RESPECTING LINGUISTIC DIVERSITY IN THE EUROPEAN UNION

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CHAPTER 5

Union citizenship and language rights

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The concept of Union citizenship, officially introduced into European Community law in the Treaty of Maastricht, has evolved with breathtaking speed, transforming itself into an important instrument for the reconceptualization of the European Community legal order. The European Court of Justice (ECJ) judgment in *Bickel and Franz* (1998) touched on language rights. As the concept of citizenship came to be qualified as what the *Grzelzcyk* judgment (2001) called the "fundamental status of nationals of the Member States", it seemed only a matter of time before the principle of linguistic diversity would be further buttressed by the concept of Union citizenship. Although in the *Kik* case the Court of First Instance (2001) and the ECJ (2003) did not take up this challenge, it seems very likely that the concept of Union citizenship will prove highly relevant to the protection of linguistic diversity within the European Union in the future.

Introduction

In the *Bickel and Franz* case (1998[1]), the European Court of Justice (ECJ) made a clear connection between two rapidly evolving sets of rights within EU law: Union citizenship on the one hand and language rights (or, respectively, minority rights) on the other. Both concepts are in certain respects in dispute, but they offer enormous potential for further development. When the *Bickel and Franz* judgment was handed down, the emancipation process of Union citizenship as a concept with autonomous meaning was in its early stages, with strong scepticism still persisting. The *Bickel and Franz* judgment was the first ever in which measures relating to minority protection were considered a possible legitimate aim of the European Union.[2]



Since *Bickel and Franz,* no further judgment dealing directly with Union citizenship on the one hand and language and minority rights on the other has been handed down. On the other hand, both concepts have undergone – independently of each other – a profound evolution. If we reconsider this issue today, and reconnect these two concepts eight years after the *Bickel and Franz* judgment, a somewhat different picture will emerge. Many aspects of the case are now far clearer, the dynamic residing in these issues having been demonstrated repeatedly. Viewed from the perspective of those who consider linguistic diversity an enrichment of the European cultural order, the legal environment seems far more propitious.

If we take this improvement of the legal environment as our basic premise and seek a somewhat more detailed picture of the actual situation, it seems advisable to start with a closer analysis of the concept of Union citizenship as it stands today and of its development potential for the near future. We will begin with a short summary of the *Bickel and Franz* case, followed by an analysis of how Union citizenship can be seen today as an instrument for fostering language rights within the European Union, and by a consideration of further developments which seem probable in the light of recent European Court of Justice (ECJ) jurisprudence. The consequences flowing from the *Kik* judgments will be considered.[3] Our conclusions will be set against the background of a changed and further changing EU constitutional order.

The development of Union citizenship

The concept as such

Although the concept of Union citizenship has a short history as a positive principle of EU law, in fact it has long been a cornerstone of the EC constitutional order. While Union citizenship was officially introduced into EC law with the Treaty of Maastricht, the idea of European citizenship dates back at least to the year 1961 when the European Commission launched the concept of a *citoyenneté européenne* in the context of the free circulation of workers (Hatje 2000: 370, citing Evans 1994: 683). This concept became especially prominent with the naming of the ad hoc Committee on A People's Europe under the direction of Pietro Adonnino in 1984. While it was too early for the revision of the Treaties of Rome known as the Single European Act to take the proposals of the ad hoc Committee into account, Articles 8 to 8e of the Maastricht Treaty of 1992 gave the concept of European citizenship central importance in the attempt to forge a new European identity. In the absence of a European people it was clear from the very begin-

ning that Union citizenship should be ascribed a high symbolic value. This was not the only concept to be given symbolic value in the Treaty of Maastricht: the entire treaty, drafted in a period of dramatic political changes in Europe, when old political divides and frontiers seemed to be rapidly disappearing, was loaded with symbolic terms and ideas. The new concept of a European Union itself – like the move from European Economic Community to European Community (Craig & de Búrca 2003: 755) – was to a large extent symbolic. It raised the hopes of those who believed in an ever closer "Union" without putting demands on the Member States and without requiring them to commit themselves too rigidly. The construction of the European Union on three pillars (the European Communities, common foreign and security policy, and cooperation in the prevention and prosecution of crime) introduced at the same time, had many traits in common with Union citizenship: it had a pronounced inspirational touch, it evoked similarities between the European Union and sovereign states, and it postponed really hard choices to a future, uncertain date.

To be sure, the concept of Union citizenship was not entirely sympathetically received, primarily because of its vagueness. It was suggested that "citizenship is, in other words, nearly exclusively a symbolic plaything without substantive content" (Jessurun D'Oliveira 1995: 82). Others described the concept as a "metaphor" (Reich 2001) – a term that may at first sight mean no more than "standing for something else," but in this context clearly bears a negative connotation: "citizenship" is seen as a sweeping, emotionally loaded concept incapable of keeping the promises it seems to imply – in fact, a mere placebo. On the one hand it was clear that European integration could not maintain momentum without the expression of lofty goals; on the other hand the will to make the necessary concessions in the field of national sovereignty was largely lacking. Dressing an existing fundamental freedom (that of free movement), along with some ancillary political rights, in new, suggestive, though confusing garb stimulated the integration process for a while – and indeed European integration still enjoys considerable support, as long as people are prepared – to a certain extent – to be deceived. In any case it would take some time before illusions died in confrontation with hard facts.

As so often in EU law when there is an evident need to develop the law further but the necessary consent of Member States is lacking, an evolutionary clause was inserted which allowed for future changes of the constitutional order without having to go through the full formal process of treaty amendment. Such a provision can be found in Article 22 of the EC Treaty (formerly Article 8e). As has been seen in other cases,[4] in the final analysis it is the ECJ that takes the lead and not the political organs.

ECJ jurisprudence

From the beginnings to Martínez Sala

At first the ECJ was rather cautious when dealing – more indirectly than directly – with issues of Union citizenship. In *Uecker*[5] the ECJ affirmed that Union citizenship was not intended to extend the *scope ratione materiae* of the Treaty to cover internal situations with no link with Community law, while in *Skanavi*[6] the ECJ seemed to attribute to Article 8a (now Article 18) only a secondary, residual role with regard to other Treaty provisions, thereby also limiting its potential for further development (Craig & de Búrca 2003: 756).

The case of *Bickel and Franz,* which will be treated in more detail later on, came to mark the real threshold: on the one hand, the judgment was carefully worded to ensure that no rupture with previous jurisprudence could be implied; on the other hand, it was evident that the Court was now prepared for a very extensive interpretation of the right not to be discriminated against in the exercise of the fundamental freedom of movement. Even though the link with Union citizenship was very cautious,[7] this concept provided the solid foundations for such an approach.

In *Bickel and Franz* the elements hinting at Union citizenship as a revolutionary concept are only sketchy – first, because the Court had recourse to a traditional mode of argument (though applied, as already mentioned, in a very extensive way) and, second, because the Court took every effort to demonstrate that the extension of the rights it was willing to grant would cause no further costs to the Member States, an issue very important to assure political acceptance of ECJ judgments.[8] As is well known, also in the field of language rights or, more generally, in that of minority protection, the cost issue is of pivotal importance.

In *Martínez Sala,* however, even this caution was given up.[9] In hindsight it may be said that this was the case where the ECJ definitely unleashed the dynamic potential dwelling in the concept of Union citizenship. In view of its importance it seems appropriate to provide some detail about this judgment.

Martínez Sala was a Spanish national who had been living in Germany since 1968. She had had various jobs, but since 1989 she had been living on social assistance. Until 1984 she had regularly obtained residence permits. For the period after 1984, she could only produce documents certifying that an extension of her residence permit had been applied for. She again obtained a residence permit as of April 1994. In 1993 she applied for a child-raising allowance from the *Freistaat Bayern.* Such allowances are granted, in principle, to German citizens or to workers under Article 7(2) of Regulation No. 1612/68, or to employed persons within the meaning of Article 2 in conjunction with Article 1 of Regulation (EEC) No. 1408/71. Ms Martínez Sala was neither a German citizen nor a migrant worker,

nor was she even in possession of a renewed residence permit. She was simp
Union citizen living in another Member State who in the past had been grant
residence permit (but who had failed up to that moment to be granted an ex
sion of this permit). Strangely enough, for the ECJ this sufficed. Once a Ur
citizen had been admitted she could fully rely on the nondiscrimination provi
in Article 12 (ex Article 6) of the EC Treaty in all situations falling within the *s*
ratione materiae of Community law. This is a statement bearing enormous c
sequences, especially if one keeps in mind how the ECJ defines such "situat
which fall within the *scope ratione materiae* of Community law". As Tomus
(2000: 451) points out, "almost anything can become enmeshed in the logi
freedom of movement to the extent that it tends either to facilitate or to ham
the full exercise of that right. [...] The Court simply asks whether the legal pro
sitions or practice under review exerts any impact on one of the freedoms ur
the Treaty."[10]

Such an interpretation implies a clear departure from the logic of material
iprocity heretofore guiding the extension of social benefits to migrant worker
to students – groups already participating in economic activity or preparing t
so. A Union citizen has, as such, contributed nothing to the economy of his co
try of residence, if one sets aside his role as a consumer and as a service receiv
is true that child-raising allowances fall within the *scope ratione materiae* of C
munity law, but only with regard to a worker, or an employed or self-emplo
person (Tomuschat 2000: 452). To extend this right to all Union citizens mean
give to the concept of citizenship an autonomous material content independer
the exercise of a fundamental freedom. This is a very important result also f
the viewpoint of language or minority protection. Since measures of this kind
not constitute public goods, because their enjoyment creates additional costs
there would be good reason to grant them only to those EU foreigners who e
the fundamental freedom of movement. This is, however, not the position ta
by the ECJ. The Court presumes a degree of solidarity between the Member St
that surely explores the outer borders of constitutional consent within the Un
On the other hand, it clearly strengthens European identity.

Further developments

Once the ground was laid for attributing to Union citizenship a material con
going beyond the rights resulting from the Articles 18 and following, the need
further clarifications was only a matter of time. The most prominent contribu
in this regard was surely the case of *Rudy Grzelzcyk*, decided in 2001.[11]

Rudy Grzelczyk was a French citizen studying in Belgium. In the first th
years of his studies he worked part-time but in the fourth year he wanted to c

centrate fully on his studies and therefore applied for *minimex*, a minimum subsistence allowance granted by the Belgian Government to Belgian citizens. Not being Belgian, Mr Grzelczyk was not entitled, according to the Belgian Government, to receive this allowance. The ECJ, confronted with this issue, ruled, in what was a very broad interpretation of Union citizenship, that denial of the allowance was to be considered a violation of EC law. This finding was based, first of all, on Article 12 (ex Article 6), which prohibits, as already mentioned, any discrimination based on nationality within the scope of application of the EC treaty.

The crucial question was whether, and on the basis of what considerations, this situation fell within the scope of application of the EC treaty. As is well known, in the past the ECJ has ruled that EC foreign students have no right to maintenance allowances.[12] The most obvious traditional way would have been to examine whether Mr Grzelczyk could be considered a worker. There were plenty of ways of making a strong case in this sense, and in fact Advocate-General Siegbert Alber argued exactly in this direction. The Court would have had, therefore, an easy way out of a delicate situation. But the Court did not take advantage of this possibility, however, and seems to have seized on the opportunity to further develop the concept of Union citizenship. It qualified Union citizenship as the "fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for" (*Grzelczyk*, para. 31). The Belgian Government's statement according to which "the concept of citizenship has no autonomous content" (*Grzelczyk*, para. 21) was thereby expressly rejected.

What was only implied in *Martínez Sala* now was said explicitly. The situations falling within the *scope ratione materiae* of Community law include (*Grzelczyk*, para. 33) "those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State as conferred by Article 8a" (now Article 18).

Therefore, it can be said that in principle it is sufficient to have the right to reside freely in another Member State in order to be entitled to all rights resulting from Union citizenship and, above all, not to be discriminated against by nationals of the state of residence.

The Portuguese government, which intervened in this case, had pleaded for a more extensive concept of European citizenship and therefore wanted a more sweeping opening, declaring:

> ... since the entry into force of the Treaty on European Union, nationals of the Member States are no longer regarded in Community law as being primarily economic factors in an essentially economic community. ...[N]ationals of the Mem-

> ber States acquired the status of citizen of the Union and ceased to be regarded as purely economic agents, [so] it follows that the application of Regulation No 1612/68 ought also to be extended to all citizens of the Union, whether or not they are workers within the meaning of that regulation. (*Grzelczyk*, paras. 21ff.)

The Court referred instead to Article 3 of the Directive 93/96, which permits restrictions to be imposed on non-national students with regard to social assistance allowances. In fact, these restrictions are only of minor importance; seems rather that the statement of the Portuguese government points to the direction in which the concept of Union citizenship will develop.

Union citizenship is a concept of EU law; it confers rights in cross-border situations or situations in which EU law can be invoked. In principle it does not apply in purely internal situations, that is, in a situation where a national of a Member State wants to exercise a right within his own state. As soon, however, as a connection with EC law can be established, the concept of Union citizenship becomes relevant. This was evidenced in the case of *D'Hoop*.[13]

Marie-Nathalie D´Hoop was a Belgian national who had completed her secondary school education in France and wanted to apply for a certain social benefit granted to Belgian nationals seeking first employment. This allowance is granted on condition that secondary education has been completed at an educational establishment in the applicant's own country.

The Court found that also in this case the concept of Union citizenship was applicable – so, even against a Member State of whom a person is a national:

> The situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 8a of the EC Treaty (now Art. 18).
> In that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement. (*D'Hoop*, paras. 29–30)

As a result it can be said that Union citizenship is coming full circle. As in *Grzelczyk*, however, also in this case the Court leaves some discretionary power to the Member States to limit the extent to which social allowances have to be granted also to Union citizens: "[I]t is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for that allowance and the geographic employment market concerned" (*D'Hoop*, para. 38).

In *Baumbast*,[14] finally, the Court accorded direct effect to Article 18. The Court stated in this context as follows (para. 84):

> As regards in particular the right to reside within the territory of the Member States under Art. 18 (1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Art. 18 (1) EC.

As a consequence, it can be said that Article 18 (1) grants directly applicable rights. Recourse to Article 12 is no longer necessary for a Union citizen to rely on Article 18 (Delli 2004: 48–49). The Court has thereby rendered explicit a principle that can already be deduced from the previous jurisprudence. In fact, also in *Martínez Sala* and in *Grzelczyk* the Court's reasoning can be explained only if it is based on the implicit assumption that Article 18(1) is directly applicable. The solution adopted could be justified only by recourse to a directly applicable concept of Union citizenship (see Delli 2004: 49).

A first stock-taking

What may appear to be a lengthy exposition of the development of the Union citizenship concept was deemed necessary to make fully understandable a principle which was poorly drafted and inserted into the EC treaty in an unsystematic way, but which nonetheless has revealed an enormous dynamism in a relatively short period of time and has even greater potential for further development.

To say, as the Court said in *Grzelczyk*, that Union citizenship is destined to be the fundamental status of nationals of the Member States, hints at a very broad potential for development which has been – as of now – only partially transformed into positive law or laid open by the Court. Recognizing the direct applicability of the citizenship principle enhances further the pace of this concept-modelling process as the need for tortuous argumentation becomes obsolete. It can also be assumed that in the future the Court will be asked even more frequently to define the boundaries of Union citizenship. Likewise very important is the fact that the Court did not stop short of applying the dynamics of Union citizenship also to the field of social allowances – even in cases where no relevant participation in the economic life of a Member State was required. However, the statement in *D'Hoop* that it is legitimate for the national legislature to require a real link between the applicant for an allowance and the geographic employment market concerned, does have a somewhat limiting effect on the scope of this principle.

Finally, when the Court required, as in *Grzelczyk*, that a certain degree of financial engagement between nationals of a host Member State and nationals

of other Member States had to be accepted, it pointed to a principle that leaves very broad room for interpretation and adds further momentum to the evolving concept of Union citizenship.

The case of Bickel and Franz

As we suggested earlier, we will give special attention to the *Bickel and Franz* case as this is the only one where Union citizenship has been directly linked to the issue of language rights.

The case is well known, so a brief summary will suffice. Horst Otto Bickel, an Austrian lorry driver, and Ulrich Franz, a German national in Italy as a tourist, were prosecuted for minor criminal offences at Bolzano in South Tyrol, where, because of the presence of a large German-speaking minority, German and Italian have the same status in criminal (and also in civil and administrative) proceedings. Only residents of this province could, however, opt for the German language while for all other defendants the official Italian language would apply. Wishing to opt for German as the procedural language, Bickel and Franz saw in this provision a clear instance of discrimination under Article 12 (ex Article 6). The procedural provisions at issue were said to fall within the scope of the Treaty in light of the provisions on Union citizenship and of Article 49 (ex Article 59) on the freedom to provide services.

As already indicated, in 1998 the Court avoided addressing in detail the concept of Union citizenship. It could resolve the case merely by recourse to Article 49, but Advocate-General Francis Jacobs invited the Court to take advantage of this situation to deliver finally a clear statement on the issue of Union citizenship. The way in which this invitation was pronounced merits citation:

> [...] The notion of citizenship of the Union implies a commonality of rights and obligations uniting Union citizens by a common bond transcending Member States nationality. The introduction of that notion was largely inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic union. That concern is reflected in the removal of the word "economic" from the Community's name (also reflected by the Treaty on European Union) and by the progressive introduction into the EC Treaty of a wide range of activities and policies transcending the field of the economy.
>
> Against that background it would be difficult to explain to a citizen of the Union how, despite the language of Articles 6, 8 and 8a, a Member State other than his own could be permitted to discriminate against him on grounds of his nationality in any criminal proceedings brought against [him] within its territory.

> Freedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship.[15]

The year 1998 was probably too early for the Court to back such a sweeping declaration; it accepted the consequences but avoided a formal commitment in this sense. If, today, the Court were to have before it a case similar to *Bickel and Franz*, it might be more daring, endorsing the statement by the Advocate General not only in substance but also in form. At this later date it is no longer necessary to build a complicated and hardly convincing legal construction based on the exercise of fundamental freedoms and the nondiscrimination provision in Article 12 of the EC Treaty, in order to open specific language provisions of a Member State's legal order to all Union citizens.

It is instead the case that Union citizenship provides autonomous, fundamental status rights. These rights are not only of a negative nature but can also imply the incurring of costs which have to be supported by the host State in view of the principle of financial solidarity between nationals of different Member States.[16]

The Kik case

The *Kik* case was examined by the Court of First Instance and afterwards by the ECJ.[17] Christina Kik, who was a lawyer and a trade mark agent in the Netherlands in a firm specialising in intellectual property work, intended to register the word "Kik" as a Community word trade mark with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (hereinafter the Office). According to the Council Regulation No 40/94 of 20 December 1993 on the Community trade mark,[18] the languages of the Office are English, French, German, Italian and Spanish. The applicant for a Community trade mark can file an application in one of the official languages of the Community but has to indicate also a second language as the language of the Office. The applicant accepts this language as a possible language of proceedings for opposition, revocation or invalidity proceedings.

Ms Kik presented her application in Dutch and indicated Dutch also as a second language. As a consequence her application for registration was dismissed as unlawful.

Before the Court of First Instance Ms Kik relied, amongst others, on Article 21 EC (then Article 8d) according to which every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 EC in one of the languages mentioned in Article 314 EC and have an answer in the same language. The Court of First Instance took, however, a different position:

> Article 21 EC refers to the Parliament and the Ombudsman and Article 7 EC mentions the Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors and also the Economic and Social Council and the Committee of the Regions. In so far as the paragraph in question is applicable *ratione temporis* to this case, the Office is in any event not one of the institutions or bodies referred to in Article 7 EC or Article 21 EC.[19]

This statement was substantially confirmed by the ECJ:

> With regard to relations between citizens and the Community institutions and bodies, Article 8d of the Treaty, as amended by the Treaty of Amsterdam, requires, *inter alia*, that the institutions and certain bodies correspond with the citizens of the Union in one of the languages mentioned in Article 248 of the Treaty. That provision, which was not yet in force when the contested act was adopted, is not in any event generally applicable to all bodies in the Union. In particular it does not apply to the Office, as the Court of First Instance correctly points out at paragraph 64 of the contested judgment.[20]
> [...]
> Account must also be taken of the fact that the Community trade mark was created for the benefit not of all citizens, but of economic operators, and that economic operators are not under any obligations to make use of it.[21]

On the whole, it can be said that both the Court of First Instance and the European Court of Justice adopted a rather restrictive vision of Union citizenship and the possible consequences flowing from it with respect to language rights. This position is hardly reconcilable with the qualification of this status as the "fundamental status of nationals of the Member States".[22]

Consequences

If initially scepticism towards the new concept of Union citizenship prevailed, as it was thought that it would add nothing to already existing rights and guarantees, the situation has in the meantime dramatically changed. Let us take a closer look at the relationship between this concept and language rights, first through a conservative examination of the immediate consequences of *Bickel and Franz* today, in an enlarged European Union, and second by exploring the implications of the further development of Union citizenship for the exercise of language rights, taking into account also the possible entry into force of the reform treaty.

With regard to the first point it can be said that in the *Bickel and Franz* jurisprudence – if viewed in isolation – there is some development potential though not an unrestricted one. The application of *Bickel and Franz* outside South Tyrol

requires that similar conditions obtain, particularly that there be a question of language choice in judicial proceedings or proceedings before public authorities. Such a situation can arise, for example, in Belgium (Desolre 2000), in Italy and in Austria (Hilpold 2001: 335ff.). As a consequence of the EU enlargement process, many more situations have arisen where the principles elaborated in *Bickel and Franz* apply. This is, for example, the case with Slovenia, where this principle has extensive implications. Slovene citizens can take advantage of special language rules both in Austria and in Italy. In Italy these particular rights will be further amplified once Law 38 of 23 February 2001 on the protection of the Slovene linguistic minority in the Friuli-Venezia Giulia region is implemented.[23] Also the protective measures for Hungarian minorities that several Eastern Europe countries had to introduce during the accession process have created situations in which *Bickel and Franz* becomes relevant. Although *Bickel and Franz* dealt only with the use of language in a *criminal* proceeding, it can be argued that this principle applies to all proceedings and to all cases in which a particular language can be used before public authorities. It is not even necessary that a Union citizen require the use of his or her own language: he or she may rely on this principle for whatever reason.

If these are the consequences of *Bickel and Franz* seen from a traditional viewpoint, Union citizenship harbours a much greater potential for the future development of language rights in Europe. This is, for example, the case with the Baltic countries of Latvia and Estonia. As is well known, both countries had a very large Russian-speaking population when they gained independence: Russia had wanted, in the past, to "sovietize" these territories (Reich 2004) and for that reason both countries, once independent, adopted harsh measures that again were extremely problematic from a human rights standpoint. These populations were denied citizenship and therefore they were also denied many civic rights in their countries. Only after severe pressure from outside, especially from the EU, were these measures softened. It is surely the case that the EU acted primarily out of humanitarian and also out of political considerations. In fact, the enlarged EU would be faced with severe minority and security problems. But Union citizenship also comes into play here. It is true that Union citizenship is accessory in foundation, that is, it cannot be awarded independently from citizenship of a Member State. It is also true that Member States are in principle free to award citizenship.[24] On the other hand, the Member States are obliged to respect the principle of loyalty as expressed in Article 10 EC. In this sense the accession candidates had to adopt a law of citizenship that would not violate the *ordre public européen*.

But there is even more to Union citizenship and language rights. If Union citizenship is the "fundamental status of nationals of Member States" (*Grzelzyk*), once the Charter of Fundamental Rights becomes the binding, hard law of the

European Union, further consideration will have to be given to the creation of minimum standards for minority and language protection throughout the European Union. Union citizenship renders these rights more mobile. The Union citizen carries these rights with him or her. Of course, this principle does not operate without restriction: minority and language protection regimes are territorially restricted, first and foremost for the practical reason of cost containment. However, we have seen that the principle of financial solidarity applies and therefore Member States can be required to undertake some additional spending. Much will depend on the interpretation given to Article 22 of the Charter of Fundamental Rights. If this provision is considered a sufficient basis for positive measures, Union citizenship would be a powerful vehicle to amplify the effects of any initiative undertaken. A further consequence could result from the new concept of Union citizenship. As we know, a matter currently in hot dispute in Europe is the question of whether special protective measures should be reserved for traditional groups with longstanding ties to a certain territory or whether also so-called "new minorities" should be able to take advantage of these provisions (see Hilpold 2004).

The Committee of Ministers of the Council of Europe, within its surveillance activity on the Framework Convention for the Protection of National Minorities, seems to endorse the former approach (Hilpold 2004). It can be argued that the evolving principle of Union citizenship will bolster this development, since the very essence of Union citizenship, the fight against discrimination,[25] favours a widely uniform application of protective norms as soon as comparable protection needs are identified. The development may be seen as potentially dangerous for minority and language protection as traditionally understood in Europe. If the number of potential beneficiaries of special rules inflates to an uncontrollable size, states may withdraw protective measures altogether. On the other hand, this danger, often voiced after *Bickel and Franz,* does not seem very realistic. It may be true that some protective measures adopted by single Member States in the field of minority protection are, at least at first sight, against the liberal spirit of EC law. Union citizenship, however, will not constitute an adequate basis for a further extension of purported abuses. If it leads to an extension of special regimes this may be seen to be at odds with the harmonizing and equalizing force of EC law. On the other hand, there is also much value in a generalization of protective norms and in the wiping out or at least softening those traits of special protective measures that give them the characteristic of a privilege, of a discriminatory practice, even if positive in nature. The development of Union citizenship as described above may therefore constitute a valid contribution to integrating protective measures firmly and smoothly into constitutional orders ever more wary of fighting any form of discrimination.

The *Kik* jurisprudence may appear to be a step backwards, but it seems likely that the powerful dynamic residing in the concept of Union citizenship, materializing, above all, in the area of free movement, will ultimately affect all areas of EU law.

We conclude, then, that boundaries between concepts that were once separate and independent are starting to blur. Of course, the entire issue is highly speculative and the outcome of recent developments will depend on various factors not fully known at present. Once we accept, however, that Union citizenship is an instrument that favours the adoption of positive measures, this concept assumes an independent meaning and we are already far away from the original approach directed mainly at opening existing language regimes to EU foreigners. Again, it is still unclear how the situation will develop, but to qualify Union citizenship as the "fundamental status" of nationals of Member States is a clear hint that this is the direction in which the whole development is directed.

Notes

1. Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

2. *Bickel and Franz*, para. 29.

3. Case C-361/01 P *Kik* [2003].

4. This was the case, for example, both in the field of education and in the area of taxation.

5. Cases C-64/96 and 65/96 *Uecker* [1997] ECR I-3171.

6. Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929.

7. See para. 15 of the judgment: "[...] Furthermore, pursuant to Article 8a of the Treaty, '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.'" The judgment continues with the following statement: "In that regard, the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals. Consequently, persons such as Mr Bickel and Mr Franz, in exercising that right in another Member State, are in principle entitled, pursuant to Article 6 of the Treaty, to treatment no less favourable than that accorded to nationals of the host State so far as concerns the use of languages which are spoken there."

8. The extent up to which solidarity can be requested from the various Member States is a very delicate issue. See in this regard, Hilpold (2007).

9. Case C-85/96 *María Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.

10. A considerable number of authors are of the opinion that a close relationship between a certain subject and the EC treaty suffices in order that Article 12 EC applies. Accordingly, it would not be necessary for the European Community to have explicit regulatory powers in this field. See Kadelbach (2005: 1165).

11. Case C-184/99 *Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve (CPAS)* [2001] ECR I-6193.

12. See Case 197/86 *Brown* [1988] ECR 3205.

13. Case C-224/98 *Marie-Nathalie D'Hoop* [2002] ECR I-6191.

14. Case C-413/99 *Baumbast, R and Secretary of State for the Home Department* [2002] ECR I-7091.

15. Case C-274/96, Opinion of AG Jacobs of 19 March 1998, para. 23 s.

16. See Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 44. It can be argued, however, that this request for solidarity has been excessively strained in the Case C-147/03, *European Commission against Austria*, Judgment of 7 July 2005, where Austria has been obliged to grant to all Union citizens free access to her universities. See Hilpold (2005, 2006).

17. For the sake of completeness it should be mentioned that, in all, there were four "Kik" proceedings. The first two proceedings, before the Court of First Instance and the ECJ respectively, were dismissed on admissibility grounds.

18. OJ 1994 L 11, p. 1.

19. See para. 64 of the judgment of 12 July 2001 in Case T-120/99 *Kik v. OHM* [2001] ECR II- 2235.

20. See para. 83 of the judgment of 9 September 2003 in Case C-361/01 P *Kik v. OHM* [2003] ECR I-8283.

21. Para. 88 of the judgment.

22. See also Nic Shuibhne (2004), who is broadly critical of the insufficient debate on language arrangements during these proceedings.

23. In this regard, the Advisory Committee on the Framework Convention for the Protection of National Minorities writes as follows in its opinion of 25 October 2005: "To date, the implementation of this piece of legislation has regrettably not really commenced due to the persisting political, legal and technical disputes over the demarcation of its territorial scope of application. There is, however, reason to believe that a number of measures foreseen in this Law could be taken without further delay and implemented in a number of municipalities, whose inclusion in the territorial scope of application does not raise any particular problems."

See ACFC/INF/OP/II(2005)003, para. 10.

24. Of course, the principles laid down in this field by the ICJ in the *Nottebohm* case (ICJ Reports 1955, 423ss.) regarding the requirement of a "genuine link" have to be respected.

25. See in this sense AG Jacobs in *Bickel and Franz*.

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CHAPTER 6

EC law and minority language policy

Some recent developments[1]

Niamh Nic Shuibhne

This contribution reviews the evolving legal framework that underpins language rules and practices in the European Union. It seeks to address EU language issues holistically, arguing in particular that concerns about the management of the official EU languages should not be divorced artificially from questions relating to minority languages. The development of the legal framework has, however, become increasingly fragmented, and this has problematic implications for both structural and substantive coherence. It is suggested that until and unless the legal foundations of EU language policy are carefully worked out, its continuing ad hoc construction will never deliver a more rational yet ideologically and legally sound EU language scheme.

Introduction

If asked "Have recent times produced key European Union (EU) developments for the status of minority languages?" an observer's instinctive answer would most probably be an abrupt, quite simple, "No". On reflection, however, more has been going on than might at first be presumed, but with somewhat mixed results. A number of more linguistically inclusive policy initiatives have been published, for example – yet the Court of Justice has confirmed the legitimacy of a controversial cutting of language options within EU agencies and other non-institutional bodies. Unprecedented EU enlargement has incurred an equally unprecedented linguistic enlargement, yet little has changed in terms of institutional language management – and so on. The EU is also in the midst of a vibrant period of constitutional reflection more generally, reflected in the Treaty