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DIALOGUE AND DEBATE: SYMPOSIUM ON NEW INTERDISCIPLINARY PERSPECTIVES IN EU LAW

Going beyond the wordlessness of EU law

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Abstract

This essay explores what can be learned from understanding EU law as a language in the literary sense of being a set of resources for manifold ethical and political expression and social action. As a contribution to new methodological approaches to studying EU law, it will propose a method highlighting how EU law can be studied in such a way by paying attention to the various linguistic and structural features of a legal text while, at the same time, diversifying the rationales through which we understand and make sense of such textual features. The *Sayn–Wittgenstein* decision will serve as point of reference in order to illustrate the value-added of this new theoretical and methodological insight to understanding EU law. This essay will conclude that it is not only worth taking the language of EU law seriously because it allows us to 'see' more in the law, but also because it enables us to elevate the deeper ideas about Europe to the surface of the language we use when writing and speaking about EU law and to thereby contribute to a more productive dialogue about the foundations and future of the EU polity.

Keywords: EU constitutional law; law and literature; political philosophy; cultural study of law; law and language

I. About the enigmatic surface language of EU law

In his (in-)famous monograph 'After Virtue', Alasdair MacIntyre puts forward the provocative thesis that moral reasoning in modern times has badly gone off the rails. While people in contemporary moral debates ground their arguments in concepts like 'equality', 'freedom', 'rights', and 'solidarity', the deeper meaning of such entrenched values has disappeared from common knowledge in contemporary political and moral debates. Those discussing issues such as homosexual marriage, environmental duties, or the status we ought to give to migrants, to name just a few examples, normally put forwards arguments which precede rival and incommensurable premises. Arguments of equality are opposed to arguments of freedom, arguments of individual autonomy are pitted against arguments of public autonomy, arguments of rights are contrasted with arguments of common responsibilities and solidarity, and so on. Yet as the debaters have lost their understanding to express the deep meaning of these concepts, when being challenged in their argumentation, they mechanically repeat the premise of their argument. They usually fall into an argumentative and decisively polarised dynamic in which they repeat the concepts from which they have started their line of reasoning without being able to articulate what rationales about the shape of the community and the human condition underlie their point of view.[1]

When reading EU legal texts, such as judgements of the Court of Justice of the European Union ('Court of Justice'), I am often reminded of MacIntyre's apposite description of contemporary discourse on political morality. This is not because I regard court judgements as being

[1]See A MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press 1981) 5–25; 40.

synonymous to moral or political discourses, but because I see them as exposing striking similarities in their argumentative structure and dynamic in a semantic sense. EU law touches upon deep ideas about the EU community and its people and the relational dynamics and bonds by which they are associated. Whether it is cases about fathers seeking to preserve their family homes from aggressive foreclosure,[2] women fighting for their right to practice religion at work,[3] the rise of class solidarity and frictions among European workers,[4] or European aristocrats opposing state measures abolishing the acquisition and possession of titles of nobility,[5] EU law touches on profound ethical and socio-political aspects of European life that determine the shape and character of the European polity and its citizens. Yet hardly ever are the judgements written in a style and in a language that allow its reader to access the complex meaning that EU law carries. In fact, most often one cannot extract more from said legal texts than the message about the rule or principle that the language of the decision explicitly suggests.[6]

Just think of the infamous *Sayn–Wittgenstein* case.[7] In this case, the Court of Justice was asked whether an Austrian measure disallowing one of its citizens (Mrs. Ilonka Fürstin von Sayn–Wittgenstein) to keep her noble title was in line with EU primary law, specifically Article 21 TFEU allowing EU citizens to freely move and reside in the EU.[8] In its decision, the Court of Justice decided that the Austrian measure, based on the law on the abolition of all nobilities, constituted a restriction of Article 21 TFEU. Nevertheless it came to conclusion that said Austrian measure was justified and proportionate.[9] Stressing that the Austrian law on the abolition of nobilities represented the national identity of Austria, the judges argued that 'it does not appear disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting [. . .] titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank'.[10] The Austrian authorities were hence not regarded 'to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them'.[11] In the literature, the decision, by which the judges allowed for a derogation from Article 21 TFEU on national identity and equal treatment grounds, was largely read as EU law giving discretion to the traditions and identities of Member State communities; of EU law showing respect towards the unique historical and social peculiarities of Member State constitutions.[12] While this attributed meaning is plausible given that

[2]See Joined Cases C-154/15, C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco* ECLI:EU:C:2016:980.

[3]See Case C-157/15 *Samira Achbita en Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* ECLI:EU:C:2017:203.

[4]See Opinion 2/13, *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[5]See Case C-208/09 *Ilonka Sayn–Wittgenstein v Landeshauptmann von Wien* ECLI:EU:C:2010:806.

[6]For a similar critique as to the reduced meaning we can draw from legal language (in international law), see B Pirker and I Skoczén, 'Pragmatic Interference and Moral Factors in Treaty Interpretation – Applying Experimental Linguistics to International Law' 23 (2022) German Law Journal 314; B Pirker, 'Balancing Interpretative Arguments in International Law – A Linguistic Appraisal' 89 (2020) Nordic Journal of International Law 438.

[7]*Ilonka Sayn–Wittgenstein* (n 5).

[8]See ibid., para 35.

[9]See ibid., para 71, 95.

[10]Ibid., para 93.

[11]Ibid.

[12]See R Sinisa, 'National Identity and Market Freedoms After the Treaty of Lisbon' 7 (2011) Croatian Yearbook of European Law and Policy 11 (arguing that the Sayn–Wittgenstein decision was plausible as it protected the republican form of government that Austria is constituted by); T Kröll, 'Der EuGH Als "Hüter" Des Republikanischen Grundprinzips Der Österreichischen Bundesverfassung?' (2010) *Jahrbuch Öffentliches Recht* 313 (positively commenting on the fact that the Court protected the Austrian republican form of government); E Cusas, 'Arrêt "Sayn–Wittgenstein": La Libre Circulation et Les Titres de Noblesse' 178 (2011) Journal de droit européen 100 (arguing in favour of the judgement on the ground that national autonomy matters are an integral part of free movement as EU citizenship law); S Weatherill, 'Distinctive Identity Claims, Article 4(2) TEU (and a Fleetingly Sad Nod to Brexit)' 12 (2016) Croatian Yearbook of European Law and Policy VII (arguing that the Court's decision seems to be correct against the background that the abolition of titles of nobility is grounded in the typical Union value of equal treatment).

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the Austrian measure was justified on national identity and equal tretament grounds in the judgement, the question is what the decision means apart from this predominantly attributed significance. Does the judgement expound a meaning about Europe and its citizens and the attachments that they hold that goes beyond the message about the rule and principle that the language of the judgement suggests?[13]

This question is difficult to answer for the European legal analyst because in its technical and doctrinal sense EU legal reasoning frequently lacks the vocabulary to describe the multiple and complex ontologies or ways of living and being in the European polity that it touches upon; it is characterised by a sense of wordlessness. We do not only see this in the European judicial text which provides little room for an in-depth consideration of the different interpretations of the law by reference to the various values and concepts that it underlies, but also in scholarly doctrinal articles, ancillary dialogues informing EU legal change, or in legal textbooks trying to systematise and classify EU primary/secondary law and case-law. What these legal documents have in common is that they are often written in a univocal and abstract way that leaves little room to presume that there is a meaning to the law that exists additionally to the words used for the formulation of the respective rule or principle.

As a result of this elusiveness of EU legal language, critical EU legal scholars have in the last decade increasingly stood up to the challenge of understanding 'what is really going on' behind the vague language through which EU law is communicated. Two general tendencies are usually guiding these interventions. While some scholars endeavor to examine how abstract legal concepts have been instrumentalised in battles amongst EU institutions,[14] others aim to understand how such concepts carry inherent biases prioritising certain social groups or paths of invocation over others.[15] In illuminating the many interests and injustices that sturdily pervade the creation of EU law, the valuable contribution of these approaches to EU legal scholarship cannot be emphasised enough. Yet this way of analyzing EU law nevertheless misses an important dimension: because even if EU law is driven by competitive practices of dominant EU agents and institutions and contains severe biases, it unavoidably also always underlies varied and complex ethical ideas and worldviews. EU law might be written in a strikingly abstract, technical, and apodictic manner, but this should not deter us legal scholars from looking for the multiplicity of socio-political meaning in the law.

With this article, I would like to encourage a conversation about how we as EU legal scholars can go beyond the wordlessness of EU law: not in order to look for the institutional struggles and power biases that it underlies, but to seek the multiple ideas about community and peoplehood that EU law motivates. There have certainly been pioneering insights by humanistic legal scholars highlighting the rich assortment of political and ethical ideas of EU law.[16] However, a productive

[13]To clarify, the questions asked here is not what the different *legal meaning* of the case are, but what the different *ethical and socio-political meanings* are that the rule advanced in the case expounds (specifically related the various understanding of citizenship identity and attachment that the case gave expression to). For a debate of the case against its different *legal meanings* and in specific the case's implications for the principle of primacy of EU law, see LFM Besselink, 'Case C-208/09, *Ilonka Sayn–Wittgenstein* v. *Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010' 49 (2012) Common Market Law Review 671, 292; S Schill and A von Bogdandy, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' 48 (2011) Common Market Law Review 1417.

[14]For an insightful sociological analysis of the institutional wars fought over the concept of 'judicial independence' in the EU, see A Vauchez, 'The Genie of Independence and the European Bottle: Courts, Central Banks, Regulators and the Transnational Contest over Independent Policy-Making' 20 (2022) International Journal of Constitutional Law 2032.

[15]See, for instance, T Perisin and S Rodin (eds), *The Transformation or Reconstitution of Europe* (Hart Publishing 2018).

[16]See, for instance, U Haltern, 'The Dawn of the Political: Rethinking the Meaning of Law in European Integration' 14 (2004) Swiss Review of International and European Law 585; U Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' 9 (2003) European Law Journal 14; JHH Weiler, 'Je Suis Achbita! (Editorial)' 15 (2017) International Journal of Constitutional Law 1; M Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004); Editorial Comments, 'A Jurisprudence of Distribution for the EU' 59 (2022) Common Market Law Review 957; L Azoulai, SB Places and E Pataut (eds), *Constructing the Person in EU Law*

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conversation on the methodology through which this array of knowledge can be retrieved and evaluated has not yet commenced. The argument that I develop in this article is that the theoretical and methodological insight of literary and linguistic studies can help us to better understand why the multiplicity of modes of knowledge and human experiences that EU law contains have often been overlooked in the analysis of the law, and on this basis ponder methodological approaches to remedy this situation. More precisely, it will contend that we can only see more in the law than what the message about the rule and principle suggests if we free ourselves from the predominant epistemological discourse that we are part of and approach the law in a spirit of philosophical multiplicity and diversification. In order to illustrate the value-added of this theoretical and methodological observation, I will return to the *Sayn–Wittgenstein* decision outlined above as an illustrative point of reference. The analysis of this decision will show how we can read a judicial text not so much for a single meaning but for a range of possible different meanings that go beyond the power biases and institutional struggles that unavoidably also underlie the law.[17] In this sense, this article contributes to the emergent field of Law & the Humanities that aims to recover modes of meaning and reciprocity in the European society against the backdrop of alarming levels of societal polarisations that currently rage across Europe.

The essay proceeds as follows. In the next Section, I will start out by explaining in more detail what it means to understand legal language as a world of multiple and complex meanings (Section II.A), followed by a methodological suggestion on how such knowledge could be applied to the analysis of the EU legal text by discarding our dominant normative lens through which we read EU law (Section II.B). Subsequently, I will display how the suggested theoretical and methodological insight can empower EU legal scholars and relevant socio-political actors to better understand the multiple significances of citizenship attachment underlying the *Sayn–Wittgenstein* decision (Section III). In the last part of this essay, I will ponder the advantages of paying heightened attention to the language of EU law in the way proposed in this article (Section IV).

II. Accessing the life of legal utterances: A methodological suggestion

A. Of propositional and performative understandings of the language of the law

In our contemporary culture, it is a predominant practice for people to talk and think about language as if it were a neutral instrument or tool, merely pointing to something outside of the language itself.[18] From this viewpoint, the language we use in our daily lives does not have a life of its own, but merely allows us to transmit messages about physical objects, experiences, and ideas in the world that exist outside of the world of the language.[19] This perspective hence splits the world of language apart from the outside world of objects, experiences, and ideas; it thinks of the world of 'speech' as different from word of 'entities' 'happenings', and 'thought'.[20] And in this view, the function of language is nothing more than to label, in a purely neutral way, the reality that exists outside of the language itself.[21]

(Hart Publishing 2016); L Azoulai, 'The (Mis)Construction of the European Individual Two Essays on Union Citizenship Law' (2014) EUI Working Paper 2014/14.

[17]See JB White, 'The Judicial Opinion and the Poem: Ways of Reading, Ways of Life', in Id, *Heracles' Bow: Essays On The Rhetoric & Poetics Of The Law* (University of Wisconsin Press 1985) 87; see also P Kahn, *Making the Case: The Art of the Judicial Opinion* (Yale University Press 2016) 24–35.

[18]This view of language has been best explained in the works of Wittgenstein, who, especially in the second phase of his life, developed an understanding of language that is contrary to the one pointing only to some 'facts in the material world', see L Wittgenstein, *The Blue and Brown Books. Preliminary Studies for the 'Philosophical Investigations'* (Harper and Row 1965) 47; L Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, Basil Blackwell 1958).

[19]See Wittgenstein, *The Blue and Brown Books* (n 18) 26–27.

[20]This has been described as typical phenomenon of the 'great divide' characteristic of modern cultures, see B Latour, *We Have Never Been Modern* (Catherine Porter tr, Harvard University Press 1993) 99.

[21]Wittgenstein, *Philosophical Investigations* (n 18) para 26.

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As a result of this view of language, the meaning of it is regarded as being nothing more than what it explicitly utters. As language only labels the outside word, it is presumed that there can only be one meaning of the words we use, and this meaning is synonymous to what our language explicitly asserts.[22] The phrase 'the moon is round today' can only mean one thing: namely that the shape of the moon is of a circular shape today. There cannot be a meaning to this phrase apart from the phenomena described because that would mean admitting that the language used has a life of its own through which meaning is autonomously constituted.

We can also recognise this way of thinking and talking about language in the EU legal sciences. EU law is predominantly understood as constituting a coherent and consistent system that is made up of legal rules that are plainly established and available. Such rules are passed by the legislator as the political sovereign and articulated in judicial opinions; they are regarded as the law itself, perhaps connected with the more general rules called principles that inform such rules. But whether the legal practitioner or legal scholar primarily focuses on the rules of the law or the principles underpinning such rules, in both accounts the one composing or analyzing the law starts from the presumption that the law can be captured by one clearly restatable message. He or she presumes that the meaning of the law is (or has to be) synonymous to the message about the rule or principle that the language of the law affirms.[23]

This way of thinking about law is, for instance, reflected in the style in which judgements of the Court of Justice are composed. They expose a rigorously deductive logic signaling that what the judges do is to subsume particular facts under universal norms, generating irrefutable and unambiguous legal results and meanings of the law. This appearance of logical deduction is linguistically accentuated by the endless repetition of beginning phrases like 'it follows from the foregoing' or 'consequently' stressing the deeply logical and precise enterprise that the Court of Justice is engaged in or the use of concluding phrase 'the reply must therefore be' emphasising the indisputable solution of the case. The decision's appearance of clear legal deduction is also displayed in how the Court of Justice refers to its own case-law: the infinite repetition of the phrase 'according to settled case-law' and the cutting and pasting of quotations from previous judgements as if they have universal validity (without having to be explicated against the concrete case) transmits the message that the judges have clearly 'settled' certain questions in their previous case-law which they now only have to logically apply.[24] A similar impression is conveyed in the practices of balancing that the judges of the Court of Justice regularly engage in. The legal practice of 'proportionality' requires the judges to balance a legitimate interest and an EU freedom through meticulously clarifying and weighing the often-un-codified values and concepts underlying EU law. Yet rather than deliberately and productively engaging with the tensions that the different norms within the law provoke, the European judicial style is often characterised by the non-discursive application of the law and the values and concepts that it presents. Rather than carefully considering and balancing the different pros and cons of the values underlying the applicable legal rules, the judges mechanically and passively apply the law, thereby transmitting the impression that there is only one irrefutable solution and hence meaning of the case.[25]

The supposition that the law can mean nothing more than the words used to formulate and interpret a rule or principle can also be observed in how the typical legal sourcebook is composed. In order to allow the reader of the legal sourcebook to quickly locate and identify the meaning of legal rules within the coherent system of the law, it systemises primarily and secondary rules into

[22]Wittgenstein attributes this understanding about the essence of human language to Augustinus, see ibid.,1.

[23]In the realm of international law, the work of Benedikt Pirker is notable in this respect in which he has criticized this constrained understanding of the meaning of the law by pointing out that legal rules always convey a 'surplus meaning' which are more than simply the words that are used for the formulation of a respective rule, see Pirker (n 6); Pirker and Skoczén (n 6).

[24]For a critical analysis of the practice of copy/pasting by the Court of Justice in an endeavor to create analogous forms of legal reasoning see F-X Millet, 'In the Name of Analogy: Judicial Copy-Pasting and Competence Creep in the Connection Data Case Law' 61 (2024) Common Market Law Review 1289.

[25]See Lasser (n 16).

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specific themes. And within these thematical explanations of the legal rules, the cases decided by the Court of Justice are integrated as manageable excerpts – as if these excerpts summarise the one meaning of the case. This approach certainly teaches its reader much about the law that is essential for the practice of the law, but it will not teach the reader much about the life of the law, the richness of what the law means in the details of its utterances.[26] It will allow the reader of the law to quickly understand how a newly established rule or principle or a recently decided decision makes sense against the broad canon of the EU acquis; but it certainly does not allow the reader to access the complex ideas about ways of life and ways of being in the EU polity that the language of EU law holds.

Yet there is another way of thinking about language. In this alternative view, language is not a transparent or neutral tool simply pointing to a message about some experiences, objects, and ideas in the outside world but a medium that has a life of its own.[27] In this view, language is not propositional in the sense of simply conveying a message about a reality that exists independent of the language itself, but is performative in the sense of being inseparable from its structure and content and the reality in which it is uttered. In concluding, language does not solely consist of singular propositions, but of something 'that goes beyond what it actually says'.[28] Take the example of a Spanish-speaker who learns the German phrase 'the moon is round today' ('der Mond ist heute rund') and who cannot believe that the moon in German is masculine ('der Mond') whereas it is feminine in Spanish ('la luna'). 'How can the moon', he inquires, 'which holds all the typical female attributes of being mysterious and secretive, be male?' 'If anything is an archetypal female characteristic', he continues in astonishment, 'it is the secretive darkness of the moon'. What this Spanish-speaker points to is not the propositional aspect of the uttered phrase (the fact that the moon is round today) but its performative understanding. He draws attention to the fact that there is something in the language itself and the context in which it is uttered, which creates a meaning (here about the female/male features of the moon) that exists additional to the actual proposition that the uttered phrase makes.

We know this way of thinking about language, if at all, from our experience of reading literature. For a long time, literary language and texts have been approached in the traditional way of thinking about language in that it was believed that it is possible to draw one clearly restatable meaning from a literary text. The supposition was that if the literary scholar only pays diligent attention to a literary text's constituent parts, meaning its linguistic and structural features, they would be able to extract one determinable and universally valid meaning from it.[29] Yet two principal objections have been brought forth against this understanding of literature. One is that the substance and structure of a literary text is simply too complex and ambiguous to be able to be restated, once and for all, in one single sentence and message. In other words, a literary text can never be defined once and for all, as a dictionary does, by drawing an equivalence between one word and phrase and another one. Rather, the constitutive parts of a text are considered able to create patterns of words and images that acquire a distinctive and complex meaning through their connection and operation, working in several dimensions at the same time.[30] But there is a second reason why it was regarded as little convincing to speak as if the meaning of literary language and texts can simply be restated in other terms. The reason for this is that a text always comprises too many ambiguities and unclarities to assume that its meaning can be entirely and clearly inferred from its linguistic and structural features. There is always a space in a text, an undefined and

[26]For a critique on the reduction of cases into manageable excerpts in the legal casebook, see Kahn (n 17).

[27]Wittgenstein writes: '[T]he speaking of language is [hence] part of an activity, or of a form of life'. Wittgenstein, *Philosophical Investigations* (n 18) para 23.

[28]See W Iser, 'The Reading Process: A Phenomenological Approach' 3 (1972) New Literary History 279, 282.

[29]The school of literary thought that has advanced this claim is famously called school of 'New Criticism'. Prominent representatives of it are, for instance, IA Richards, *Principles of Literary Criticism* (Routledge Classics 1924); C Brooks, 'Irony as Principle of Structure' in MD Zabel (ed), *Literary Opinion in America* (3rd edition, Harper & Row 1962).

[30]See JB White (n 17), 82–83.

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ambiguous whole that cannot be made sense of by reference to the language and pattern of the text alone but always also depends on the perspective of the reader of it. Literary texts can hence never mean only one thing but mean multiple things as its significance depends as much on the 'horizon' of language and structure itself as on the subjective 'horizons', 'prejudices', and 'fore-structures' that the reader of a text holds.[31]

Does anything of the aforementioned also apply to legal texts? Can the language of the law also be regarded as having a life of its own in that its ethical and socio-political meaning is constituted both through its constituent words and structure as much as through the context from which it is read? There are certainly some similarities between legal and literary texts. A legal text, just like any literary text, acts directly upon its language in such a way to give its words a certain meaning and to establish certain patterns that give the text a significance on its own. Typical examples of such legal textual features would, for instance, be: the mentioning and definition of a new legal value or principle in a case that has not been mentioned before;[32] the absence or overreliance of the arguments/interests advanced by the applicant (or the defendant) of the case (why, eg, does a judgement in which a father asks for parental leave never explicitly talks about the 'father' and only about the 'mother'?);[33] the definition of a key term in contrast to another key word or the reference,[34] or the reference to (and omission of) certain aspects of an AG Opinion.[35] These textual elements impose demands on the legal interpreter of the judgement that are independent of the fore-structures of the one engaging with the text. Yet just like a literary text, also a legal text carries enough ambiguities that ultimately ask the reader of the text to realise it. That is, there are always aspects of the textual features of the law that do not unequivocally tell the reader what the law means with the result that it is ultimately the reader herself who realises its significance through the 'horizons', 'prejudices', and 'fore-structures' that he or she holds.

In conclusion, it seems that just like the literary language also legal language comprises enough uncertainties that would allow us to say that there is more to it than the message about the rule or principle that the language of the law suggests. But why do we as legal scholars hardly ever take notice of these multiple ontologies or ways of being in the world that legal utterances carry? What I will argue is that it has something to do with the normative presuppositions of the legal scholar and practitioner; that is related to the dominant interest of knowledge with which the legal scholar and practitioner approaches the law.

[31]For a description of the perspective of the reader of a text as 'horizon', 'prejudice' or 'fore-structure', see the work of Hans-Georg Gadamer. Drawing from the insights of his teacher Hans-Georg Gadamer, Wolfgang Iser reasoned that textual meaning is neither entirely identical with the text nor with the predisposition of its reader 'but in fact must lie halfway between the two'. In his view, while the text itself 'sets the stage', there is always something unambiguous or uncertain in a text that depends for its realization on the experience and understanding of the one engaging with it. And through the reader's engagement with the text against his own experiences and understanding, she ultimately 'realizes' it; she lives through the 'aesthetic' experience of creating the text and thereby endows it 'with a far greater significance than it might have seemed to possess on its own'. H-G Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G Marshall trs, The Continuum Publishing Company 1994) 260; Iser (n 28) 279, 281; LM Rosenblatt, *The Reader, the Text, the Poem. The Transactional Theory of the Literary Work* (1st edition, Southern Illinois University Press 1994).

[32]Subsequently, I will show how this was the case in the Sayn–Wittgenstein case, in which the Court of Justice, for the first time, referred to the principle of national identity, see *Ilonka Sayn–Wittgenstein* (n 5) para 83,92.

[33]I owe this insight to Meret Plucis and her formidable analysis of concepts of motherhood underlying the case-law of the Court of Justice in her Master Thesis 'O Mommy, what are thou? Concepts of Motherhood in the Jurisprudence of the European Court of Justice'. For the case mentioned here, see Case C-643/15 *Slovakia v Council* ECLI:EU:C:2017:631.

[34]In the Laval judgement, the Court of Justice clarified what the 'economic' in the internal market means by pitting it against what 'the social' means, see Case C-341/05 *Laval un Partneri* ECLI:EU:C:2007:809 paras 76–77, 103–105.

[35]For this, also see *Ilonka Sayn–Wittgenstein* (n 5).

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B. Reading EU law in a spirit of philosophical multiplicity: A methodological suggestion

It is not uncommon that a central concern in EU legal thought and practice is the desire to change and improve the European legal order, or at least to theorise the prospect thereof. Yet when approached in this way, the practice of understanding, analyzing, and assessing EU law collapses into a project of legal reform; the scholar becomes a participant in legal practice and hence a part of the object that she purports to examine. She does not deal with and analyze the law and legal institutions to make an offering about how to better understand the law, but how to better contribute to the law.[36] This breakdown of the divisions between the subject investigating the law and the practice of the law that is the object of the investigation is the central weakness of contemporary European legal scholarship.[37]

To some extent, the endeavor to change and reform EU law and its underlying legal order has something to do with the aspiration of the EU legal sciences to uphold a coherent and consistent system of law. From such hope springs the understanding of EU law as a rational instrument to regulate (and reform) the world which demands the EU legal researcher to develop a cohesive doctrinal and theoretical understanding and interpretation of the law. Yet what is the benchmark upon which the legal scholar assesses such coherence and cohesion of EU law? Or to put it differently, what benchmark will she or he shuffle aside as being equivocal and vacillating as opposed to intelligible and solid? The prioritisation (or glorification?) of coherence and cohesion is often premised on a single epistemology and unique regime of knowledge. It is grounded in a particular normative perspective of the European legal order that is believed to allow for the extraction of the most authoritative, true, and irrefutable interpretation and hence meaning of the law or legal decision.[38]

Such normative perspective on the basis of which the legal analyst assesses the European legal order is usually grounded in a particular regime of political philosophy. There is some logic to this. Political theories are, in the most general sense, a reflection about 'the nature and purposes of political life' in a polity.[39] They are, at their core, concerned with conditions that make human beings free, with acceptable limits of state actions, political obligations, questions of citizenship, and the nature of social justice, which are all matters that also the law is concerned with and touches upon. It is hence not surprising that the legal analyst draws from a particular normative structure grounded in political philosophical principles when inquiring into the most authoritative interpretation of the law against the backdrop of the containment of a coherent and consistent legal system.

Yet the choice of one particular philosophical regime in the analysis of the law can have immense conditioning effects on what the legal analyst can see in the law. The ideas accentuated in the theory of political justice that the legal analyst regards as the ideal normative basis of EU law work like binoculars: they allow her to zoom in on certain forms of meaning that the law gives expression to, while leaving others hidden that lie outside the field of the binocular's focus. It determines, to say it in the words of Martti Koskenniemi, '[w]hat is being put forward as significant and what's gets pushed into the darkness [in the analysis of the law]'.[40]

[36]See J Komárek, 'Freedom and Power of European Constitutional Scholarship' 17 (2021) European Constitutional Law Review 422.

[37]For a critique of a similar nature in the US and international legal scholarship, see respectively P Kahn, *The Cultural Study of Law. Reconstructing Legal Scholarship* (The University of Chicago Press 1999) 7; E Cusato et al, 'In Praise of Multiplicity: Suspending the Desire to Change the World' (Editorial) 37 (2023) Leiden Journal of International Law 1.

[38]Some authors have noted that this traditional way of reasoning about the law shares many similarities with the discipline of theology as in both field of study 'the exegesis of texts through a complex of self-consciously refined interpretative techniques was coterminous with the ascertainment of "truth"', see WT Murphy and S Roberts, 'Introduction' 50 (1987) Modern Law Review 677–87; 678–79.

[39]C Larmore, 'What Is Political Philosophy?' 10 (2012) Journal of Moral Philosophy 2.

[40]M Koskenniemi, 'The Politics of International Law–20 Years Later' 20 (2009) European Journal of International Law 7, 11.

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To be able to reveal these overlooked significances of the law and bring them to light, we therefore need to select a different methodological proceeding for the analysis of the law. Such proceeding would be to diversify our viewpoints, to read EU legal texts not from the point of view of one philosophical regime but in a spirit of philosophical multiplicity: not in the sense of reading the law from one distinct philosophical principle regarded as the most true and coherent basis of the canon of EU law; but rather in the sense of reading the law from various different philosophical points of view understood as types of 'public philosophies'[41] by which diverse ideas about forms of living and being in the EU polity can be illustrated.[42] While the difference between these two ways of reading the law might certainly be blurred at times, I think that it is important to analytically separate them since they have two different '*Erkenntnisinteressen*': while the former approach aims to find out what the most authoritative meaning of the law is against a particular understanding of the coherent and consistent system of the legal order, the latter approach endeavors to understand the complex and multifaceted ethical and socio-political meaning of the life of the language of the law. The first approach hence confines the legal scientist to her unique regime of knowledge production that she is part of in order to 'see' the language and structure of the law in light of the criteria of said interpretative community, the latter actuates the legal scientist to step out of her epistemological straitjacket in order to 'see more' in the law. In other words, it encourages the legal scholar to take a certain distance to the discourse of similar knowledge production that she (as well as the structure of the law) is unavoidably part of so that she can see different significances that the constituent parts of a legal text create as much as to fill the voids of a legal text which only she can make sense of as reader of the text through the application of different philosophical ideas.

Does all of this mean that we cannot (or should not) contemplate the transformative and legitimising potential of the law and the legal order underlying it? Paradoxically this is not what it means. What this epistemologically varied way of reading EU law asks us to do is to pause for a moment our reformist imaginaries for a more perfect EU legal order through unfolding our curiosities about the various lives and communities that European law inspires. This is a position that is not so much geared towards an outside world where a change and immediate transformation of the law should be the ultimate objective of the scholarly endeavor. Rather, it speaks to our scientific curiosities and sensitivities as readers as well storytellers of EU law, which might be a position that is humbler than the legal reformist, but not necessarily less transformative in effect. Let me now display the advantages of the aforementioned theoretical and methodological insight from reading the judicial text of the *Sayn–Wittgenstein* decision from such point of view.

III. Going beyond the surface language of the *Sayn–Wittgenstein* judgement

When the concept of citizenship of the European Union was introduced in the Maastricht Treaty in 1993, the ultimate objective was to bring EU citizens closer to the Union polity. The EU citizenship provisions were integrated into the Treaty in order to create a common sentiment, an identity amongst EU citizens, and to thereby improve the democratic self-governing capacities of

[41]For an understanding of principles of political philosophy being an integral part of our everyday lives and hence constituting a type of 'public philosophy', see MJ Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Belknap Press of Harvard University Press 1998).

[42]This proposed method of reading the law from different points of view of political philosophy is not without precedent. In fact, it has only recently been utilized by the European private lawyer Martin W. Hesselink in his monograph 'Justifying Contract Law in Europe'. Hesselink aims to analyze European contract law from six different political philosophies in order to contribute to a better understanding of the 'political questions of European contract law' and to open up 'the academic and political debate'. However, as Hesselink does not provide a theoretical and methodological justification for the usage of this method, it remains unclear what the broader purpose and value-added of his approach is, see MW Hesselink, *Justifying Contract in Europe. Political Philosophies of European Contract Law* (Oxford University Press 2021).

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the EU.[43] So far so good, but what does this alleged (or envisioned) rationale behind EU citizenship provisions mean for the interpretation of EU law? Does it mean that cases decided in favour of Article 21 TFEU, as the core citizenship provision allowing EU citizens to freely move and reside across the territory of the European Union, give expression to a spirit (or aspiration) of commonality amongst free moving EU citizens? And *a contrario*, would this then mean that a decision decided against Article 21 TFEU on the basis of Member State derogations is not based on the presupposition of a common European identity but simply on the existence (and importance) of Member State identities?

In order to be able to disentangle the understandings of citizenship identity and attachment that EU citizenship law motivates, the *Sayn–Wittgenstein* case is an especially noteworthy case to consider. In this case, the Court of Justice did not only allow Austria to derogate from its obligations under Article 21 TFEU on the basis of such equal treatment grounds but also highlighted this discretion given to a Member State interest by referring, for a first time, to the national identity clause of Article 4(2) TEU. But does this mean that the judicial text of the *Sayn–Wittgenstein* decision only conveys a meaning about the unique historical and social identities of Austrian citizens (as it was predominately claimed in legal commentaries)? Or are there other possible understandings of citizenship identity that the text of the case inspires?

In order to be able to answer these questions, I will draw from the linguistic and literary insights elaborated on above that require us to take the different horizons of a text seriously if we want to understand its manifold as opposed to univocal ethical and socio-political meaning. I will hence read the text of the *Sayn–Wittgenstein* decision from different points of view of political theories concerned with questions of citizenship identity, such as liberal nationalist, supranational and liberal cosmopolitan theories, and move back and forth between these diverging theories and the text of the judgment. The goal is to understand how the various constituent parts of the text and its language create patterns of words and images and hence various significances in light of the different theoretical understandings of citizenship attachments and sentiments from which they are read.

In the following, I will start with a short summary of the facts of the *Sayn–Wittgenstein* case (Section III.A), followed by the core analysis of the case probing the above-explained methodological suggestions (Section III.B).

A. *Facts of the* Sayn–Wittgenstein *case*

We encounter the following situation in the *Sayn–Wittgenstein* case, which the Court of Justice decided in 2010: an Austrian national moves to Germany, where she is adopted (at the age of 47) by Mr Lothar Fürst von Sayn–Wittgenstein. As a result of this adoption, she receives his noble name (which is included into the Austrian civil registry and recognised by German law). However, after living in Germany for 15 years under the name of Ilonka Fürstin von Sayn–Wittgenstein ('Princess of Sayn–Wittgenstein'), the Austrian authorities change her surname based on the Austrian 'Law on the abolition of the nobility' which prohibits Austrian citizens from using designations of noble status, including that of 'Fürstin'.[44]

In the proceedings to the case, the Court of Justice is asked whether the Austrian measure not to acknowledge the noble parts of Ilonka's name constitutes a restriction of her free movement rights as European citizen under Article 21 TFEU. In its reply given, the Court of Justice decides that it does.[45] However, it also holds that although the Austrian measure constitutes a restriction of Article 21

[43]The idea of community citizenship and the rhetoric of the people of Europe coming closer together and eventually being united by a common identity had been in circulation for a long time, see Communication from the Commission to the Council, A People's Europe. Implementing the Conclusions of the Fontainebleau European Council 1984 [COM(84(446 final]; Commission of the European Communities, Report on the Operation of the Treaty on European Union 1995 [SEC(95)731 final]; D O'Keeffe and M Horspool, 'European Citizenship and the Free Movement of Persons' 31 (1996) Irish Jurist 145.

[44]On more details about the facts of the case, see *Ilonka Sayn–Wittgenstein* (n 5) para 19–35.

[45]See ibid., paras 52–71.

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TFEU, it can be justified in light of the object pursued by the Austrian legislation to ensure formal equality of treatment of all Austrian citizens. More precisely, the Court of Justice interprets the constitutional background of the Austrian legislation to ensure formal equality for all its citizens as an element of Austria's public policy, which allows necessary and proportionate restrictions of EU fundamental freedoms.[46]

What is noteworthy in this case is that the Court of Justice mentioned, for the first time, the national identity clause of Article 4(2) TEU. It refers to it twice in the justification/proportionality part of the judgement. It commences the proportionality test by stating that 'in the context of Austrian constitutional history, the Austrian law on the abolition of nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests [here public policy interests] and the right of free movement'.[47] When ultimately examining whether the Austrian government could have reached the same goal of protecting the equality of its citizens through less restrictive means, the Court of Justice comes back to said clause. It states that 'in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States'[48] and concludes from this that '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'.[49] Unfortunately, the Court of Justice never actually explains to the reader of the judgement why Austria could not have used less restrictive means to reach the same goal. Yet from the passages of the decision mentioned above it seems that Austria's idiosyncratic tradition and culture in dealing with its artistocratic past played a critical role in the Court's proportionality assessment of the measure.

B. Core analysis: Of forms of 'wohnen' and 'leben' as EU citizen in the EU polity

Let me start the analysis of the judicial text of the *Sayn–Wittgenstein* case case by asking what the judgement meant for Ilonka's sense of citizenship attachment (as the protagonist EU citizen of the case). There are some (but not many) indications within the text that can help us answer this question. It is, for instance, striking that the judges of the Court of Justice included Ilonka's arguments (as applicant of the case) into the text of the judgement (which the Court of Justice does not do on a regular basis). In the particular paragraph that I have in mind, it is explained how Ilonka assesses (and disagrees with) the derogation used by the Austrian government in the case. More precisely, it is clarified how Ilonka opposes the justification of public policy to legitimatise the restriction of her free movement rights because it 'presupposes the existence of a sufficient connection with the Member State concerned' which, according to her, is 'lacking' 'because since the date of her adoption she has resided in Germany'.[50] In other words, what Ilonka alleges here is that Austria cannot constrain her free movement rights on grounds related to a fundamental interest of the Austrian society (as expressed in the concept of public interest) because she does not consider herself an integral part of Austria's society and citizenry anymore.

This argument advanced by Ilonka is essential for questions of citizenship attachment in the EU polity. Because what she seems to presume is that EU citizenship law allows EU citizens to emancipate themselves from the idiosyncrasies and identities of their home Member State to such an extent that said state cannot restrict their rights on grounds relating to the public interest that they are part of. In this view, EU citizenship law is not only regarded as allowing Ilonka to move to

[46]Ibid., paras 81–95.
[47]Ibid., para 83.
[48]Ibid., para 92.
[49]Ibid., para 93.
[50]Ibid., para 72.

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and reside in another Member States (here Germany); it is also seen as enabling her to change her sense of attachment and obligation away from the Austrian society (as her country of nationality) to the German one (as her country of residency).

Let me illustrate the rationale underlying Ilonka's argument by an interesting distinction made in the German language. When describing the act of living, the German language holds two 'verbs' to do so, whereas the English language only has one verb. In English, when describing the act of residing somewhere, one would use the verb to 'live', whereas in the German language one would need to choose between the verbs 'wohnen' und 'leben'. Whereas 'wohnen' describes the place of residency, 'leben' has, in contrast, a much more emotional and/or spiritual dimension. It describes an act of being, of 'feeling' at home with all the obligations and responsibilities that a 'home' brings with it. I can 'wohnen' in Italy, meaning that I can have my residency there, while actually 'leben' in Germany due to my dreams, memories, and my sense of attachment and responsibility that I feel towards it. What is interesting about Ilonka's argument is that she considers Germany as her place of 'leben'. Although she grew up in Austria, lived there for most of her life, and still holds Austrian nationality, she feels more attached to Germany than to Austria and demands that EU law recognises this fact of her sense of attachment (by not allowing Austria to constrain her EU citizenship rights on Austrian public interest grounds).

Yet the Court of Justice does not seem to agree with Ilonka on this point. Not only does it ultimately allow Austria to justify its measure restricting Ilonka's free movement rights in light of the object pursued by the Austrian legislation to ensure formal equality of treatment of all Austrian citizens. It also accentuates this decision by bringing into the judgement the national identity clause of Article 4(2) TEU. The Court of Justice did not have to mention Article 4(2) TEU in its decision. In fact, before the adoption of the Lisbon Treaty, the Court of Justice accepted various principles of Member State constitutional law as justification for the restriction of a fundamental freedom without the reference to said clause.[51] So why mention it at all? There is the obvious fact that the law simply allowed for it. As the provision only became subject to the jurisdiction of the Court of Justice through the Lisbon Treaty, which was adopted a year before the decision in the *Sayn–Wittgenstein* judgement, it was now legally possible for the Court of Justice to refer to Article 4(2) TEU. Yet we can also understand the explicit mentioning of the clause as conveying something significant about forms of attachment and identity under EU law that requires a small philosophical detour.

In one philosophical strand concerned with questions of citizenship identities, sometimes referred to as the *liberal nationalist* account, people are not the freer and more autonomous the more they are able to emancipate themselves from the thick values and traditions of their national identities. Rather, people like EU citizens are regarded the more autonomous the more they are able to keep a profound attachment to their national identities.[52] Clearly, this does not imply that EU citizens should not be allowed to freely move and reside in the EU territory. They should be able to exit their communities to choose to live in the national community that is more suitable to

[51]See Schill and Von Bogdandy (n 13) 1424.

[52]In political philosophy scholarship, this idea that autonomy can best thrive within national communities has been foreshadowed by I Berlin and Taylor and in its various versions worked out in considerable detail by authors D Miller, Y Tamir, C Kukathas, and K Nielsen to name just a few authors, see I Berlin, 'Nationalism: Past Neglect and Present Power', *Against the Current* (Penguin 1979); C Taylor, *Sources of the Self* (Cambridge University Press 1989); C Taylor, *Reconciling the Solitude* (McGill-Queen's University Press 1993); D Miller, 'Community and Citizenship' in S Avineri and A De-Shalit (eds), *Communitarianism and Individualism* (Oxford University Press 1992); D Miller, *On Nationality* (Oxford University Press 1995); DL Miller, *Citizenship and National Identity* (Blackwell 2000); D Miller, *Justice for Earthlings, Essays in Political Philosophy* (Cambridge University Press 2013); Y Tamir, *Liberal Nationalism* (Princeton University Press 1993); C Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press 2003); K Nielsen, 'Liberal Nationalism, Liberal Democracies and Secession' 48 (1998) Toronto Law Journal 253.

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their preference.[53] Yet in this philosophical account, their ultimate sense of loyalty should rest with the values and traditions of their national polities and the obligations attached to it. Only if the idiosyncratic aspects of a Member States' national ethos are protected can EU citizens' desire for belonging and meaningfulness in their lives ultimately be protected and guaranteed.

We can read the text of the *Sayn–Wittgenstein* judgement as underlying this philosophical rationale. Not only does the Court of Justice allow for the public policy derogation forwarded by the Austrian government and accentuate this discretion given to Austria by mentioning the principle of national identity (which it did not have to do). The Court of Justice also writes 'that the specific circumstances that may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another'.[54] It adds that 'it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'.[55] These passages of the judicial text can be understood as the Court of Justice giving the Austrian state 'a margin of discretion'[56] in preserving the distinctiveness of the Austrian idiosyncratic values and traditions of its citizens' identity and to thereby stress Ilonka's duty of loyalty with the specific values underlying the Austrian identity.

But is this understanding of the text of the *Sayn–Wittgenstein* judgements as underlying liberal nationalist principles of citizenship identity the only way to read the case? One particular passage in the text of the judgement raises doubts as to this being the only reading of the judgement; in paragraph 89, the Court of Justice writes the following:

> The European Union legal system undeniably seeks to ensure the observance of the principle of equal treatment as a general principle of law. That principle is also enshrined in Article 20 of the Charter of Fundamental Rights. There can be no doubt that the objective of observing the principle of equal treatment is compatible with European Union law.[57]

What the Court of Justice explains in this paragraph is why the Austrian measure, which constitutes a restriction of Article 21 TFEU, can, from an EU legal point of view, be justified in light of the objective pursued by the Austrian legislation to ensure formal equality of treatment of all Austrian citizens. And in the view of the Court of Justice, the objective to ensure formal equality can be accepted because it is a principle that also the 'European Union legal system undeniably seeks to ensure'.

Already before the *Sayn–Wittgenstein* decision, the Court of Justice had accepted various principles of national law as justification for the restriction of EU fundamental freedoms on the ground that they are acceptable from an EU legal point of view.[58] Yet the way the Court of Justice justified such examinations in previous cases is different from how it did so in the *Sayn–Wittgenstein* judgement. In previous cases, when checking whether a national measure was in line with fundamental rights (considered part of the general principles of EU law) the Court of Justice always clarified that it takes 'inspiration from the constitutional traditions of Member States and

[53]For an insightful essay of how the modern concept of autonomy and free choice is in line which the liberal nationalist account, see W Kymlicka, 'From Enlightenment Cosmopolitanism to Liberal Nationalism,' in Id, *Politics in the Vernacular Nationalism, Multiculturalism, and Citizenship – Oxford Scholarship* (Oxford University Press 2001), 203.

[54] *Ilonka Sayn–Wittgenstein* (n 5) para 87.

[55]Ibid., para 91.

[56]Ibid., para 87.

[57]Ibid., para 88–9.

[58]See, for instance, Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865 para 71; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614 para 43.

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from the guidelines by the international treaties for the protection of human rights'.[59] The Court of Justice hence explicitly imbedded the 'quality-check' of a national measure in national and international fundamental rights practices. Yet the Court of Justice mentions no such thing in the *Sayn–Wittgenstein* judgement. It only focuses on how the objective of the Austrian measure is acceptable from the point of view of the EU legal system which 'seeks to ensure the observance of the principle of equal treatment as a general principle of law', which is 'also part of the Charter of Fundamental Rights'.

This passage can be read as indicating that the Austrian policy not to allow for titles of nobility on equal treatment grounds to actually represent a common value and commonality of the European and not the Austrian citizenry is more in line with *liberal cosmopolitan* than with *liberal national* principles of citizenship theory.[60] A basic presumption of *liberal cosmopolitan* philosophy is that the ability of EU citizen to lead satisfying lives does not derive from the thick moral choices of national identities but from their ability to emancipate themselves from such and to instead freely move and mingle with other EU citizens on the basis of a newly found European identity.[61] The statement of the Court of Justice that the objective of the Austrian measure is acceptable from the point of view of the EU legal system which 'seeks to ensure the observance of the principle of equal treatment as a general principle of law' can be understood in this line. It can be read as favoring the making of a self-sufficient European identity, or sense of belonging, as a unifying force for the people of Europe on the basis of the interpretation of the principle of equal treatment as chosen for by the Austrian polity. Instead of simply accepting and tolerating the interpretation of the principle of equality as decided upon by Austrian citizenry as an idiosyncratic part of Austrian forms of 'leben', it seems to elevate such a value choice to becoming part of a potentially new form of European 'leben'.

The astoundingly sturdy language used by the Court of Justice that there 'can be no doubt' that the EU legal system 'undeniably seeks to ensure' the principle of equal treatment only exacerbates the impression that EU law makes the Austrian prohibition of holding titles of nobility on equal treatment grounds part of its own value foundation.

Yet there is a third and final way of understanding the judicial text of the *Sayn–Wittgenstein* case, which aligns the binary reading of it as expounding both liberal nationalist as well as a cosmopolitan forms of citizenship attachment, and which we can draw from gazing at the text from the perspective of *supranational* citizenship theory.

The supranational account to citizenship attachment puts a lot of emphasis on the importance of maintaining the values and traditions of Member State identities. It presumes that only when people belong to a national ethos can their 'existential yearning for a meaning located in time and space'[62] be amply satisfied. Yet this account is slightly different from the liberal nationalist one sketched out above: instead of simply stressing the importance of EU law in preserving the national identities of Member States, it stresses that EU law needs to preserve such identities in a way that they do not collapse into illiberal and oppressive forms.

[59]Ibid.

[60]For an interpretation of the theoretical account of Marquis de Condorcet as a typical account of cosmopolitan citizenship theory see, Kymlicka (n 53) 204–5.

[61]See, for instance, D Kostakopoulou, 'European Union Citizenship: Writing the Future' 12 (2007) European Law Journal 623 (regarding the linking of EU citizenship with national citizenship, as specified in the Treaties, as a transitional stage in the creation of a new European cosmopolitan form of citizenship); J Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' 12 (1992) Praxis International 1; J Habermas and J Derrida, 'Nach Dem Krieg: Die Wiedergeburt Europas' *Frankfurter Allgemeine Zeitung* (31 May 2003) (imagining the creation of a European federation in which European Union citizenship supplants national citizenship); S Benhabib, 'Transformations of Citizenship: The Case of Contemporary Europe' 37 (2002) Government and Opposition 439 (arguing that forms of citizenship such as European citizenship are unavoidable in a globalized word; in her view, in order for such forms of citizenship to be conducive to democratic citizenship they have to be accompanied by active involvement with and attachment to the respective institutions).

[62]JHH Weiler, 'To Be a European Citizen: Eros and Civilization,' in Id, *The Constitution Of Europe: 'Do The New Clothes Have An Emperor?' And Other Essays on European integration* (Cambridge University Press 1999) 347.

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But how can EU law achieve such an objective? The supranational account presumes that this is only possible if EU law does not incorporate the 'thick' national values and traditions of Member States as their own. Because if it would do so, EU law and the polity that it presents would be susceptible to the same fallacies of corruption and oppression that is its objective to prevent. This does not mean that EU law cannot be grounded in some type of citizenship identity, or ethos. Important is only that such identity is *not* thick and moral but represents an idea of humanity as constituting of equally reasonable human beings that tolerate and respect the different and diverging thick identities of Member States.[63] The identity by which EU citizens are hence aligned upon has to remain thin and rational, as opposed to becoming thick and moral, because only then is EU law able to tame the 'excesses of the modern nation-state' as the major purpose of European integration.[64]

Having these philosophical considerations in mind, it is first of all worth re-calling the different philosophical principles that we have previously identified in text of the *Sayn–Wittgenstein* judgement, and which have, on the one hand, pointed to the importance of Member States traditions and values as source of citizen attachment and, on the other hand, to the importance of a cosmopolitan European identity. With regard to the former, we concluded that the decision allowed for a Member State derogation from Article 21 TFEU on equal treatment grounds, specifically mentioned national identity in the proportionality analysis, and stressed that not all Member States have to agree to the restrictive measure and its justification as provided for by Austria. Yet as much as these textual elements point to a liberal nationalist grounding of the judicial text, such reading is not entirely conclusive when taking paragraph 89 into account. Here, the Court of Justice fervently stresses that the 'European Union legal system undeniably seeks to ensure the observance of the principle of equal treatment as a general principle of law' that the Austrian law is grounded upon. This passage, which suggests that the Austrian interpretation of equal treatment is part of the European identity rather points to a liberal cosmopolitan reading of the case, which conflicts with the liberal nationalist reading of it. The reason for this tension is that cosmopolitan theory aims to free EU citizens from thick national identities, while liberal nationalist theory aspires to safeguard the embeddedness of EU citizens in said national traditions, customs, and values.

Is there a way to align these two seemingly contradictory philosophical principles of citizenship attachment that the judicial text indicates? Is there a way of understanding the decision as both valuing and protecting Member States identities (as most commentators have done) while at the same time acknowledging that the value of equal treatment, which the Austrian measure was grounded upon, constitutes a profound part of a European way of life and thinking that is presently in the making? The answer to this question lies in the philosophical meaning we attribute to passage 89 of the judgement.

Apart from the liberal cosmopolitan reading of it, we can also understand it as stressing the importance of thick national identities that exist in harmony with a European value system that accepts rather than incorporates national idiosyncrasies. In such an understanding, the Court of Justice when declaring the principle of equal treatment as basis of the Austrian measure as a general principle of EU law *only* regards the Austrian policy choice as tolerable from the point of view of EU law. It does not suggest that EU law incorporates the interpretation of the equality principle as decided upon by the Austrian government, but simply suggests that said interpretation by the Austrian citizenry is one of many different possible interpretations that EU law tolerates and respects as reasonable grounds for a national citizenry to unite upon.

[63]Ibid.

[64]Ibid., 341; Ulrich Haltern claims that because the supranational (the European) is the place of Civilization as opposed to the nation (the Member States) which is the place for Eros, the former cannot be regarded as comprising any culture at all, see Haltern, 'The Dawn of the Political' (n 16) 595.

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This difference between a liberal cosmopolitan and supranational reading of the text might seem minor at first; but it is anything but that. Whereas in the first reading the 'thick' values underlying the Austrian interpretation of the equal treatment principle are elevated to becoming a constituent part of the identity by which EU citizens mingle upon; in the second, such 'thick' values underlying the Austrian interpretation of the equal treatment principle are simply regarded as one of many tolerable ways of interpretation that the 'thin' identity underlying EU law allows for. Or to put it in slightly different terms with respect to the two expressions of 'living' that we find in the German language: in the cosmopolitan reading of the decision, the Court of Justice elevates Austrian forms of 'leben' to becoming European forms of 'leben'. Contrarily, in the supranational reading of it, the Court of Justice regards Austrian forms of 'leben' as acceptable and tolerable forms of European 'wohnen', thereby aligning the seemingly different philosophical principles that the language and structure of the judicial text exposes.

IV. Considering the constitutive effects of the language of EU law

This essay started with the observation that in our current ways of speaking and writing about EU law, often the deeper socio-political meaning underlying legal values and principles are not visible for legal scholars, practitioners, and participants in the pertaining socio-political discourses. Against this background, this essay purported to find out in what way European lawyers could get a grip of this deeper and complex meaning of EU law. The analysis concluded that legal scholars and practitioners can best do so if they pay attention to the autonomous life of the language of the law in the way linguistic and literary scholars often do when engaging with literary texts (eg by looking at the linguistic/structural 'horizon' of the text through different epistemological 'horizons'). But why should we make the effort of reading EU law in this way? Doesn't the possibility to extract multiple meanings from EU law render our already complex and highly pluralistic lives in Europe even more difficult to manage and understand?

The above analysis of the *Sayn–Wittgenstein* judgement revealed that the decision can be read as suggesting different and partly contradictory understandings of citizenship identity. While the dominant surface language and concepts used suggests a *liberal national* understanding of the case, we can also identify *cosmopolitan* and *supranational* principles of citizenship attachment when reading the decision, while especially the latter philosophical reading seems to allow for a philosophical alignment of several diverging and contradictory meanings that the text suggests. This result is noteworthy in two significant ways. It does not only encourage us to exhibit a certain skepticism with regard to the meaning that judicial language instinctively creates for its legal audience and makes us think whether EU law should be more perspicuous in the ontologies of European life that it expresses. It also rises more general questions about what kind of citizenship identities EU law should foster in order to allow for the respect of the unique historical and social peculiarities of Member State citizenries while, at the same time, enable enhanced forms of European integration.

Some might reply to this that they would rather avoid dealing with the moral and political ideas underlying EU law; not only because they lack the knowledge to do so but also because they believe that it is more desirable for the needs of 'legal certainty' to retain a significant degree of coherence and consistency of the EU legal order.[65] But to avoid dealing with the ethical and socio-political meaning of the law neither affects legal certainty nor allows for the legal text to remain neutral about its meaning. Whether we want it or not, language (whether literary or legal) always unavoidably creates meaning. It conveys a message about forms of living and being and thereby inherently shapes our consciousness about who we are as a community and as citizens of a

[65]Such arguments are often employed with respect to the French judicial style which are similarly apodictic to how European court judgement are composed see, for instance, E Steiner, *French Law: A Comparative Approach* (2nd Edition, Oxford University Press 2018) 121.

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polity.[66] As a result, not contemplating the meaning that we transmit when writing and speaking about EU law does not then mean not conveying meaning. It just means doing it in a less conscious, reflective, and transparent way.[67]

In the European legal debate, the critical voices as to the way EU law is communicated have tremendously increased in the last decade. It is not unusual to read that the wordlessness of EU law impedes an open dialogue about the meaning of EU law in the broader legal community.[68] Given the polarised communicative climate that currently characterises conversations about EU law and its underlying polity, being more conscious and explicit about the socio-political meaning inspiring our legal interpretations might therefore not be a bad idea, as it might contribute to a more productive (and maybe less shrill) dialogue about the founding values and principles as well as the future of the European Community.

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[66]The constitutive nature of law and its language has famously been pinpointed to by scholars like Catherine MacKinnon, see, for instance, CA MacKinnon, *Only Words* (Harvard University Press 1993).

[67]See Weiler (n 16) 891.

[68]The importance of 'EU law talk' has been addressed from different points of view in the scholarship looking more generally at legal and political discourses as much as more specifically at legal texts like court judgements. For some examples see, L van Middelaar, *Alarums and Excursions. Improvising Politics on the European Stage* (Agenda Publishing 2019); Weiler (n 16); See A Arnull, *The European Court of Justice* (Oxford University Press 2006) 13.

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