law in which it is applied and the substance of the conflicting interest at stake. Starting from this premise, the first aim of this paper is to throw light on the rationale of the CJEU when applying the principle in a concrete 'area of law': citizenship. In order to do so, this work compares recent cases that share similar conflicting interests: cases where Member States' derogation from Art. 21 TFEU is related to public policy issues are particularly sensitive due to their constitutional identity concerns. The approach for the comparison in this paper consists in finding and measuring 'pathologies' (a concept introduced by Endicott, 2012), in the application of the principle by the CJEU. Through this approach, I will evaluate, as a second aim, the legitimacy of the final result achieved by the Court when applying the principle.

Key-words

Principle of proportionality, citizenship, pathologies, substantial legitimacy, formal legitimacy, substance of conflicting interests, national sensitive policy, constitutional identity



1. Introduction

According to Harbo, the CJEU is interpreting the proportionality principle in different ways, and these different interpretations ‘are determined by the different areas of law in which it is applied, and the substance of the conflicting interests at stake’ (Harbo 2010: 180). Starting from this premise, this paper will focus on one specific area, that of citizenship, in which particularly strong and conflicting interests are at stake: it is a sensitive area of individual rights in which the exclusive competence of the Member States to grant and withdraw the status of citizen (derived from its power to award nationality) converges with the ‘fundamental status’ that the CJEU has constantly proclaimed it would tend to achieve for European citizenship^I.

Within the more general purpose of determining if there is a unique interpretation of the principle of proportionality in the citizenship’s case law of the CJEU, this paper also has a more specific aim: to throw light upon the rationale (or rationales: either a single or multiple ones) followed by the CJEU when applying the proportionality principle in cases concerning citizenship and sharing a particular ‘substance of the conflicting interests at stake’ (Harbo 2010). More particularly, I will analyze cases where Member States’ derogation from Art. 21 TFEU is related to public policy issues that are particularly sensitive due to their constitutional identity concerns. Additionally, through the analysis of the use of the proportionality principle by the CJEU, I will be able to evaluate the legitimacy of the final result of this use.

In order to attain that aim, a selective but in-depth comparison of how the Court applies the principle of proportionality in two recent cases corresponds to the chosen methodology. The approach that I am going to use for that comparison is based on searching for ‘pathologies’^{II} (a concept introduced and used by Endicott 2012), in the application of the proportionality principle by the CJEU, and a comparison of their significance in the respective cases. Through this approach, I will also be able to evaluate the legitimacy of the final result of the ruling.

The two selected cases are *Sayn-Wittgenstein*^{III} and *Runevič-Vardyn*^{IV}. In both *Sayn-Wittgenstein* and in *Runevič-Vardyn* the CJEU is faced with national measures concerning ‘national sensitive policies’ that aim to protect fundamental constitutional principles related



to the constitutional identity of the respective State: concretely, in the case of *Sayn-Wittgenstein* the national measure pursues to protect the principle of equality; in *Runevič-Vardyn*, the national measure protects the official national language which is at the same time a safeguard for national unity and social cohesion.

In order to clarify the discussion of this paper, I do not distinguish between justifications anchored in national fundamental rights concerns (such as the principle of equality in *Sayn-Wittgenstein*) and other justifications based on the constitutional identity, because all of them fall within the concept of ‘national sensitive policy’ that concerns the constitutional identity. Nevertheless, it is important to point out that fundamental rights can be separated from justifications based on ‘public provisions’, but this separation is hardly problematic because sometimes ‘the state simply couches its (possibly legitimate) “public interest” in terms of fundamental rights’ (Reich 2011)^V. In any case the CJEU considered the justification in *Sayn-Wittgenstein* as a matter of public policy. It is therefore the purpose of this article to enter into this discussion.

Before comparing the application of the proportionality principle by the CJEU in the selected cases, this paper will first provide a review of the origins and significance of the principle of proportionality in general terms, of its attractions and failures. Secondly, I will briefly analyze the application of the proportionality principle in the European Union legal system in particular. In a third part, the analysis of the application of the proportionality principle by the CJEU is focused on case law pertaining to citizenship, and more particularly on two cases in which a particular substance, ‘national sensitive policies’, is at stake: *Sayn-Wittgenstein* and *Runevič-Vardyn*. The application of the proportionality principle by the Court to these two cases will be the main object of comparison, but before that, a brief overview of the facts and the reasoning followed by the Court in each of these cases will be provided. Finally, I summarize the conclusions.

2. The proportionality principle – its strengths and weaknesses

The proportionality principle, broadly perceived, is a technique for managing conflicts between two legal claims: a ‘right provision’ or private interest, on the one hand, and a state or public interest, on the other. The origins of the principle of proportionality are to be found in the German legal tradition that developed a formal test of proportionality



consisting in a three step analysis: suitability, necessity, and proportionality in a narrower sense (or proportionality *stricto sensu*). The suitability test measures the adequacy of the public interest to attain its aim. A measure is found necessary if no less restrictive measure is capable of achieving the same aim. Finally, in the third stage of the proportionality test, even if a measure is found both suitable and necessary, it still should not place an excessive burden upon an individual. The essence of the proportionality principle is that it makes it possible to combine a liberal rights-based constitutional rationality with a strong commitment to a welfare state (Harbo 2010: 158).

Courts use principles of law, in general, and the proportionality principle, in particular, to ensure the legitimacy of their decisions: principles of law rationalise the decision making; they make decisions more objective and predictable, so they are capable to increase legal certainty. These advantages of the proportionality principle have been proclaimed in different ways by the main theorists on the subject. For Alexy, ‘balancing turns out to be an argument form of rational legal discourse’ (Alexy 2010: 32). For Beatty, ‘proportionality offers judges a clear and objective test to distinguish coercive action by the state that is legitimate from that which is not’ (Beatty 2004: 166). Barak considers that it structures the mind of the balancer (Barak 2010: 1). Craig thinks that ‘the proportionality test provides a structured form of inquiry. The three-part inquiry focuses the attention of both the agency being reviewed, and the court undertaking the review’ (Craig 2008: 637).

Nevertheless, the certainty of the result cannot be guaranteed automatically through the application of the proportionality principle, that is through the mere application of this ‘structured form of inquiry’, using Craig’s words (2008: 637). The reality is more complicated, as law is not a natural science and rights cannot be measured, at least not without difficulties. The results of the application of the proportionality principle to similar factual circumstances may differ. Is this an inconsistency? Is the application of the proportionality principle still legitimate when it leads to diverging results?

In a recent article, Harbo distinguishes the formal structure of the proportionality principle from its substance. Within the substantial understanding of the principle of proportionality, Harbo makes a theoretical distinction between a ‘strong’ and a ‘weak rights regime’. According to the strong rights regime, based on a liberal understanding of rights represented by the works of Dworkin (1977) and Habermas (1998: 259-260), ‘there is not room for weighting mechanisms like the one laid down in the proportionality principle’



(Harbo 2010: 168) Rights should always trump public interests. In strong rights regimes the structure of the Court's reasoning as provided within the frame of the proportionality principle is not its main vehicle of legitimacy; rather, the reference to rights is in itself sufficient to legitimise its decisions (Harbo 2010: 168). By contrast, in a weak rights regime, based on the work of Alexy (2002), rights are perceived as principles which imply that they can be balanced against other principles, i.e. other individual rights but also collective interests or public policies. Therefore, the proportionality principle is, according to a weak rights regime, a 'tool in which a balance between individual and group interests, on the one hand, and public interest, on the other hand, can be struck in the best possible way' (Harbo 2010: 166). Both theoretical distinctions would in practice appear in different and combined forms.

According to Harbo, the proportionality principle may be interpreted in different ways, depending on the substantial understanding of the principle – so the use of the principle can lead to different results according to the substantial meaning accorded to it by different legal orders. Different results are possible and do not undermine the legitimacy of a decision as long as the competent court, in its interpretation, does not deviate too much from the understanding of the principle that it has itself proposed (Harbo 2010: 169 f).

One of the main arguments against the usage of the proportionality principle is the problem of the incommensurability of the interests subjected to the balancing exercise. Despite the ability of the competent judge to define the substantial understanding of the different interests, judges can still face difficulties when measuring the impact of the respective interest against each other. This difficulty would be exacerbated in a pure weak rights regime, where no standards exist and in which all the interests can be balanced against each other without any hierarchy guiding the weighting. Habermas argues that, if it is to be considered rational, weighting has to be conducted with a clear advantage given to individual rights, according to customary standards and hierarchies (Habermas 1998: 259, as interpreted by Harbo 2010: 161). In my opinion, the existence of these customary standards and hierarchies makes incommensurability difficult: if there are customary standards and hierarchies to guide the weighting, there are also units of measurement in the balancing that make the problem of incommensurability disappear.

This problem may lead one to consider the proportionality principle as useless, since it would not bring any objectivity and transparency to the judge's reasoning. Still, scholars



that consider this problem as the main failure of the principle nevertheless find arguments in support of it. Endicott identifies an argument for saving the proportionality principle, based on its necessity: ‘it is necessary, in light of the institutional premise (that is that the respect that all public authorities must have for certain human interests can be best secured by a power in an independent tribunal (Endicott 2012: 17)), even though it does not bring objectivity and transparency to governance’ (Endicott 2012: 20). He continues that ‘the incommensurabilities in human rights cases ... do not necessarily lead to arbitrary decision making ... So the proportionality reasoning is not generally pathological. If the institutional premise holds, then there is good reason for a justiciable bill of rights. And then, the pathologies of proportionality that might affect the system are particular, and depend on particular mistakes’.

I find it useful to put the theories of Harbo and Endicott together in order to infer from them premises that help to evaluate the legitimacy of the result of the application of the proportionality principle. According to those authors, the legitimacy of the result depends on how the Court adapts its decision to two premises that I qualify as substantial and procedural respectively. Firstly, according to Harbo, legitimacy depends on how the Court adapts its decision to the substantial meaning accorded to it in that particular legal order (substantial legitimacy); and secondly, in Endicott’s view – and due to the impossibility to perfectly measure the concrete impact on rights while making the final balance, even if the substantial meaning is perfectly defined –, legitimacy also depends on how the Court adapt its decision to its particular power in the concrete legal order or particular institutional context, with more or less deference vis-à-vis the concrete powers at stake (procedural legitimacy).

I find especially Endicott’s identification and definition of certain potential ‘pathologies’ of the proportionality principle interesting. I only partly agree with his view on the impossibility of avoiding pathologies completely. But this disagreement does not preclude the employment of his concept as a useful tool. I think that the Endicott’s ‘pathologies’ may be used as a good approach to measure the level of legitimacy of decisions on proportionality. I am going to use them in this way in this paper.

According to Endicott, the seriousness of pathologies depends on the degree of creativity that a judge applies. Applying this consideration to the two sources of legitimacy mentioned above, substantial and procedural, it is possible to infer that creativity would



nevertheless be reduced (and consequently the legitimacy reinforced) if a judge does not deviate too much from substantial and procedural premises.

The pathologies come in pairs because distortions may be in favour of the individual or in favour of the public authority. The first of the pathologies identified by Endicott is ‘proportionality spillover’, consisting in ‘balancing’ things that should not be balanced. This is due to the generalisation of proportionality into a legal technique. The worst would be to ‘balance’ public interests against private interests, although public interests do not belong to these so-called scales (Endicott 2012: 21). A lesser risk would be the unwarranted weighting of private interests in the balance.

The second pathology is ‘uncertainty’. A judge’s policy choice in human rights litigation will suffer from this pathology if she favours the public interest by 1) exaggerating the capacity of the choice in question to achieve the prospective public benefit, or by 2) underestimating the risks posed for private interests at stake because these are uncertain. On the other hand, she will suffer from the same pathology when favouring the individual interest by 1) exaggerating the risks posed to private interests, or by 2) underestimating the capacity of the choice in question to achieve the prospective public benefit, because this is uncertain. These pathologies involve a dilemma that the author calls the ‘dilemma of uncertainty’: ‘on the one hand, it would be a fallacy to think that only proven gains can legitimately be pursued, when there is a proven detriment to ... (an individual right). On the other hand, some speculative measures to pursue uncertain gains are bad mistakes’ (Endicott 2012: 29). One way of solving this dilemma, even if not fully satisfactory, would be to leave it to the initial decision maker, supposed to possess a more technical sense of the realities.

The last potential risk for the application of the proportionality principle is the ‘pathology of deference’. It relates to the challenge that courts face in any review of executive or legislative action: the challenge of taking an appropriate attitude towards the judgments of the authorities whose decisions they are reviewing (Endicott 2012: 30). If the courts defer excessively to the initial decision maker, then the protection of human rights will be lost. If courts do not defer to the judgement of other institutions where there is good reason to, the system suffers from the same pathology but in reverse. The relevant question to be posed by the judge in this case is if there is ever a good reason for deference (Endicott 2012: 30).



In this paper I use these ‘pathologies’ as a tool for analysing the proportionality review of the CJEU in a selection of cases. But before that, in order to set the context for the discussion, the next section briefly analyses the particular application of the proportionality principle in the European Union legal system.

3. The proportionality principle in the case law of the CJEU

The proportionality principle has been used by different international and supranational judges, such as those sitting in the European Court of Human Rights or, what is relevant for this article, also in the European Court of Justice.

There are some peculiarities of the application of the principle of proportionality into the case law of the CJEU that are due to the *sui generis* nature of the European legal order. One of these peculiarities of the proportionality test in EU law is its ‘changing nature’ (Fontanelli and Martinico, forthcoming: 15), or the ambiguity of the approach in the CJEU’s use of proportionality. A second characteristic is the ‘cooperation dynamic’ (Fontanelli and Martinico, forthcoming: 15) that takes place between judges in the EU.

Firstly, concerning the ambiguity of the approach in the CJEU’s use of proportionality, in terms of procedure the CJEU very rarely follows the formal test elaborated by the German legal tradition^{VI}. Only in theory is it possible to perceive a paradigm of proportionality in the EU that follows the German model. According to Gerards, ‘*Although these three sub-tests are also widely used and recognised in European law, the CJEU appears to be rather ambiguous as regards their application. In fact there is no single formula the Court systematically and consistently uses in its proportionality review. Rather, the Court disposes of a variety of different formulas, seemingly rather arbitrarily choosing one or the other depending on the circumstances of the case. Sometimes the Court focuses on just one or two of the three distinct tests; in other cases it applies a general test of arbitrariness or reasonableness; and it even sometimes uses a completely different formula, for instance stating that a decision should not impair the very substance of the right at hand*’ (Gerards 2009).

Also, substantially, it has been strongly supported that the CJEU takes two different approaches to the proportionality principle (de Búrca 1993: 105; Tridimas 2006). On the one hand, when the Court assesses whether a Community regulation is in accordance with the four freedoms and proportional, it adopts a very lenient approach. By contrast, when the court assesses national measures, it adopts a much stricter approach. The reason for



these two different approaches is that the Court is not neutral – quite the contrary: its reasoning is guided by a strong substantial bias of promoting European integration (Tridimas 2006: 193).

Harbo, in assessing the proportionality principle in EU law from a legal theoretical and constitutional perspective in order to discover the function of the principle, came to the conclusion that it is ‘plausible to suggest that there are enough cases to underpin an assumption that the court is interpreting the proportionality principle in a variety of different ways, i.e. that the different results in cases where the proportionality principle is applied are not merely due to the cases’ different facts. The diverging interpretations of the proportionality principle are determined by the different areas of law in which it is applied and the substance of the conflicting interests at stake’ (Harbo 2010: 180).

Reich (2011) has reaffirmed this difficulty, further identifying four different versions of the proportionality test as applied by the CJEU: an ‘autonomous balancing’ approach, a ‘margin of discretion’ approach, a ‘fundamental rights’ approach and a ‘quasi-legislative’ approach.

These different approaches in EU law can better be understood considering the complexities of the EU legal order, especially two main features: that in EU law the interests that call for legal protection are different from those that emerge in national legal orders; and, secondly, that they emerge from three main actors and not only two (the individual and the state), as it is the case in nation-states.

In EU case law the main interest has basically been to prevent national public measures that impede free trade and the free movement across borders within the Single Market. Therefore, traditionally the proportionality principle has been used to balance fundamental freedoms vis-à-vis national legislation or, less often, EU legislation. The proportionality principle has been used therefore in a *sui generis* way, balancing fundamental freedoms against EU or national legislation. Craig has defended this use of the proportionality principle, arguing that ‘proportionality should be a general principle of judicial review that can be used both in cases concerned with rights and in non-rights based cases’ (Craig 2010: 265), basing his argument on EU reality.

Secondly, the European legal order is based on a complex ‘triangular relationship’ (Reich 2011: 11) between individuals, Member States imposing certain limits to these individuals that may impede their fundamental freedoms, and the role of the CJEU to



monitor the respect of the ‘fundamental freedoms’. This relationship makes the application of the proportionality principle a particularly complex one.

Nevertheless, the respect of fundamental freedoms is in some occasions very closely related to the respect of fundamental rights, and this is especially true in cases concerning EU citizenship or free movement of persons. As a consequence, the boundary between fundamental freedoms and fundamental rights has become very much blurred. In these cases the CJEU, while monitoring the protection of the fundamental freedoms, is also enrolled in the monitoring of the protection of the fundamental rights that are intrinsically connected to freedom^{VII}. These cases approximate the proportionality principle as understood in EU context to its general understanding: fundamental freedoms/fundamental rights are balanced against Member States/public interests.

There is an increasing tendency for Member States to invoke human rights (in some cases as recognised singularly by their own national constitutions due to the guarantee of national identity enshrined in the recently added Art. 4 (2) TUE^{VIII}) as a defence for justifying restrictions to fundamental freedoms. This tendency can be included in a more general movement – which started with the proclamation of the Charter and continued with its integration into the Constitutional Treaty^{IX} – aimed at proclaiming a ‘fundamental rights discourse’ in the EU legal order (Biondi 2004: 52). As a consequence, the normative hierarchy between national constitutional rights, international and European conventions on human rights, and the economic freedoms that form the backbone of the EU has become mixed up (Hepple 1995: 46). These developments have reopened the debate on the necessity of reconciling the fundamental freedoms with the protection of the fundamental rights as recognised in national constitutions. They have also complicated the application of the proportionality principle by the CJEU: the balancing between these interests is complicated, especially because of the primacy of EU law over national constitutions and also because of the complex division of competences between the national and the EU legal orders. The application of the proportionality principle in the EU context opens up the question for the CJEU about the degree of deference to be paid to the national legislator – which differs depending on the degree of EU competence in the area of law at stake.

The CJEU usually takes the necessity to respect national prerogatives into account. As determined by de Búrca in her seminal article on proportionality, where a state’s measure



is seen to be primarily within the competence of the state, the Court is likely to be reluctant, unless a very important Community interest is adversely affected, to examine the proportionality of the national measure too closely' (de Búrca 1993: 112). In these cases the CJEU applies a very vague test of proportionality, implying a very deferential approach vis-à-vis national judges.

That is why scholars talk about a second peculiarity of the proportionality test in EU law: the 'cooperation dynamic' (Fontanelli and Martinico, forthcoming: 15) that takes place between judges in the EU, notably in respect of the use of the preliminary ruling machinery (Art. 267 TFEU). The attention of scholars has normally been focused on the 'upward phase' of the mechanism, when national judges pose a question to the CJEU on the interpretation or validity of EU law. However, as pointed out by Fontanelli and Martinico, 'proportionality, instead, offers a quite interesting example of "downward" cooperation between the CJEU [...] and the referring judge (which receives from Luxemburg the applicable instruction to resolve the main proceedings). In many cases, indeed, the CJEU, after "constructing" the test of proportionality, hands it over to the ordinary judge. This is because, in the logic of judicial subsidiarity, the referring judge is the real master of the proceedings, he knows the factual background of the dispute, as well as the national context and sensitivity in which the allegedly discriminatory measure operates' (Fontanelli and Martinico, forthcoming: 15). This practice of the CJEU is more often used when the proportionality principle is applied to fundamental rights cases^X.

After having provided a review of the origins and significance of the principle of proportionality in general terms, its strengths and weaknesses, and its application in the European Union legal system in particular, I now analyse the application of the proportionality principle by the CJEU in a concrete area of law, that of citizenship, through a comparative analysis of the principle's application by the Court in two particular cases.

4. The peculiarities of the proportionality review made by the CJEU in a concrete area of law: Citizenship cases where Member States' derogation from Art. 21 TFEU is related to public policy issues that are particularly sensitive due to constitutional identity concerns

Considering the peculiarities and complexities regarding the application of the principle of proportionality in the EU context, I have decided to focus, in this study, on a concrete



area of law, citizenship, taking as a premise the hypothesis stipulated by Harbo (2010: 180)^{XI}.

As already mentioned above, Reich has identified four different versions of the proportionality test as applied by the CJEU: an autonomous balancing approach, a margin of discretion approach, a fundamental rights approach and a quasi-legislative approach. These different versions of the proportionality test have been found when analysing case law pertaining to the internal market. Nevertheless, citizenship is a hybrid area in which the reasoning of the CJEU may differ from the one followed in market cases because of, amongst other reasons, the inherent personality element that may come close to fundamental rights protection (Reich 2011: 2) (Reich 2011: 2; see in this regard Art. 21(2) of the EU Charter of Fundamental Rights).

As inferred in the previous section from the works of Harbo (2010) and Endicott (2012), legitimacy has to be both substantial (depending on how the Court adapts its decision to the substantial meaning accorded to it in that particular legal order) and procedural (based on how the Court adapts its decision to its power in the legal order, i.e. taking a more or less deferential stance vis-à-vis other public authorities).

Firstly, in EU law the substantial legitimacy strongly depends on the effective protection of human rights. The substantial meaning given to fundamental rights protection is particularly strong in the EU legal order. This is not the ambit for providing an overview over the protection of human rights in the history of EU integration. The history of the incorporation of the fundamental rights as general principles of EU law to the case law of the CJEU, through which the Court has been able to guarantee the respect for human rights, even before the first codification of the rights in the EU Charter, is well known. Today, after the entry into force of the Treaty of Lisbon, the Charter is part of primary EU law sources^{XII}, legally binding for Member States. The CJEU has proclaimed that the 'European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'^{XIII}. Moreover, 'measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community'^{XIV}, including international obligations^{XV}. In the Court's own words, the obligation of the Union to give effect to its international obligations 'may in no circumstances permit any



challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights^{xvi}.

The Member States and the EU share the same interest for protecting fundamental rights. Outside the limits of EU law, Member State's constitutions equally ensure the protection of fundamental rights. Member States are additionally signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, fundamental rights as guaranteed by the European Convention and as they result from the constitutional tradition common to all Member States, constitute general principles of the Union's legal framework (art. 6.2 TUE).

But an especially problematic case arises when a Member State stands to derogate from a fundamental freedom, a fundamental constitutional value or a sensitive national policy. The constitutional tradition may be additionally funded on a fundamental right that is particular to that national legal order. The Court in these cases only engages in a marginal review. The reason is that in these cases the CJEU is faced with a norm that in principle is exogenous to the EU legal order, a matter of sensitive national policy (Craig 2006: 516; De Búrca 1993: 127-128 and 147), so it takes a very lenient approach vis-à-vis the national court to preserve the legitimacy of its decision.

But the deference due by the CJEU to national courts in citizenship cases is especially complex to determine because of the fact that the protection of the fundamental freedom comes very close to fundamental rights protection. The effective protection of fundamental rights is what is at stake in these cases. Arguably, in these cases a marginal review of proportionality is more appropriate, even if sensitive national policies are involved (the protection of fundamental rights is also a main interest for the Member States to accomplish). If the Court concentrates its efforts on achieving procedural legitimacy for its decision in these cases, accordingly showing more deference to national judges, it might risk losing out on the substantial legitimacy of the result by failing to properly protect the special meaning accorded to human rights in the EU legal order.

Considering this risk, this paper in particular aims at shedding light upon the rationale (or rationales: either a single or multiple ones) followed by the CJEU when applying the proportionality principle in the area of citizenship. In order to attain this purpose, I will compare two recent cases regarding citizenship, *Sayn-Wittgenstein*^{xvii} and *Runevič-Vardyn*^{xviii}, where the interests that have to be balanced are very similar. On the one hand, a Member



State's derogation from Art. 21 TFEU is related to public policy issues that are particularly sensitive due to constitutional identity concerns. On the other hand, the fundamental freedoms contained in Art. 21 TFEU are in both cases intrinsically related to a fundamental right: Art. 7 of the Charter of Fundamental Rights of the European Union (protection of identity and private life).

Before comparing the application of the proportionality principle by the CJEU in the two selected cases, I briefly mention the facts of the cases and then provide an overview over the reasoning followed by the Court in each case.

4.1. *Sayn-Wittgenstein*

4.1.1. *The facts of the case*

This case deals with whether a constitutional tradition specific to Austria (the Austrian law on the abolition of nobility that prohibits Austrian nationals from holding any title of nobility^{XIX}) was contrary to Treaty provisions on citizenship. The facts of the case are the following: the applicant, Ilonka Sayn Wittgenstein (thereinafter Mrs. Sayn Wittgenstein) is an Austrian national born in 1944. In 1991 she was adopted by a German national, Lothar Fürst von Sayn-Wittgenstein. The adoption did not have any effect on her nationality. However, it had an effect on her surname: by supplementary order of 24 January 1992, the competent German administrative authority stated that, following the adoption, the applicant in the main proceedings acquired the surname of her adoptive father in the form 'Fürstin von Sayn-Wittgenstein', which would be the name she would use^{XX}. Thereafter, following the acquisition of her new identity, the Austrian authorities registered that surname in the Austrian civil registry^{XXI}. This means that they issued Mrs Sayn Wittgenstein with a birth certificate in the name of Ilonka Fürstin von Sayn-Wittgenstein.

On 27 November 2003, the *Verfassungsgerichtshof* (the Austrian Constitutional Court) delivered a judgment in which it held that the Law on the abolition of nobility, which is of constitutional status and implements the principle of equal treatment in this field, precluded any Austrian citizen from acquiring a surname which would include a former title of nobility, including one of foreign origin^{XXII}.

Sometime after the judgment, the Austrian administrative authorities adopted the view that the birth certificate of the applicant was incorrect and notified her of their intention to correct her surname in the civil registry to 'Sayn-Wittgenstein'. Despite the objections of



the appellant, on 24 August 2007 they issued a decision in which they confirmed that her family name had henceforth to be registered as ‘Sayn-Wittgenstein’. Mrs. Sayn-Wittgenstein appealed that course of action.

The appellation was dismissed, so the applicant sought to have the decision overturned by the *Verwaltungsgerichtshof*, the referring Court in the case. She claimed that her rights to freedom of movement were hindered by the non-recognition of the effects of her adoption with regards to the law governing surnames^{xxiii}. She also claimed the existence of an interference with the right to respect for family life, guaranteed by Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

The national court referred the case to the CJEU for a preliminary ruling, posing the following question: ‘Does Art. 21 TFEU preclude legislation pursuant to which the competent authorities of a Member State refuse to recognise the surname of an (adult) adoptee, determined in another Member State, in so far as it contains a title of nobility which is not permissible under the (constitutional) law of the former Member State?’^{xxiv}

4.1.2. The answer of the Court and the review of proportionality

The CJEU firstly pronounced, by way of a preliminary point, that ‘a person’s name is a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter of Fundamental Rights of the European Union’.

The Court continued by holding that the refusal, by the authorities of a Member State, to recognise all the elements of the surname of a national of that State as determined in another Member State, where that national resides, and as having been recorded during 15 years in the civil registry of the first Member State, is a restriction on the freedoms conferred by Article 21 TFEU upon every citizen of the Union^{xxv}.

After having determined the existence of a restriction, the CJEU then analysed if a valid justification for the obstacle existed, i.e. if the Law on the abolition of nobility of constitutional status is an objective justification for the restriction on the freedom of movement and residence enjoyed by citizens and, if so, if this obstacle is proportionate with its aim.

Firstly, regarding the objectivity of the justification, the Court considered that, within the context of Austrian constitutional history, the Law on the abolition of nobility, as an



element of national identity, could be regarded as a valid justification.^{xxvi} The CJEU considered it a public policy justification and recalled that the concept of public policy had to be interpreted strictly and that it had to be relied on only if there was a genuine and sufficiently serious threat to a fundamental interest of society. Nevertheless, as the concept of public policy may vary from one Member State to another and from one era to another, the competent national authorities could therefore be allowed a margin of discretion within the limits imposed by the Treaty^{xxvii}.

The Austrian Government argued that the Law on the abolition of nobility constituted the implementation of the more general principle of the equality before the law for all Austrian citizens. The CJEU held that the principle of equal treatment was also a general principle of EU law, enshrined in Article 20 of the Charter of Fundamental Rights^{xxviii}.

Once it had determined the adequacy and objectivity of the defence advocated by Austria, the CJEU started to analyse the proportionality of the justification in question – the most interesting part of the judgement for the purpose of this paper.

As a preliminary point, the CJEU held that ‘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’^{xxix}. The CJEU then mentioned Art. 4(2) TEU which defines the obligation of the European Union to respect the national identities of its Member States.

The CJEU, in applying a very vague test of proportionality – in scarcely one paragraph –, subsequently suggested that the measure was indeed proportionate: *In the present case, 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 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*.^{xxx}



4.2. *Runevič-Vardyn*

4.2.1. *The facts of the case*

The first applicant in this case was Ms. Runevič-Vardyn, a Lithuanian national belonging to the Polish minority in the Republic of Lithuania but not possessing the Polish nationality. She was born as ‘Malgožata Runevič’, so her forename and surname were accordingly registered in her birth certificate in their Lithuanian form as Malgožata Runevič, on 17 June 1977.

After having lived and worked in Poland for some time, the first applicant married the second applicant in 2007 in Lithuania. On the marriage certificate issued by the Vilnius Civil Registry, the name of the second applicant, a Polish national, ‘Łukasz Pawel Wardyn’, was transcribed as ‘Lukasz Pawel Wardyn’ (using the characters of the Roman alphabet but without its diacritical modifications), whilst his wife’s name appeared, unlike his own, in Lithuanian characters as ‘Malgožata Runevič-Vardyn’ – Lithuanian characters do not include the letter ‘W’, so the addition of her husband’s Polish surname to her own surname^{xxxI} appeared with ‘V’. The applicants were at that time living in Belgium, together with their son.

The first applicant subsequently requested that the Vilnius Civil Registry Division would change her birth and marriage certificates into the Polish spelling form, that is to say to Roman characters including diacritical modifications. The refusal of the request by the Lithuanian administrative authorities led the applicant to bring an action before the competent national court.

The second applicant stated that the refusal of the Lithuanian authorities to transcribe his forenames on the marriage certificate into a form which complied with the rules governing Polish spelling constituted discrimination against a citizen of the European Union who had married in a State other than his State of origin^{xxxII}.

According to settled case law of the Lithuanian Constitutional Court, a person’s forename and surname have to be entered on a passport in accordance with the rules governing the spelling of the official national language in order not to undermine the constitutional status of that language.

The First District Court of the City of Vilnius took the view that it was not possible to solve the dispute without further clarification of Articles 18 and 21 TFEU and of Article 2(2)(b) of Directive 2000/43, so it decided to refer four questions to the CJEU for



preliminary ruling, later reformulated by the CJEU. The first and second questions concerned the application to the case of Directive 2000/43 that implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The CJEU held that the situation referred to did not fall within the scope of this Directive.

Through the third and fourth questions – the interesting ones for the purpose of this paper – the national court asked, in essence, whether Articles 18 and 21 TFEU precluded the competent authorities of a Member State from refusing to change the form in which a person’s surname and forename are registered, pursuant to national rules that would oblige them to issue certificates of civil status in the official national language, with the result that those names must be entered using only the characters of the national language, without diacritical marks, ligatures or any other modifications to the characters of the Roman alphabet which are used in other languages.

4.2.2. The answer of the Court and the review of proportionality

Concerning the third and fourth questions – the interesting ones for the purpose of this paper – the CJEU proceeded first to review its competence for this case. Mr. and Mrs. Vardyn were both nationals of Member States of the Union so derivatively citizens of the EU that had exercised their fundamental freedoms to move and reside in a different Member State. The situation was therefore within the scope of Article 21 TFEU.

Once the competence of the Court determined, the CJEU started to analyse, as in *Sayn-Wittgenstein*, if there was a restriction on the freedom of movement. To do so, the Court divided the different requests into three^{xxxiii}:

- the request by the first applicant in the main proceedings for her maiden name and her forename to be entered on her birth and marriage certificates in a form that complied with the rules governing Polish spelling, involving the use of diacritical marks common for that language;
- the request of the applicants in the main proceedings that the surname of the second applicant in the main proceedings, joined to the maiden name of the first applicant in the main proceedings and appearing on the marriage certificate, should be entered in a form that complied with the rules governing Polish spelling; and



- the request of the second applicant in the main proceedings for his forenames to be entered on that certificate in a form that complied with the rules governing Polish spelling.

As in *Sayn-Wittgenstein*, the CJEU started its argumentation concerning the analysis of the existence of a restriction on the freedom of movement, mentioning, by way of a preliminary point, the importance of the protection of the fundamental rights as enshrined in the Charter and also in the European Convention. More specifically, it held that a person's forename and surname were a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter of Fundamental Rights of the European Union and in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

With regard to the first and third requests, the CJEU found that there were no restrictions of Art. 21 TFEU. The facts were estimated by the Court not to cause inconveniences to those concerned.

By contrast, with regard to the second request, the Court thought the existence of a restriction to be likely. However, the Court recalled that in order to constitute an obstacle to Art. 21 TFEU, national rules at hand had to be liable to cause 'serious inconvenience' to those concerned at administrative, professional and private levels^{xxxiv}. Weak restrictions of fundamental freedoms would not override the power of the Member State to refuse to amend the joint surname of the applicants recorded by the civil registries according to its national rules.

Differently than in its ruling in *Sayn-Wittgenstein*, in which the Court itself determined the existence of a 'serious inconvenience' by taking into account the facts provided by the national judge, in this case the Court, surprisingly, handed the decision back to the referring judge. It would be up to the national judge to consider whether the 'refusal involves the possibility that the truthfulness of the information contained in those documents will be called into question and the identity of that family and the relationship which exists between its members placed in doubt'^{xxxv}, which in turn would have significant consequences as regards, among other things, the exercise for the right of residence conferred by Article 21 TFEU^{xxxvi}. But the CJEU, although delegating the final decision on the existence of a serious inconvenience (and therefore on the existence of restrictions to the freedoms contained in Art. 21 TFEU) to the referring judge, nonetheless issued the



guidelines as to how to qualify a restriction as a ‘serious inconvenience at administrative, professional and private levels’.

Despite this delegation, the Court still hypothetically considered the existence of a restriction. In this way it was capable to express its view on the evaluation of the justification and its proportionality^{xxxvii}. The Court found that, firstly, it was legitimate for a Member State to ensure that the official national language is protected in order to safeguard national unity and preserve social cohesion^{xxxviii}. This cements Art. 3(3) TEU and Art. 22 of the Charter of Fundamental Rights of the European Union (that provide for the obligation to respect the cultural and linguistic diversity of the Union). Additionally, according to the Court the obligation to respect the national identity of a Member State (Art. 4(2) TEU) would include the protection of a State’s official national language.

Thereafter, in paragraphs 87 to 93, the CJEU reviewed the necessity and proportionality of the justification. Interestingly enough, and also differently from *Sayn-Wittgenstein*, at this point the Court highlighted, by way of a preliminary observation, the importance of the protection of Art.7 of the Charter of Fundamental Rights of the European Union and Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (protection of private and family life)^{xxxix}. It expressly mentioned the link between fundamental freedoms and fundamental rights, stating that ‘the importance of ensuring the protection of the family life of citizens of the Union in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty has been recognised under European Union law’^{xl}. Therefore, the balance to be struck in the present case, once it had been determined that a restriction of Art. 21 existed, was one between, on the one hand, the right of the applicants in the main proceeding to respect for their private and family life and, on the other, the legitimate protection of its official national language and its traditions through the Member State concerned^{xli}.

The CJEU suggested a solution for the proportionality test: ‘With regard to the alteration, on the marriage certificate, of the Polish surname “Wardyn” to “Vardyn”, the disproportionate nature of the refusal...may possibly appear from the fact that the Vilnius Civil Registry Division entered that name, in respect of the second applicant in the main proceedings, on the same certificate in compliance with the Polish spelling rules at issue’^{xlii}. This solution is nevertheless conditional on a prior finding of a ‘serious



inconvenience' by the referring judge that would confirm the competence of the CJEU in the case.

4.3. Comparing the application of the proportionality principle by the CJEU in *Sayn-Wittgenstein* and *Runevič-Vardyn*

4.3.1. *Why comparing Sayn-Wittgenstein and Runevič-Vardyn? Similarities between the cases*

In the cases summarized above, the CJEU does not examine the proportionality too closely. It applies a very vague test in both cases but with some differences. The respective results of the application of the principle diverge: in *Sayn-Wittgenstein* the Court finds that 'the Austrian authorities [...] do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them'^{XLIII}, while in *Runevič-Vardyn* the Court establishes the 'disproportionate nature' of the 'refusal by the Vilnius Civil Registry Division to accede to requests for change made by the applicants'^{XLIV}.

According to Harbo's premise (2010: 180)^{XLV}, the 'differences' in the application and results of the proportionality principle by the Court in *Sayn-Wittgenstein* and *Runevič-Vardyn*, could find an explanation in the fact that the two cases belong to two different areas of law and/or because of the different substance of the conflicting interests at stake in each of the cases.

Regarding, firstly, the area of law, both cases concern the same area: citizenship. In both cases the analysis of proportionality concerns the application of Art. 21 TFEU. This article contains the right to move and reside and a prohibition of discrimination^{XLVI}. Discrimination is only claimed in *Runevič-Vardyn*, not in *Sayn-Wittgenstein*, but as Art. 21 TFEU also contains the prohibition of discrimination, at the stage of the analysis of the justification for the restriction and its proportionality (the object of this analysis), it is only Art. 21 TFEU (and not 18 TFEU) that is taken into account here. Therefore, this difference is not relevant for the purpose of comparing the proportionality principle.

Secondly, concerning the 'substance' of the conflicting interests at stake, in my opinion the two cases are equally similar. Even if there are differences of facts, I think that the substance of the interests subjected to the balancing exercise is close enough to compare the application of the proportionality test by the Court. Below I will provide further arguments in support of this conclusion.



Firstly, in both *Sayn-Wittgenstein* and *Runevič-Vardyn* the CJEU is faced with a ‘national sensitive policy’ with the aim of protecting fundamental constitutional values related to constitutional identity. Concretely, in the case of *Sayn-Wittgenstein* the latter relates to the principle of equality; in *Runevič-Vardyn*, to the official national language that it is at the same time the safeguard of national unity and social cohesion. Both interests are protected by Art. 4(2) TEU: according to the Court, the obligation to respect the national identity of a Member State (Art. 4(2) TEU) includes both the protection of a State’s official national language^{XLVII} and also the peculiar system for the protection of equality used by Austria^{XLVIII}. The principle of equality and a Member State’s official national language are also values protected by EU primary law, as the CJEU has recalled in both cases. The principle of equality is enshrined in Article 20 of the Charter of Fundamental Rights^{XLIX}, while the protection of a State’s national language is guaranteed by Art. 3(3) TEU and Art. 22 of the Charter that ensure respect for the cultural and linguistic diversity of the Union^L.

It is true that the public policy justification in *Sayn-Wittgenstein*, differently from *Runevič-Vardyn*, has a closer relation with a fundamental right concern. This could be the origin of a different reasoning by the Court. Still, the separation between public policy and human right is hardly problematic because sometimes ‘the state simply couches its (possibly legitimate) “public interest” in terms of fundamental rights’ (Reich 2011: 24)^{LI}. But in *Sayn-Wittgenstein* the CJEU considered the justification as a matter of public policy, which entails that ‘it must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions’^{LII}. Additionally, the CJEU stated that a ‘public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society’^{LIII}. This finding of the Court lies outside the remit of this article.

Secondly, in both cases national measures based on fundamental constitutional values have brought about a partial change to the surnames of claimants. In both cases the changes were applied by the State to the surnames of its own nationals that, similarly, have received those surnames from non-nationals: by adoption and by marriage, respectively. Due to the change, the surnames of the claimants have become slightly different from the one of their relatives with different nationality. Consequently, the changes may lead the claimants to the same inconveniences: the family ties and respective identities of the claimants may be put into question. The change may thus create inconveniences at private



and public levels which may consequently create interferences on the freedoms guaranteed by Art. 21 TFEU.

The changes to the surnames are nevertheless formally different, which could in principle explain the different result of the Court concerning the proportionality of the changes. In *Sayn-Wittgenstein*, the change consists in removing from the surname the title of nobility (from ‘Fürstin von Sayn-Wittgenstein’ to ‘Sayn-Wittgenstein’) because those noble elements are not authorised by national legislation based on a fundamental constitutional value, the principle of equality. In *Runevič-Vardyn*, the change to the surname consists on placing a ‘V’ instead of a ‘W’ in the surname (from ‘Wardyn’ to ‘Vardyn’), because this last letter does not exist in Lithuanian, the national language, which is also a fundamental constitutional value that should be protected.

In *Runevič-Vardyn* the claimant received the ‘foreign surname’ from a non-national, therefore originally written in a foreign language according to its own rules. The change in the spelling of a foreign name means a change in a constituent element (one of the letters) of the surname. By contrast, in *Sayn-Wittgenstein*, the claimant had received, also from a non-national, a ‘German surname’, written nevertheless in the national language of Austria. The removal of a title of nobility from a ‘national’ name could therefore be understood as a non-substantial change. Nevertheless, while Germany and Austria share the same language, they do not share the same understanding of noble elements included in surnames. As affirmed by the Court in its ruling, ‘under German law, the words ‘Fürstin von’ are regarded not as a title of nobility but as a constituent element of the name lawfully acquired in the State of residence’^{LIV}. Consequently, the names ‘Fürstin von Sayn-Wittgenstein’ and ‘Sayn-Wittgenstein’ are considered as not being identical^{LV}.

In conclusion, even if there is a formal difference in the changes, substantially the transformations are similar: in both cases they make the surname ‘not identical’ to the one of their respective relative in a place where the claimants reside and develop their respective family lives. Therefore, the alterations of the surnames are able to lead the claimants into the same inconveniences concerning their respective identities and family lives, and also their freedoms under Art. 21 TFEU.

To sum up, at the stage of the analysis of proportionality, the Court is faced in both cases with a similar interest to be subjected to the test. I only find a difference between the justifications in *Sayn-Wittgenstein* and *Runevič-Vardyn* concerning the substance of the



interests. In *Sayn-Wittgenstein*, the CJEU is confronted with a constitutional principle which is ‘specific’ to the national legal system (the system for the protection of equality used by Austria), while in *Runevič-Vardyn* the constitutional tradition is ‘common’ to several Member States (the protection of the official national language). I will discuss later on if this single divergence may justify the difference in the application of the proportionality principle by the CJEU and also the different results. Despite this difference, the similarities between the two cases enable a comparison of the application of the proportionality principle by the Court.

4.3.2. *Comparison of the application of the proportionality principle by the CJEU in the selected cases*

As affirmed by de Búrca, where a state’s measure ‘is seen to be primarily within the competence of the state, the Court is likely to be reluctant, unless a very important Community interest is adversely affected, to examine the proportionality of the national measure too closely’ (De Búrca 1993: 112). The jurisdiction over national sensitive policies based on constitutional values should lie primarily with a national judge, who better knows the national sensitivities. This is even more so the case when those national policies are ‘specific’ to that national legal order. In this type of cases, the CJEU cannot strike a balance between two norms that are exogenous with respect to each other (the principle of EU law and the norm deriving from the national legal order) (Fontanelli and Martinico, forthcoming: 19). Additionally, if the area of law concerns citizenship – a transverse area of competence in which Member States still retain the main competence^{LVI} – the deference due to the national court and the national legislator is stronger than it would be in other areas of EU law.

Sayn-Wittgenstein is a case in which all those facts may justify a vague examination of proportionality by the Court: it is a citizenship case where the measure disputed is a national act based on a constitutional identity concern that constitutes a singular value to that State. All these facts would explain the reasoning of the Court which, in merely one paragraph, suggests that the national measure is proportionate without further analysis and justification.

As argued previously, the legitimacy of the result of the review of proportionality, using the works of Harbo and Endicott and putting them together, depends on two premises: firstly, on how the Court adapts its decision to the substantial meaning accorded to it in the



particular legal order (substantial legitimacy) and, secondly, on how the Court adapts its decision to the particular institutional context (procedural legitimacy). In *Sayn-Wittgenstein* the CJEU seems to be adapting its decision on proportionality to its particular power in the concrete case, assuring the legitimacy of its decision according to the second premise.

The judgement in *Sayn-Wittgenstein* seems to follow the path of the case law established by *Omega*^{LVII} and *Dynamic Medien*^{LVIII}, even if these two cases concern a different area of law, namely the internal market (Öberg 2012: 72-76; and Fontanelli and Martinico, forthcoming: 18-19). Scholars also add to this list the case of *Schmidberger*, even if this last case is slightly different from the rest (Öberg 2012: 72-76; and, only concerning the cases on internal market, Reich 2011: 18-19). In this case the CJEU was facing a constitutional tradition that was ‘common’ to several Member States (the freedom of assembly), while in the other cases the measure in question was ‘specific’ to a single legal system: in *Omega* the derogation was related to human dignity, while in *Dynamic Medien* the protection of child/human dignity was at stake. As Martinico affirms: ‘*Arguably, only in the first scenario – the one in which a ‘common’ constitutional tradition is involved – is the Court required to do some balancing proper. In these cases, indeed, the Court needs to balance two principles or sources belonging to the same legal order (the idea behind that is that national and supranational law share a zone where they overlap, in which the two terms of the balancing are situated). This is not the case in the second group of cases –concerning ‘singular’ constitutional tradition – because the CJEU cannot strike a balance between two norms that are exogenous with respect to each other (the principle of EU law and the norm deriving from the national legal order)*’(Fontanelli and Martinico, forthcoming: 19).

But in all these cases (*Schmidberger* included), the Court applied the proportionality test in the same way and arrived to the same result. It applied a vague review of proportionality and was reluctant to undertake a proper balancing, therefore adopting a deferent approach vis-à-vis the national legislator. The result in all these cases was that, for the Court, constitutionally sensitive measures based on fundamental rights arguments (being either common to all or specific to a single legal system) trump fundamental freedoms. This result respects the especial substantial meaning accorded to human rights in the EU legal order^{LIX} (substantial legitimacy), while respecting also the deference due to the national legislator that stems from the constitutional sensitivity of the measure (procedural legitimacy).

In principle, *Sayn-Wittgenstein* seems to be an example of the same approach taken by the Court. The Court would be applying a test similar to that used in *Omega*, *Schmidberger*,



Dynamic Medien and *Sayn Wittgenstein* because (using Harbo's premise) 'the substance of the conflicting interests at stake are the same', or at least similar enough. But I do not think that in this last case the 'substance' is completely the same because of to 'the different areas of law' involved in the respective cases.

Sayn-Wittgenstein regards citizenship, an area where the personality element brings fundamental freedoms closer to fundamental rights. In *Sayn-Wittgenstein*, the freedom to move and reside is intrinsically linked to the fundamental right to respect for the private and family life, while in the other cases the fundamental freedoms concerned merely economical aims. An application of the proportionality principle as used in *Omega*, *Schmidberger* and *Dynamic Medien* would entail a different result for *Sayn-Wittgenstein*. The result of *Sayn-Wittgenstein* was that constitutionally sensitive measures based on fundamental rights arguments (even if 'specific' to a single legal system) trump not only fundamental freedoms, but also fundamental rights that are 'common' to the constitutional tradition of Member States, and that is not only of interest for the EU but also for the Member States to effectively protect them. I think that, in this type of cases, at the very least a deeper analysis of proportionality is required in order to duly ascertain the substantial legitimacy of the result.

According to de Búrca, in applying a lenient test of proportionality the CJEU is not striking a proper balance (De Búrca 1993). Nevertheless, I think that the reasoning of the Court involves a balance in which prominence is given to the national measure. The Court is suggesting 'a result on proportionality', and the absence of a proper balance only indicates a strong bias in favour of the constitutionally based national measure, which renders an exhaustive balancing unnecessary. This bias is the result of the lack of competence of the CJEU in an ambit of national sensitive policy (which is, additionally, 'singular' to the Austrian legal system in the case of *Sayn-Wittgenstein*). This makes the constitutionally based national measure to stand as the main interest to be protected. But regarding a formal application of the principle of proportionality, this bias provokes some 'pathologies' (Endicott 2012) in the principle of proportionality that erode the very function of it: to secure the legitimacy of judicial decisions (Harbo 2010).

This problem did not emerge in *Omega*, *Schmidberger* or *Dynamic Medien*, cases in which the legitimacy was nevertheless assured: the final decision of the CJEU made fundamental rights prevail over fundamental freedoms while at the same time respecting the



constitutional character of the national measure. Nevertheless, in *Sayn-Wittgenstein* the implications of applying the same test to a different area of law have been underestimated. As a consequence, the proportionality principle suffers from two of the ‘pathologies’ identified by Endicott (2012): the pathology of ‘uncertainty’ and the pathology of ‘deference’.

Concerning, firstly, the pathology of uncertainty, I think that in *Sayn-Wittgenstein* the CJEU, while applying the proportionality principle, is favouring the public interest and underestimating the risks to the private interest at stake. The Court, in the ruling in *Sayn-Wittgenstein*, only mentions, as a preliminary point before assessing the existence of a restriction to the free movement, that the importance of protecting ‘a person’s name is a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter of Fundamental Rights of the European Union’^{LX}. Consequently, it affirms the link between the fundamental freedoms involved in the dispute and the fundamental rights recognised by the Court. Nevertheless, when the answer of the Court arrives to the stage of analysing proportionality, the Court upholds the proportionality of the national measure without any further mention of that fundamental right just proclaimed.

This lack of reference to the human rights involved in the case could be explained by the lack of binding force by the EU Charter when the request for a preliminary ruling was received by the CJEU^{LXI}. But human rights were already then one of the main interests to be protected by the CJEU. The legitimacy of the application of the proportionality principle is undermined if human rights are underestimated and I think this was the case in *Sayn-Wittgenstein*. While confirming the proportionality of the national measure without any further consideration of the private interest at stake, the CJEU was implicitly giving priority to public policy provision.

This conclusion is supported by the fact that, already at the stage of the judgement when the Court was considering whether or not a restriction existed, it determined that the divergence between the most recent Austrian identity documents of Mrs Sayn-Wittgenstein and the name which she had used for 15 year in her daily life was causing her ‘serious inconvenience’ at private and public levels. According to the Court’s own case law a restriction on the freedoms recognised by Art. 21 TFEU must be liable to cause ‘serious inconvenience’ to those concerned at administrative, professional and private levels^{LXII} in



order to be qualified as such. The liability to dispel doubts as to the person's identity that is capable to cause a serious inconvenience at private level constitutes also an interference (that is qualified by the Court as 'serious') on the right to private and family life. I think that the Court is already measuring, implicitly, the proportionality of the national measure when considering it a 'serious' inconvenience for Mrs. Sayn-Wittgenstein's private rights.

The test of proportionality is linked to and conditioned upon the previous finding of a restriction of Art. 21 TFEU. If the Court finds a restriction, the application of the proportionality principle is conditioned upon two premises, in my opinion: the strict understanding of the public policy provision that the CJEU has reiterated^{LXIII} and also the fact that a restriction that has been qualified as a 'serious inconvenience' for the private interests of Mrs. Sayn-Wittgenstein has already been found and affirmed.

It seems inconsistent to me to sustain, firstly, that there exists a restriction of Art. 21 TFEU and, consequently, a restriction of the right to private and family life, qualified as a 'serious inconvenience' for Mrs. Sayn-Wittgenstein, while later on the judgement, when examining the proportionality, does not make any reference to the private right involved. Consequently I think that this fact proves the existence of the pathology of uncertainty: when determining the proportionality of the public interest, the Court is favouring this interest and underestimating the risks to the private interest at stake. A more prominent role of the likely risks for the private interest is required, at least in the examination of proportionality, in order to elude or minimize this pathology.

A national constitutional sensitivity by the CJEU is also the reason of a second pathology in the application of the proportionality principle in *Sayn-Wittgenstein*: the pathology of deference. I consider that the Court, for the same reasons as enshrined above, is deferring excessively to the initial decision maker, so the protection of human rights is lost. It gives priority to the national measure without weighting this interest vis-à-vis the private interest involved in the case.

In conclusion, the interpretation of the principle of proportionality as it is used in cases concerning the area of the internal market may lead to pathologies if it is applied in the same way in cases concerning citizenship, a different area of law. As a consequence of these pathologies, the legitimacy of the result is undermined. The result in *Sayn-Wittgenstein*, as I have previously advanced, is that for the CJEU, a constitutionally sensitive measure based on a fundamental rights concern (even if 'specific' to a single legal system) trumps



not only fundamental freedoms, but also fundamental rights that are ‘common’ to the constitutional traditions of the Member States. The legitimacy of this result is at least more questionable than in the cases of *Omega*, *Schmidberger* or *Dynamic Medien*.

But the Court is trapped by its obligation of deference. Therefore, a dilemma arises: how to effectively protect the special substantial meaning accorded to human rights in the EU while respecting, at the same time, the deference due to the national judge because of the constitutional character of the national measure (and additionally in some cases its singularity) and the area of law at stake?

Runevič-Vardyn is a judgement of the CJEU where the problems of the proportionality principle as applied by the CJEU in *Sayn-Wittgenstein* decrease (even if they are not completely erased). Differently than in *Sayn-Wittgenstein*, the CJEU in *Runevič-Vardyn*, at the stage of the analysis of proportionality, highlights the importance of the protection of Art. 7 of the Charter of Fundamental Rights of the European Union and Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (protection of private and family life)^{LXIV}. The Court expressly mentions the link between fundamental freedoms and fundamental rights: ‘the importance of ensuring the protection of the family life of citizens of the Union in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty has been recognised under European Union law’^{LXV}. By mentioning the importance of the fundamental right at stake at this stage of the reasoning, the CJEU contributes to alleviate the pathology of ‘uncertainty’ with respect to *Sayn-Wittgenstein*, a case where the Court made no express reference to the private interest at stake. Already this sole mention renders more justice to the special substantial meaning given to human rights in the EU legal order.

Still, the test is very lenient, but the fact of giving a more important role in the reasoning about proportionality to the human rights involved in the case contributes to alleviate the pathologies found in *Sayn-Wittgenstein*. It entails also less deference to the national legislator (consequently, it alleviates the pathology of deference) because the CJEU highlights the importance of not undermining the protection of human rights, despite the constitutionally sensitive national interest. The results on proportionality are different in *Sayn-Wittgenstein* and *Runevič-Vardyn*. This can be seen as a proof of the lack of deferential constrains of the Court. In this last case, differently from *Sayn-Wittgenstein*, the CJEU suggests the ‘disproportionate nature’^{LXVI} of the national measure.



4.3.3. *Why the differences between Sayn-Wittgenstein and Runevič-Vardyn in the application of the proportionality principle?*

The question that arises from the comparison above is why the reasoning of the Court in *Runevič-Vardyn*, and the ensuing result, differs from *Sayn-Wittgenstein*. Why does the Court highlight, at the stage of the analysis of proportionality in *Runevič-Vardyn* but not in *Sayn-Wittgenstein*, the protection of the human right involved? *Sayn-Wittgenstein* and *Runevič-Vardyn* are both cases where references for a preliminary ruling were received by the Court before the entry into force of the Treaty of Lisbon, when the Charter of Fundamental Rights of the EU had not acquired its binding force^{LXVII}. Additionally, both cases were resolved by the Court after the entry into force of the Treaty of Lisbon. Therefore, there are no differences between the two cases concerning the binding force of the Charter that could explain the mentioning of the human right involved in one but not in the other.

Can the difference be explained by the fact that in *Sayn-Wittgenstein* the constitutional principle is ‘specific’, while it is not so in *Runevič-Vardyn*? Arguably, only in this second case is the Court required to making a proper balance because the two interests belong to the same legal order (Fontanelli and Martinico, forthcoming: 19). This could explain the reduction of pathologies in *Runevič-Vardyn*, where the origin of the bias is lessened: in *Runevič-Vardyn* the CJEU is less constrained than in *Sayn-Wittgenstein* to show deference to the national legislator because the constitutional tradition is ‘common’ to several Members. In *Sayn-Wittgenstein*, where the constitutional value is ‘specific’, the CJEU theoretically cannot strike a balance between two norms that are exogenous with respect to each other. The problem is that, in spite of its lack of competence, the CJEU still proposes a solution in *Sayn-Wittgenstein* (even if only as a suggestion), thus incurring in pathologies due to a vague analysis made because of its constrains.

Still, I do not think that this explanation is fully convincing because the main difference between the reasoning of the Court in both cases does not arise at the stage of the analysis of proportionality but already before, at the stage of the decision about the existence of restriction on Art. 21 TFEU. I think that this main difference is the cause of the subsequent divergence between *Sayn-Wittgenstein* and *Runevič-Vardyn* in the application of the proportionality principle. The CJEU in *Runevič-Vardyn*, differently than in *Sayn-Wittgenstein*, delegates the decision about the existence of a restriction of Art. 21 TFEU to



the national judge. More specifically, the CJEU delegates the decision about the existence of ‘serious inconvenience’, which involves a restriction of Art. 21 TFEU.

It is true that, in both cases that are the object of this analysis, the CJEU suggests a decision base on proportionality, and also that in both cases the last decision about proportionality rests with the national judge. But the delegation made in *Runevič-Vardyn* has consequences for the application of the principle of proportionality by the CJEU. When the CJEU applies the proportionality principle, its competence to do so has not yet been ascertained because the affirmation of the existence of a restriction of Art. 21 TFEU is still pending. The Court only assumes, hypothetically, that it is competent, in order to issue guidelines to the national judge about proportionality. As a consequence, the national judge might not feel compelled so strongly to follow the guidelines by the CJEU on proportionality; while, in parallel, the CJEU on its part can assume in this case, more comfortably than in *Sayn-Wittgenstein*, the place of the national judge when suggesting a solution on proportionality. Therefore, its suggestion is removed more clearly from the origin of its bias – the obligation of deference towards to the national judge – and thus the pathologies decrease.

One of the main arguments for this conclusion is the fact that the CJEU does not hesitate to affirm that the balance to be made in *Runevič-Vardyn* is one between, on the one hand, the right of the applicants in the main proceeding to respect for their private and family life and, on the other, the legitimate protection of the official national language and traditions by the Member State concerned^{LXVIII}. Art. 21 TFEU and the freedom to move and reside disappear from this balance, absorbed by the human right involved in the case. This is astonishing, considering that the CJEU has still not clarified in its case law whether the right to private and family life may be seen as part of the content of Art. 21 TFEU (Kochenov 2013), even if it is intrinsically linked to it.

The explanation of this attitude is that the Court is assuming, without prejudice, the place of the national judge when suggesting its own view on proportionality. The national judge is the one that has the competence and who is not constrained to balance the human right to private and family life. So the CJEU would be assuming the position of the national judge, who does not owe deference in the same way that the CJEU does, and who may also take into account in the balancing the human right involved without problems of competence.



Still, the possibility for the national judge to fall into any of the pathologies while examining the proportionality is not precluded, but the result of the application of the principle of proportionality as suggested by the CJEU is liberated from the bias: the referring Court, unlike the CJEU, does not owe any deference to an exogenous Court in order to balance a public policy based on a constitutional concern with a fundamental right also protected not only by its own constitution, but by the EU Charter and the European Convention.

But even if this delegation might constitute a way to minimize the pathologies of the proportionality principle, as it has been argued above, I think that it stops short of being truly convincing because of the high price to pay by the CJEU when ceding the decision on the existence of restriction of Art. 21 TFEU. The delegation may lead to undermining the coherence and consistency of EU law, as well as the essence of EU citizenship (Kochenov 2013: 17-18). But it is beyond the purpose of this paper to analyse the effects of the delegation, which that are different from the effects on the application of the principle of proportionality in particular. This will have to be the object of further research.

5. Conclusions

In this paper I have tried to shed light on the rationale of the CJEU when applying the principle of proportionality in a concrete area of law: that of citizenship. In order to do so, this article has compared recent cases that share similar conflicting interests. The approach for the comparison has consisted in finding and measuring ‘pathologies’ (Endicott 2012) in the application of the principle by the CJEU. Through this approach it was possible to evaluate the legitimacy of the final result achieved by the Court. The main findings of this article may be summarized as follows:

- In the two cases analysed that concern the same area of law and where the interests to be weighted are close enough, the reasoning of the Court in the application of the proportionality principle is nevertheless different. Consequently, I can conclude that there is no unique reasoning in the interpretation of the principle of proportionality by the CJEU in the selected cases, despite the fact that they regard the same area of law, citizenship, with similar interests subjected to balance.



- Owing to this divergence in the reasoning, also the pathologies in the application of the proportionality principle differ. In *Sayn-Wittgenstein* the pathologies are more important because the reasoning of the Court on proportionality is biased in favour of the public interest, which in turn is due to the deferential constrains of the Court when balancing a national measure related to a national sensitive policy that is additionally specific to the Austrian legal order. The Court favours the public interest when it suggests its solution on proportionality, not making special reference to the private interest involved. By contrast, in *Runevič-Vardyn* the private interest (and, more specifically, the fundamental right involved in the balance that is intrinsically linked to the fundamental freedom) is mentioned and considered by the Court.

- However, despite of the less pathological application of the proportionality principle in *Runevič-Vardyn*, the vague application of the proportionality test does not render justice to the special substantial meaning given to human rights in the EU legal order. Additionally, the delegation to the national Court to decide about the restriction of Art. 21 TFEU (which has been argued in Section 4.3.3. of this paper to be the cause of the different reasoning on proportionality in *Runevič-Vardyn*) stops short of being truly convincing. This delegation may lead to undermining the coherence and consistency of EU law, as well as the essence of EU citizenship (Kochenov 2013: 17-18).

- In conclusion, a more coherent interpretation of the proportionality principle by the CJEU is urgently required in order to effectively protect the special substantial meaning given to fundamental rights in the EU legal order. This is especially true for citizenship cases where fundamental rights are intrinsically connected to fundamental freedoms. In order to achieve legitimacy, it is crucial to explore alternative ways to eliminate or at least diminish the pathologies of the principle of proportionality in the application of it by the CJEU. This will be the object of personal future research.

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¹ The 'fundamental status' has been established by the Court (Case C-184/99 *Grzelczyk* [2001] ECR I-06193) and it is gathered in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77.

¹¹ A further explanation of this concept is provided in Section 2 of this paper.

¹¹¹ Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693.



- ^{IV} Case C-391/09 *Runevič-Vardyn* [2011] ECR I-03787.
- ^V Cf. Case C-36/02 *Omega* [2004] ECR I-9609; Case C-244/06 *Dynamic Medien* [2008] ECR I-505.
- ^{VI} Joined cases C-96/03 and C-97/03, *A. Tempelman and Coniugi T.H.J.M. van Schaijk v. Directeur van de Rijksdienst voor de keuring van Vee en Vlees* [2005] ECR I-1895.
- ^{VII} It is well-known the history of the incorporation of the fundamental rights as general principles of EU law to the case law of the CJEU (at that time CJEU), through which the Court has been able to guarantee the respect of human rights, before the first codification of the rights in the EU Charter.
- ^{VIII} See for example *Omega* (n V); *Dynamic Medien* (n V); *Sayn-Wittgenstein* (n III).
- ^{IX} Treaty establishing a Constitution for Europe, Official Journal of the European Union, notice number 2004/C 310/01 Volume 47, 16 December 2004.
- ^X See Case C-122/00 *Schmidberger* [2003] ECR I-05659; Case C-341/05 *Laval* [2007] ECR I-11767; Case C-438/05 *Viking* [2007] ECR I-10779.
- ^{XI} The hypothesis was already mentioned in the Introduction of this paper. According to Harbo, the CJEU is interpreting the proportionality principle in different ways, and these different interpretations are determined by the different areas of law in which it is applied as well as by the substance of the conflicting interests at stake.
- ^{XII} Art. 6, para. 1, TUE: 1. “1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”
- ^{XIII} Case C-294/83, *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1986 Page 01339, para. 23.
- ^{XIV} *Schmidberger* (n X), para. 73. See, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-02925, para. 41; and Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 14.
- ^{XV} Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, para. 307.
- ^{XVI} *Ibid.*
- ^{XVII} *Sayn-Wittgenstein* (n III).
- ^{XVIII} *Runevič-Vardyn* (n IV).
- ^{XIX} (Gesetz über die Aufhebung des Adels, der weltlichen Ritter- und Damenorden und gewisser Titel und Würden) of 3 April 1919 (StGBI. 211/1919), in the version applicable to the main proceedings (StGBI. 1/1920; ‘the Law on the abolition of the nobility’). It has constitutional status under Article 149(1) of the Federal Constitutional Law (Bundes-Verfassungsgesetz).
- ^{XX} *Sayn-Wittgenstein* (n III), para. 22.
- ^{XXI} *Sayn-Wittgenstein* (n III), para. 23.
- ^{XXII} *Sayn-Wittgenstein* (n III), para. 24.
- ^{XXIII} *Sayn-Wittgenstein* (n III), para. 27-30.
- ^{XXIV} *Sayn-Wittgenstein* (n III), para. 35.
- ^{XXV} *Sayn-Wittgenstein* (n III), para. 71.
- ^{XXVI} *Sayn-Wittgenstein* (n III), para. 83.
- ^{XXVII} *Sayn-Wittgenstein* (n III), para. 87; *Omega* (n V), para. 30; Case C-33/07 *Jipa* [2008] ECR I-5157, para. 23.
- ^{XXVIII} *Sayn-Wittgenstein* (n III), para. 89.
- ^{XXIX} *Sayn-Wittgenstein* (n III), para. 91; *Omega* (n V), para. 37-38.
- ^{XXX} *Sayn-Wittgenstein* (n III), para. 93.
- ^{XXXI} *Runevič-Vardyn* (n IV), para. 20.
- ^{XXXII} *Runevič-Vardyn* (n IV), para. 25.
- ^{XXXIII} *Runevič-Vardyn* (n IV), para. 50.
- ^{XXXIV} *Runevič-Vardyn* (n IV), para. 76. See to that effect, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para 36; Case C-353/06 *Grunkin and Paul* [2008] ECR I-07639 paras 23-28; and *Sayn-Wittgenstein* (n VI), paras 67, 69 and 70.
- ^{XXXV} *Runevič-Vardyn* (n IV), para- 77.
- ^{XXXVI} See, also to that effect, *Garcia Avello* (n XXXIV), para. 36, and *Sayn-Wittgenstein* (n III), paras 55 and 66-70.
- ^{XXXVII} *Runevič-Vardyn* (n IV), para. 83.
- ^{XXXVIII} *Runevič-Vardyn* (n IV), para. 84.
- ^{XXXIX} *Runevič-Vardyn* (n IV), para. 89 and 90.
- ^{XL} *Runevič-Vardyn* (n IV), para. 90. See Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 98.



XL^I *Runevič-Vardyn* (n IV), para. 91.

XL^{II} *Runevič-Vardyn* (n IV), para. 92.

XL^{III} *Sayn-Wittgenstein* (n III), para. 93.

XL^{IV} *Runevič-Vardyn* (n IV), para. 92.

XL^V Harbo's premise was already mentioned in the Introduction of this paper. He affirms that the CJEU is interpreting the proportionality principle in different ways, and these different interpretations 'are determined by the different areas of law in which it is applied and the substance of the conflicting interests at stake'.

XL^{VI} *Runevič-Vardyn* (n IV), para. 65.

XL^{VII} *Runevič-Vardyn* (n IV), para. 86.

XL^{VIII} *Sayn-Wittgenstein* (n III), para. 92. Concretely the CJEU says in this paragraph: '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'.

XL^{IX} Article 20 of the Charter of Fundamental Rights of the European Union enshrines: 'Everyone is equal before the law'.

^LArt. 3(3) TEU says: 'It (the Union) shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'. Article 22 of the Charter of Fundamental Rights of the European Union enshrines: 'The Union shall respect cultural, religious and linguistic diversity'.

^LI See *Omega* (n V); *Dynamic Medien* (n V).

^LII See *Sayn-Wittgenstein* (n III), para. 86; *Omega* (n V), para. 30; and *Jipa* (n XXVII), para. 23.

^LIII *Sayn-Wittgenstein* (n III), para. 86.

^LIV *Sayn-Wittgenstein* (n III), para. 64.

^LV *Sayn-Wittgenstein* (n III), para. 65.

^LVI Case C-135/08 *Rottman* [2010] ECR I-01449.

^LVII *Omega* (n V).

^LVIII *Dynamic Medien* (n V).

^LIX Reference to it has already been mentioned in section 4 of this article.

^LX *Sayn-Wittgenstein* (n III), para. 52.

^LXI The reference for preliminary ruling was received on 10 June 2009. The EU Charter acquired binding force with the entry into force of the Lisbon Treaty on 1 December 2009.

^LXII See Case *Runevič-Vardyn* (n IV), para. 76; *García Avello* (n XXXIV), para. 36; *Grunkin and Paul* (n XXXIV), para. 23-28; and *Sayn-Wittgenstein* (n III), paras. 67, 69 and 70.

^LXIII *Sayn-Wittgenstein* (n III), para. 86; *Omega* (n V), para. 30; and *Jipa* (n XXVII), para. 23.

^LXIV *Runevič-Vardyn* (n IV), para 89-90.

^LXV *Runevič-Vardyn* (n IV), para. 90. See also *Orfanopoulos and Oliveri* (n XL), para. 98.

^LXVI *Runevič-Vardyn* (n IV), para. 92.

^LXVII 10 June 2009 and 2 October 2009 respectively.

^LXVIII *Runevič-Vardyn* (n IV), para. 91.

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