

Die Amtssprache ist Deutsch. *Fair Communication in Administrative Proceedings*

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Abstract

This article focuses on the official language policy, and how it affects newcomers during their interaction with public services: A language barrier is created, and newcomers are dependent on the support of government institutions, lawyers, and volunteers in order to communicate effectively with public services. This article raises the question, can newcomers benefit from the concept of fair communication with public services during administrative proceedings? It portrays the gradual development of individual-based communication and ends with a suggestion of what can be done by whom to eliminate the existing language barrier.

I. Introduction

‘Since we arrived to Germany and until this day, we have suffered from endless incomprehensible paperwork (...)’.¹ A team of Syrian refugees recently designed the app *Bureaucrazy* in order to simplify German bureaucracy for newcomers. The app is currently under construction and in need of more funding. But once launched, *Bureaucrazy* will offer the following services: The translation of official documents into Arabic and English, answers for frequently encountered problems with public services, and a mapping service that leads the way to the responsible office.² Based on their own experiences with public services, the *Bureaucrazy* team is aiming to solve the existing language barrier for newcomers. Newcomers are dependent on the support of government institutions, lawyers, and volunteers in order to accurately communicate with the public services in the country of arrival. Lost in translation and bureaucracy, newcomers are in danger of submitting incorrect or incomplete applications, which may even result into the denial of governmental services altogether. This article discusses whether newcomers can benefit from the concept of fair communication during administrative proceedings with public

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¹ ‘Support “Bureaucrazy” Simplify German Bureaucracy’ (*Betterplace.org*, 1 January 2017), www.betterplace.org/en/projects/47346-support-bureaucrazy-simplify-german-bureaucracy, accessed 3 September 2017.

² ‘Syrian Refugees Design App for Navigating German Bureaucracy’ (*The Guardian*, 2016), www.theguardian.com/world/2016/aug/05/syrian-refugees-app-navigating-german-bureaucracy-bureaucrazy?CMP=fb_gu, accessed 3 September 2017.

services. In this context, the international, regional and national framework on a right to a fair trial and against discrimination is being examined. This article ends with a suggestion of what can be done by whom to eliminate the language barriers between newcomers and public services.

Throughout this article, *newcomers* are individuals, who recently crossed the border of their country of arrival. This article does not focus on their purpose of arrival and, consequently, their legal classification as an asylum seeker, refugee, migrant worker or otherwise foreign resident. The migrant worker from Turkey, the student from Spain, and the asylum seeker from Somalia all have the same problem in common: They are dependent on the support of others when communicating with the Job Centre, the Social Rights Centre or the Foreigners Office. The term *fair communication* comprises the right to translation of documents and/or assistance by an interpreter in administrative proceedings. The term *administrative proceeding* refers to ‘the activity of administrative authorities with external effects directed towards the examination of conditions, preparation and taking of an administrative act’.³ Examples are the granting or refusal of a residency status or of welfare. Further, the article does not focus on financial and legal aid, nor does it discuss Court proceedings.

2. The Official Language Policy

The official language policy is widespread in the European Union (EU). Bulgaria, France, Estonia, Latvia, Lithuania, Greece and Poland apply a single official language policy.⁴ Next to their official language, Austria, Croatia, the Czech Republic, Germany, Hungary, Portugal, Romania, Slovakia, Slovenia, Sweden and the United Kingdom recognise under certain circumstances one or more other minority languages within their territory.⁵ Throughout the article, Germany will be used as a national example. Since the German language is not that widespread around the world, language barriers for newcomers in private and public life tend to be higher in Germany than for instance in France or the United Kingdom. In addition to the recent influx of asylum seekers, over eight million foreigners (legally) reside in Germany.⁶ Most

³ R. Seerden, *Administrative Law of the European Union, its Member States and the United States* (3rd edn, Intersentia 2012) 65.

⁴ Stefaan van der Jeught, *EU Language Law* (Groningen 2015) 36.

⁵ *Ibid.* 38.

⁶ Federal Statistical Office, *Statistical Report* (2015) 40, www.destatis.de/DE/Publikationen/StatistischesJahrbuch/Bevoelkerung.pdf?blob=publicationFile, accessed 3 September 2017.

of them originate from other EU member states, many from the Balkan States and Turkey.⁷

2.1. Current Situation

Although it was briefly discussed by the federal parliament in 2011, the official language is not enshrined in the German Constitution.⁸ Sec.23.1 Administrative Procedure Act⁹ states that ‘the official language shall be German’.¹⁰ Consequently, official notices, letters, rulings and the complete administrative paperwork are in German.¹¹ Subsequently, communication with public services, for example the Foreigners Office, the Job Centre and the Social Rights Centre is in German only. To give an example, the documents of the Foreigners Office concerning the reasons of withdrawal of a residency status or the reasons given in a deportation order are in German.¹² The public offices themselves do not offer translation services. Hence, it is a general principle, that the individual of a third-state or a EU member state is responsible to either learn German or to independently obtain an interpreter.¹³

2.2. Current Support

As a result of the lack of governmental translation services, newcomers cannot communicate with public services without support from government institutions, lawyers or volunteers. There are few German governmental bodies that provide comprehensive legal aid in residency and social law, e.g. the Senate Department of the Commissioner for Integration and Migration in Berlin.¹⁴ However, these public offices are rare and often have limited office-hours. In addition, ten governmental ‘Welcome-Centres’ were established and equipped with English-speaking officers throughout the nation

⁷ Ibid.

⁸ ‘Deutsch ins Grundgesetz’ (Federal Parliament, 7 November 2011), www.bundestag.de/dokumente/textarchiv/2011/36382677_kw45_pa_petitionen/206798, accessed 3 September 2017.

⁹ Administrative Procedure Act, www.bmi.bund.de/SharedDocs/Downloads/EN/Gesetzes-texte/VwVfg_en.pdf?__blob=publicationFile, accessed 2 November 2017.

¹⁰ In the context of Court proceedings, the official language policy is enshrined in Sec.184 Court Constitution Act (GVG).

¹¹ F. Kopp & U. Ramsauer, ‘Sec.23’ in *Verwaltungsverfahrensgesetz: VwVfG* (16th edn, C.H. Beck 2016) para. 5.

¹² Federal Ministry of the Interior, ‘Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz’ (26 October 2009) 77.1, www.verwaltungsvorschriften-im-internet.de/pdf/BMI-MI3-20091026-SF-A001.pdf, accessed 3 September 2017.

¹³ Ruling by Federal Fiscal Court BFHE VIIR102/75<14> (09 March 1976) www.jurion.de/Urteile/BFH/1976-03-09/VII-R-102_75, accessed 3 September 2017.

¹⁴ Senate Department of Commissioner for Integration and Migration in Berlin, www.berlin.de/lb/intmig/service/ueber-uns/, accessed 3 September 2017.

as a test-run to attract (only) highly qualified immigrants.¹⁵ Furthermore, companies offer their (charged) service. For example, Red Tape Translation provides German-English translation during appointments with the Foreigners Office in Berlin.¹⁶

Most importantly, numerous legal aid services organized by non-governmental organizations (NGOs) and churches improve the situation of newcomers, especially in regards to asylum seekers, in Germany. Many NGOs organize a network of volunteers to accompany newcomers to their appointments with public offices, e.g. *Caritas*, *AWO* and *Diakonie*.¹⁷ Furthermore, universities support newcomers, especially asylum seekers, through the establishment of Human Rights Clinics. For volunteers, the language barrier is challenging as well: In 2015, Google witnessed a fivefold increase in the use of *Google Translate* between the Arabic and German language.¹⁸

2.3. Recent Court Rulings¹⁹

While there is strong support for newcomers outside of the public services, the language barrier can create an uneven balance of power between newcomers and public services and ultimately can result in mistakes during administrative proceedings that cannot easily be revoked through access to court proceedings. To give an example, in 2015 a Syrian couple mistakenly withdrew the asylum procedure of their newly born child after receiving the documents in German only.²⁰ Later in court, their attorney claimed that the withdrawal of the asylum procedure was not valid. Among other reasons, the

¹⁵ 'Auslaenderbehoerde wird Willkommensbehoerde' (*Federal Office for Migration and Refugees*, 30 April 2014) www.bamf.de/SharedDocs/Pressemitteilungen/DE/2014/20140430-0014-pressemitteilung-potsdam-abh-projekt.html; 'Germany Tries Warmer Welcome For Immigrants' (*Deutsche Welle*, 2 April 2013), www.dw.com/en/germany-tries-warmer-welcome-for-immigrants/a-16713149, accessed 3 September 2017.

¹⁶ Red Tape Translation, www.redtapetranslation.com/, accessed 3 September 2017.

¹⁷ Caritas Nordrhein-Westphalen, www.caritas.de/spendeundengagement/engagieren/ehrenamt/fluechtlinge/engagement-ratgeber; AWO Duesseldorf, www.awo-duesseldorf.de/ueber-uns/ehrenamtsboerse/detailansicht/2017/08/begleitung-und-unterstuetzung-von-menschen-mit-migrationshintergrund/; Diakonie Pfalz, www.diakonie-pfalz.de/diakonisches-werk-pfalz/haeuser-der-diakonie/ludwigshafen/fachdienst-integration-und-migration.html, accessed 3 September 2017.

¹⁸ 'Google's Arabic-German Translations Surge Amid Newcomer Influx' (*PHYS*, 25 September 2015), <http://phys.org/news/2015-09-google-arabic-german-surge-newcomer-influx.html>, accessed 3 September 2017.

¹⁹ Both Court Rulings are based on the Council Directive 2005/85/EC, which later was enhanced by the Directive 2013/32/EU.

²⁰ Administrative Court VG Göttingen 2A131/15 (29 September 2015), www.rechtsprechung.niedersachsen.de/jportal/?quelle=jlink&docid=JURE15018015&psml=bsndprod.psml&max=true, accessed 3 September 2017.

documents should have been translated into Arabic by the Federal Office for Migrants and Refugees. The judge did not revoke the final withdrawal of the asylum procedure since – in his opinion – the parents must have been aware of their actions. In 2014, an identical case concerning an Ethiopian mother and her newly born child was decided.²¹ Considering the situation in Ethiopia (in comparison to Syria), the court did not prohibit deportation, leaving the decision on how to proceed to the Foreigners Office.

2.4. Abolishment of the Official Language Policy?

In the past, the above described language barrier and its consequences for newcomers have triggered the debate on an abolishment of the official language principle. In Germany, the official language policy was challenged numerous times in the 1970's and 1980's. Yet, the policy is claimed not to be unconstitutional.²² It has been argued that the use of an official language secures uniformity and comprehensibility in proceedings (including for non-participants) and is part of the culture of the nation.²³ Stefaan van der Jeught – expert in European language law – agrees, and distinguishes between the ‘protection of linguistic diversity’ and the need of ‘efficient communication’.²⁴ In his opinion, a common language is required for EU institutions, bodies and agencies as well as national administrations in order to work and communicate efficiently. Another argument for the official language policy may be that access to public services in a foreign language may reduce the incentive for newcomers to learn the language of the country of immigration and that could reduce incentives for integration. However, that point can hardly be made for recently arrived newcomers. Furthermore, in the context of recognized minority languages, the indicated respect for the culture of minorities by the state can be seen as an incentive for further integration.²⁵

The human rights sector currently lacks advocacy strategies or an academic debate on the official language and its consequences for newcomers. Considering the arguments above, it is understandable that NGOs react to the more pressing

²¹ Administrative Court VG Muenchen M12K14.00097 (6 May 2014), <https://open-jur.de/u/760897.html>, accessed 3 September 2017.

²² Ruling by Federal Constitutional Court BVERFG 87.785 (25 August 1985), www.jurion.de/Urteile/BVerfG/1985-09-25/2-BvR-881_85, accessed 3 September 2017; Ruling by Federal Administrative Court BVWERGE IB3.74<8> (14 August 1974), www.jurion.de/Urteile/BVerwG/1974-08-14/BVerwG-I-B-374, accessed 3 September 2017.

²³ O. Palandt, ‘Sec.184’ in *Gerichtsverfassungsgesetz: GVG* (75th edn, C.H.Beck 2016) para. 1.

²⁴ Revista Afaceri Juridice Europene, ‘Interview with Stefaan van der Jeught about EU Language Law’ (2015), <http://iaduer.ro/?p=3740>, accessed 3 September 2017.

²⁵ J. Wheatley, ‘The Status of Minority Languages in Georgia and the Relevance of Models from Other European States’ [2006] *European Centre for Minority Issues* 20.

needs posed by the official language and assist with translations, rather than fighting the root cause of official language stipulations in administrative procedures. Changing the public services' use of an official language would entail a very long-lasting bureaucratic process with many obstacles, also hindered by lack of resources and political will. Furthermore, the current legislation and Court rulings are deeply enshrined. Consequently, the goal of future advocacy should not concentrate on the abolishment of the official language policy, but its amendment in favour of the concept of fair communication, e.g. through the service of written and oral translation by public offices.

3. A Violation of Fundamental Rights?

The above-mentioned court rulings seem unjust. However, the question, whether this is a violation of (fundamental) rights of the concerned Syrian and Ethiopian families, cannot be answered with certainty. To answer this question, the concept of fair communication must first be investigated. In this context, the current framework of the right to a fair trial and the protection against discrimination on grounds of language and of minorities must be examined.

3.1. Right to Fair Communication

This paragraph investigates the definition and scope of the concept of fair communication. With the intention of demonstrating the lack of rights experienced by newcomers during administrative proceedings, the rights of the accused in criminal proceedings are portrayed in addition. Furthermore, the current practices of national, European and international bodies are highlighted.

3.1.1. Definition and Scope

'Not to secure it [communication], from the very outset of the suit to the very last act in it, on every occasion (and as between whatsoever persons and things, where the existence of it is necessary to the attainment of the ends of justice), is a flagrant oversight'.²⁶

Continuing the thoughts of the philosopher, jurist, and social reformer Jeremy Bentham, well-functioning communication with public offices is necessary to gain access to governmental services. As early as in 1837, Bentham

²⁶ J. Bentham, 'Judicial Communication' in: J. Bowring (Ed.), *The Works of Jeremy Bentham* Vol. 2 (1843) 52.

highlighted the importance for illiterate individuals to communicate efficiently with state authorities. In Bentham's opinion, an authoritative body treats an individual properly when communication channels are adjusted to the circumstances of the individual.²⁷ Thus, the capabilities of each individual must be considered, and public services must act accordingly. Otherwise an unbalanced power at the expense of the individual emerges. This assessment in favour of the individual comprises the concept of fair communication. The concept of fair communication entails individual-based communication with public authorities and – if necessary – the translation of documents and/or assistance by an interpreter.

3.1.2. Criminal Proceedings

The significance of fair communication between the state and the individual has been acknowledged internationally, however mostly in the context of criminal proceedings. The language rights of the accused in criminal trials have continuously strengthened in the past decades. With the intention of demonstrating the lack of rights experienced by newcomers during administrative proceedings, the rights of accused in criminal proceedings are portrayed.

The International Covenant on Civil and Political Rights (ICCPR) sets minimum guarantees for fair communication during criminal hearings, e.g. to obtain the information in a language which the accused reasonably understands (Art.14.3a;f). In addition, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems mandates fair communication during the initial stages of a pre-trial process for illiterate persons, minorities, persons with disabilities and children (General Assembly Resolution No.67/187; Guideline 4.44,e). The Directive 2010/64/EU on the Right to Interpretation and Translation in Criminal Proceedings empowers the accused to obtain a written translation of all documents, which are essential to safeguard the fairness of the proceedings (Art.3.1) and obligates states to use the oral translation only in exceptional circumstances (Art.3.7). Furthermore, the European Convention on Human Rights (ECHR) enshrines the right to be informed in a language, which the accused understands as a minimum right in criminal proceedings (Art.5.2;6.3). Germany obeys this right during all stages of criminal proceedings through the implementation of it in relevant domestic legislation (Sec.37.3 Criminal Procedure Act; Sec.187.1 Court Constitution Act).²⁸

²⁷ Bentham (n. 26) 52.

²⁸ Court Constitution Act, www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#po844, accessed 02 November 2017; Code of Criminal Procedure, www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html, accessed 02 November 2017.

3.1.3. Administrative Proceedings

In legal theory, criminal and administrative law are strongly linked to each other: In differentiation to civil law, they both address the relationship between the state and the individual. Yet, the concept of fair communication has found little attention so far in relation to administrative proceedings. Some European and international institutions have, nevertheless, addressed the question, especially regarding asylum proceedings.

Administrative matters are mostly discussed in international conventions concerning people leaving their country either voluntarily or involuntarily. Surprisingly, the International Convention Relating to the Status of Refugees does not mention a right to be informed in an understandable language. Nevertheless, the United Nations High Commissioner for Refugees portrays an individual-based focus in its Handbook and Guidelines of 1951 and accentuates the importance of communication through an understandable language with children (IV.70) and women (III.36). The International Convention on the Protection of All Migrant Workers and Members of Their Families (ICMW) regulates, that information on administrative formalities shall be provided (as far as possible) in a language the migrant worker is able to understand (Art.33). However, the ICMW has only been signed by 38 states, mostly countries of origin, and Germany is not among them.²⁹

The EU honours the concept of fair communication. *Firstly*, the EU has considered fair communication regarding its own institutions. The EU Charter on Fundamental Rights (EU Charter) stipulates the right to good administration (Art.41). This right includes the right to be treated fairly by the institutions and bodies of the EU, especially the right to receive an answer from the institutions in the chosen language of the treaties. *Secondly*, the EU has considered the importance of fair communication in the context of economic growth. The Directive 2006/123/EC on Services in the Internal Market encourages certain information to be expressed in other community languages (Art.7.5.1). However, the Directive does not interfere with a country's official language (Art.7.5.2). *Lastly*, the EU has considered the importance of fair communication in administrative proceedings in the context of asylum procedures. In his chapter 'Language rights for asylum seekers' of *EU Language Law*, Stefaan van der Jeught names the language arrangements concerning the reception of asylum seekers in the Directive 2013/33/EU as an example.³⁰ Indeed, Art.5 of Directive 2013/33/EU states

²⁹ Ratifications of ICMW, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en, accessed 3 September 2017.

³⁰ Van der Jeught (n. 4) 202.

that EU Member States must inform applicants of obligations and possible legal assistance ‘in a language that the applicant understands or is reasonably supposed to understand’. Germany fulfils its obligation through the implementation of relevant domestic legislation (Sec.31.1 and Sec.47.4 Asylum Procedure Act³¹).³² The Directive 2013/32/EU on Common Procedures for Granting and Withdrawing International Protection similarly obligates states to translate the final decision and the information on how it can be challenged ‘in a language which they understand or are reasonably supposed to understand’ (Art.11.2;12.1.f). However, the vague wording leaves the actual threshold of the applicant’s understanding undefined and makes room for uncertainty and violations. As an example, interviews during the Federal Office for Migrants and Refugees hearings’ are criticized greatly: Wrong interpreters assigned to individuals as well as poor language skills and inaccurate or summarised translations by interpreters lead to the rejection of asylum procedures due to the lack of credibility of the applicant.³³ In contrast, UNHCR – focusing on an individual-based communication – demands that ‘information on reception conditions should be provided in a language that the applicants *actually* understand and in a manner which considers their individual circumstances including in particular their age and gender’.³⁴

The Council of Europe (CoE) is pro-active in enhancing fair communication during administrative proceedings and established a committee of experts, the Project Group on Administrative Law (CJ-DA).³⁵ The CJ-DA drafted the Recommendation on Local Public Services and the Rights of Their Users (No.97).³⁶ No.97 highlights the purpose of administrative language as ‘facilitating relations within society’ and urges the language to ‘be adapted to modern culture with a view to being comprehensible to the greatest possible number’ (III.9). Furthermore, the CJ-DA has published a handbook on rights in administrative law and (carefully) established the access to public services as a procedural prin-

³¹ Asylum Procedure Act, www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html#po344, accessed 02. November 2017.

³² R. Marx, ‘Sec.37’ in *Kommentar zum Asylverfahrensrecht* (8th edn, Luchterhand 2014) para. B.3; ‘Sec.47’ para. E.

³³ Asylum Information Data Base, *Country Report: Germany* (2015) 19, www.asylumineurope.org/sites/default/files/report-download/aida_de_update.iv_o.pdf, accessed 3 September 2017.

³⁴ UNHCR, Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), www.refworld.org/pdfid/5541d4f24.pdf, accessed 3 September 2017.

³⁵ Project Group on Administrative Law, www.coe.int/en/web/cdcj/completed-work/standard-setting/administrative-law, accessed 3 September 2017.

³⁶ Recommendation No.97 on Local Public Services and the Rights of Their Users, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=564967&SecMode=1&DocId=563742&Usage=2>, accessed 3 September 2017.

ciple.³⁷ According to the CJ-DA, access to justice includes the right to make formal requests, applications, petitions and complaints in a foreign language, if accepted by domestic law (Comment 36.4).

The ECHR does not stipulate the choice of language in administrative proceedings. On the contrary, the European Court of Human Rights (ECtHR) quickly dismisses applications that raise this matter.³⁸ In the case *Inhabitants of Leeuw-St. Pierre v. Belgium* the European Commission of Human Rights ruled, that the Convention does not guarantee 'linguistic freedom'.³⁹ As a result, the Francophone complainants were not 'able to use the language of their choice, or of their mother tongue or usual language' in their written and spoken communication with the Belgian authorities. According to the Commission, Art.5.2 and 6.3.a,e address languages, but are limited in scope and not applicable to the case. Consequently, Art.14, which prohibits discrimination solely based on the rights stipulated in the ECHR, is left inapplicable as well. The ECtHR confirmed the ruling in *Mentzen v. Latvia*, stating, that each Member State has 'the liberty to impose and to regulate the use of its official language or languages in identity papers and other official documents'.⁴⁰ The Court established the lack of linguistic freedom further in *Podkolzina v. Latvia* and *X. v. Ireland*.⁴¹ Thus, in view of the ECtHR, the function of language is purely pragmatic.⁴²

In Germany, fair communication in administrative proceedings has not been discussed sufficiently. Participants have certain procedural language rights, e.g. where an individual with language difficulties has been prevented from observing a statutory time limit, he/she is granted a restoration of the original legal position.⁴³ However, the Administrative Procedure Act does not regulate the right to obtain an interpreter for administrative proceedings. In contrast, the law requires the presence of an interpreter in court proceedings (Sec.185 Court Constitution Act) as well as at the interview of the Federal Office for Migrants and Refugees in asylum proceedings (Sec.17 Asylum Procedure Act).

³⁷ Council of Europe (CoE), *Administration and You: Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons* (1996) 21-22, <https://book.coe.int/eur/en/international-law/536-the-administration-and-you-a-handbook.html>, accessed 3 September 2017.

³⁸ M. Paz, 'The Failed Promise of Language Rights: A Critique of the International Language Rights Regime' [2013] Vol. 23, *Harvard International Law Journal* 196.

³⁹ *Inhabitants of Leeuw-St. Pierre v. Belgium* [1965] App. No. 2333164, 360.

⁴⁰ *Mentzen v. Latvia* [2004] App. No. 71074/01, 26.

⁴¹ *Podkolzina v. Latvia* [2002] App. No. 46726/99, 34; *X v. Ireland* [1970] App. No. 4137/69, 792.

⁴² Paz (n. 38) 196.

⁴³ Kopp 'Sec.23' (n. 11) para. 4a.

3.2. Right to Fair Communication within Right to a Fair Trial

The following paragraph discusses whether the concept of fair communication can be extracted from the right to a fair trial. In this context, legislation and case law on criminal and asylum proceedings are used as examples to feature a gradual development in favour of the individual.

3.2.1. Criminal Proceedings

The concept of fair communication in criminal proceedings is secured through the right to a fair trial. The right to a fair trial is enshrined in various international conventions, e.g. Art.10 Universal Declaration on Human Rights (UDHR), Art.47 EU Charter and Art.6.1 ECHR. The ECtHR has ruled that in certain circumstances the translation of relevant documents during criminal proceedings is included in the right to a fair trial.⁴⁴ Furthermore, the concept of equality of arms, an equal balance between both parties, is ensured through Art.6.1 ECHR for civil and criminal proceedings.⁴⁵

3.2.2. Administrative Proceedings

This raises the question, can the concept of fair communication in administrative proceedings be extracted from the right to a fair trial? While the specific wording of Art.6.1 ECHR does not indicate its application to administrative proceedings, the increasing protection through ECtHR case law cannot be denied. The principle, that the character of the legislation and of the authoritative body is not decisive for the application of Art.6.1 ECHR, was developed in order to prevent the creation of a law-less area around administrative proceedings.⁴⁶ Therefore, a proceeding which is classified as public law in domestic law and whose result is decisive for civil rights and obligations is applicable to Art.6.1 ECHR, e.g. proceedings concerning social-security benefits.⁴⁷ However, there are various obstacles to overcome in order to apply Art.6.1 ECHR to certain administrative proceedings. *Firstly*, the ECtHR has not given a general definition of ‘civil rights’, creating an unbalanced set of case law.⁴⁸ To give an example, it rejected an application to immigration proceedings, despite the

⁴⁴ *Amer v. Turkey* [2009] App No. 25720/02, para. 77; *Kamasinski v. Austria* [1989] App No. 9783/82, para. 74.

⁴⁵ B. Rainey, E. Wicks & C. Ovey, *The European Convention on Human Rights* (6th edn, OUP 2014) 263.

⁴⁶ Rainey (n. 45) 252.

⁴⁷ ECtHR, ‘Guide on Art. 6 – Right to a Fair Trial (civil limb)’ (CoE/ECtHR 2013) para. 21, 25, www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf, accessed 3 September 2017; *Feldbrugge v. the Netherlands* [1986] App No. 8562/79, paras 25-40.

⁴⁸ Rainey (n. 45) 252.

serious consequences for the economic and social welfare of the individual.⁴⁹ *Secondly*, a breach of administrative procedure law can later be cured through providing access to a court of ‘full jurisdiction’.⁵⁰ Considering the diversity of administrative proceedings, a court of ‘full jurisdiction’ remains difficult to determine.⁵¹ Hence, the translation of documents or the free assistance of an interpreter similar to criminal proceedings are not yet adapted to administrative proceedings in general.

Nevertheless, the current development of language rights in asylum proceedings demonstrates the gradual development in favour of the concept of fair communication in administrative proceedings. The ECtHR recently found in *Ilias and Ahmed v. Hungary* that ‘the lack of access to information is a major obstacle in accessing asylum procedures’.⁵² In the case, the Hungarian authorities interviewed the applicant and gave him information leaflets on asylum proceedings in Dari, a language he does not speak. Accordingly, the Court highlighted the importance of obtaining sufficient information in order to effectively access relevant procedures. Thus, the ECtHR stresses the importance of fair communication in asylum procedures similarly to the rulings in *M.S.S. v. Belgium and Greece* and *Hirsi Jamaa and Others*.⁵³

In Germany, fair administrative proceedings have been discussed thoroughly. As a constitutional right, Art.19.4 Basic Law⁵⁴ empowers the individual to gain access to justice through an effective remedy concerning a right violated by a public authority.⁵⁵ Thus, the authoritative body of an administrative proceeding has the responsibility to make access to justice not unreasonably difficult for an individual.⁵⁶ To give an example, in 1994, the Constitutional Court obligated the concerned administrative authority to arrange for translation during asylum

⁴⁹ Rainey (n. 45) 254; ECtHR civil limb (n. 46) para. 40.

⁵⁰ ECtHR civil limb (n. 47) para. 21,25; *Feldbrugge v. the Netherlands* [1986] App. No. 8562/79, para. 82.

⁵¹ C. Forsyth, ‘Procedural Justice in Administrative Proceedings and Art.6.1 of the European Convention of Human Rights and Fundamental Freedoms’ [2003] Vol. 62, *Cambridge Law Journal* 244.

⁵² *Ilias and Ahmed v. Hungary* [2017] App. No. 47287/15, para. 116.

⁵³ *M.S.S. v. Belgium and Greece* [2011] App. No. 30696/09, paras 301 and 304; *Hirsi Jamaa and Others* [2012] App. No. 27765/09, para. 204.

⁵⁴ Basic Law, www.bundestag.de/blob/284870/ceodo3414872b427e57fccb703634dcd/basic_law-data.pdf, accessed 02. November 2017.

⁵⁵ B. Pieroth & B. Schlink, *Grundrechte Staatsrecht* (31. edn, C.F.Mueller 2015) para. 1123; H. von Mangoldt, F. Klein & C. Starck, ‘Art.19.4’ in *Kommentar zum Grundgesetz: GG* (7th edn, Vahlen 2016) para. 489;

⁵⁶ Ruling by Federal Constitutional Court BVERFG 22.49<115> (8 March 1967), www.servat.unibe.ch/dfr/bv022049.html, accessed 3 September 2017; Ruling by Federal Constitutional Court BVERFG 61.82<89> (8 July 1982), www.servat.unibe.ch/dfr/bv061082.html, accessed 3 September 2017.

procedures at airports in order to prevent the breach of Art.19.4 Basic Law.⁵⁷ Prevailing case law, however, denies a breach by Sec.23 Administrative Procedure Act based on the ground that ‘violations by public authority’ in Art.19.4 Basic Law are acts of the executive, not of the legislative body.⁵⁸ This view is astonishing as neither the use of words nor the purpose of Art.19.4 Basic Law can lead to this conclusion.⁵⁹ According to Art.1.3 Basic Law, all fundamental rights of the Constitution bind the legislature, the executive and the judiciary as directly applicable law.

3.3. Protection against Discrimination

This paragraph raises the question, can the use of the official language in public services be discriminatory against newcomers on grounds of language and of equal access to public services? For this, the language rights of national minorities within the EU are portrayed in order to highlight the gradual development of the concept of fair communication. Further, the right of visually, hearing and speech impaired persons to communicate in sign language and Braille with German public services demonstrate the possibility of structural change within public services.

3.3.1. Equal Treatment

The protection from discrimination on grounds of language is acknowledged universally (Art.2 UDHR; Art.2.2 International Covenant on Economic, Social and Cultural Rights; Art.26 ICCPR). The International Convention on the Elimination of Racial Discrimination (CERD) encourages universal respect for human rights and fundamental freedoms without distinction to language (Preamble). Furthermore, the CERD enshrines equal treatment before all organs administering justice (Art.5). The ICCPR, too, stipulates the right to have equal access to public services (Art.25.c).

Both, the EU and the CoE, highlight the concern of discrimination on grounds of language (Art.14 ECHR; Art.21 EU Charter; and (on grounds of nationality) Art.18 Treaty on the Functioning of the European Union). In this context, the Directive 2000/43/EC on Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, imposes on member states an obligation to abolish ‘any laws, regulations and administrative provisions contrary to the principle of equal treatment’ (Art.14.a). The

⁵⁷ Ruling by Federal Constitutional Court BVERFGE 94,166<4.a> (5 December 1995), www.servat.unibe.ch/dfr/bv094166.html, accessed 3 September 2017.

⁵⁸ Mangoldt ‘Art.19.4’ (n. 55) para. 433.

⁵⁹ Mangoldt ‘Art.19.4’ (n. 55) para. 434.

Directive applies to all public and private sectors, including public bodies (Art.3.1), for example concerning access to services (Art.3.1.h). However, the Directive is not applicable to provisions relating to the residence of third-country nationals (Art.3.2) and, therefore, does not address their communication with public services. In order to implement the Directive, Germany enacted the General Act on Equal Treatment in 2006. In the end, the Act is futile in the context of fair communication during administrative proceedings. It, unfortunately, mostly covers racial discrimination with a focus on employment.⁶⁰ Nevertheless, the Directive 2000/43/EC notions a gradual change of direction towards an obligation of member states to remove language barriers for individuals from other member states.

3.3.2. Protection of Minorities

Language is a formative feature of a person's identity and especially in regards to minorities in need of protection.⁶¹ However, a general right to equal treatment concerning language rights, such as equal treatment in comparison to a minority group where the state recognizes the official right to use a particular minority language, is absent within the EU.⁶² The ECtHR, as well, has not included the right to communicate with or receive information in a particular language by public authorities to the protection of cultural rights.⁶³

The CoE emphasises the importance of the protection of minorities through the enactment of the European Charter on Regional and Minority Languages (Languages Charter) and the Framework Convention on National Minorities (Framework Convention), both ratified by Germany.⁶⁴ The Languages Charter obliges member states to ensure that minority groups are able to communicate with administrative authorities in their language (Art.10). Consequently, in certain areas of Schleswig-Holstein individuals can correspond with administrative bodies in the Frisian language and in Saxony in the Sorbian language, while Hesse provides the German Roma and Sinti minority with (some) lan-

⁶⁰ 'European Commission Closes Cases Against Germany on Anti-Discrimination Rules' (*European Commission*, 28 October 2010), europa.eu/rapid/press-release_IP-10-1429_en.htm, accessed 3 September 2017.

⁶¹ M. Sachs, 'Art.3' in *Grundgesetz: GG* (7th edn, C.H.Beck 2014) para. 298.

⁶² S. Mancini & B. de White, 'Language Rights as Cultural Rights' in: F. Fancioni & M. Scheinin (eds) *Cultural Human Rights* (Martinus Nijhoff Publishers 2008) 272.

⁶³ ECtHR, *Cultural rights in the Case-Law of the European Court of Human Rights* (Coe/ECtHR 2011) para. 21, www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf, accessed 3 September 2017.

⁶⁴ Ratifications of EU Charter, www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/signatures, Ratifications of Framework Convention, www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_MapMinorities_bil.pdf, accessed 3 September 2017.

guage rights.⁶⁵ Recently, the Committee of Ministers recommended Germany to ‘implement fully the legislation in place to promote the use of minority languages in contacts with local and regional administrative authorities’.⁶⁶ However, the Language Charter does not protect the languages of migrants (Art.1.a). Comparing national minorities with newcomers, e.g. the 1.5 million Turkish people, while much larger in size, therefore, seems fruitless due to the specific protection through the Languages Charter.⁶⁷ Nevertheless, its implementation shows that – with sufficient political will – structural change in public services is possible. The Framework Convention does not define the term national minorities, creating a broader scope of application. It (cautiously) requires states to create the possibility for national minorities, who reside traditionally or in substantial numbers in the state, to use their own language when communicating with administrative authorities (Art.10.2). Unfortunately, the international supervision mechanisms of both treaties do not lead to binding judicial decisions.⁶⁸ However, both conventions indicate a gradual development of a minimum standard to meet fair communication during administrative proceedings.

3.3.3. Discrimination?

In Germany, the prohibition of discrimination on grounds of language by the legislative body is enshrined in Art.3.3 Basic Law. The term language refers not only to dialects, but also to other languages spoken by individuals living in Germany for a certain amount of time, such as migrant workers.⁶⁹ Germany acknowledges exceptions to the official language principle and, thus, highlights the importance of protection against discrimination in the context of administrative proceedings: The Disability Discrimination Act⁷⁰ was enacted in 2002, enshrining the right for visually impaired people (Sec.10.1) to obtain documents from administrative authorities written in Braille. Furthermore, people with hearing or speech impairments have the right to communicate with public services in sign language (Sec.9.1). Both groups are similar in the barriers they face in corresponding with administrative authorities: Visually, hearing or speech-impaired individuals may not be capable to correspond with

⁶⁵ Kopp ‘Sec.23’ (n. 11) para. 4e.

⁶⁶ Committee of Ministers, ‘Resolution CM/ResCMN (2016) 4 on the Implementation of the Framework Convention for the Protection of National Minorities by Germany’ (3 February 2016), <https://wcd.coe.int/ViewDoc.jsp?id=2411251&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>, accessed 3 September 2017.

⁶⁷ Statistical Report (n. 6) 40.

⁶⁸ Mancini (n. 62) 273.

⁶⁹ Mangoldt ‘Art.3’ (n. 55) para. 389.

⁷⁰ Disability Discrimination Act (in German), www.gesetze-im-internet.de/bundesrecht/bgg/gesamt.pdf, accessed 02 November 2017.

administrative authorities without the help of others. In the same way, many newcomers cannot communicate without obtaining support by lawyers, NGOs or volunteers. Yet, they are being treated differently. Reasons for the unequal treatment, perhaps, are a lack of political will to enhance the protection of newcomers, higher costs for governments and with the result of more work for public services. Instead, newcomers and German-speakers are assisted similarly in public services.⁷¹ However, due to the existing language barrier, German-speakers and newcomers are not alike. Embracing Bentham's thoughts on equal treatment, the lack of fair communication for newcomers in administrative proceedings can only be described as a 'flagrant oversight'.⁷² Minority groups should be offered the possibility to communicate in their native language during administrative proceedings in order to gain equal access to public services.

4. Establishing the Concept of Fair Communication

As shown above, an evident violation of rights cannot be affirmed with certainty. For this, case law and legal frameworks in the international community and within the EU have not (yet) evolved sufficiently. The concept of fair communication in administrative proceedings has to be developed further. Nevertheless, the absence of law does not imply that the situation for newcomers is just. Given the importance of administrative procedural law, the insufficient protection on grounds of fair communication during administrative proceedings is startling. Public services make life-altering decisions on a daily basis as they decide on the extension of a residency status or the grant of social welfare. The administrative procedure law is tasked with enacting the constitution and monitoring the government's actions, which reflects its central role in ensuring fair treatment.⁷³ Furthermore, through correct implementation of administrative procedure law, actions of public services are made (more) transparent for individuals and their lawyers.

Laws can be fair and noble, but without an appropriate law of procedure they cannot be implemented according to their purposes.⁷⁴ Appropriate law of procedure obeys the concept of fair treatment and social values.⁷⁵ Fair treatment includes a framework of 'resources, institutions and personnel to make sure

⁷¹ C. L. Laessig, *Deutsche Amts- und Gerichtssprache* (Vol.8, *Studien und Gutachten aus dem Institut der Staatslehre* 1980) 47.

⁷² Bentham (n. 26) 52.

⁷³ Seerden (n. 3) 39.

⁷⁴ D. Galligan, *Due Process and Fair Procedures – A Study of Administrative Procedures* (Clarendon Press Oxford 2004) xvii.

⁷⁵ *Ibid.* 7.

that each person is dealt with properly'.⁷⁶ To give a positive example, in 2004 the Language Access Act was enacted in Washington, D.C.⁷⁷ According to the Act, government agencies provide 'oral language services' (Sec.3.a) and 'translations of vital documents into any non-English language spoken by a limited or non-English proficient population that constitutes 3% or 500 individuals' (Sec.4.a). The Act resulted from years of advocacy through the D.C. Language Access Coalition (DCLAC), an alliance of 41 community based NGOs serving newcomer populations, particularly Latinos.⁷⁸ Even 12 years later, the DCLAC is actively engaged in advocating for language policy improvements and in developing a community outreach and education program.⁷⁹ Although there are undoubtedly practical challenges in the actual implementation,⁸⁰ it nonetheless shows that political will can be changed through persistent advocacy.

5. The Way Forward

Germany, along with other EU member states, lacks advocates similar to the DCLAC and, consequently, has so far not enacted legislation comparable to the D.C. Language Access Act. According to Deena Hurwitz, 'dynamic' advocacy includes various strategies such as influencing public opinion through report writing, campaigns and strategic litigation.⁸¹ These advocacy strategies can now be used to enhance the situation for newcomers in European countries. *Firstly*, through the formation of a coalition like the DCLAC, campaigns can be organized jointly by NGOs that focus on newcomer populations. *Secondly*, a public debate can be triggered through the publishing of reports and academic articles on this matter. For this, court rulings, similar to the ones mentioned above, can be researched and published. *Thirdly*, a joint constitutional petition of a significant number of newcomers, supported by lawyers, against the official language policy on the grounds of discrimination may (carefully) be considered. As for Germany, a petition seems pre-dated concerning new-

⁷⁶ Ibid. 76.

⁷⁷ D.C. Language Access Act, www.lep.gov/resources/2008_Conference_Materials/DCLanguageAccessActof2004.pdf, accessed 3 September 2017.

⁷⁸ H. Bernstein & others, 'Ten Years of Language Access Act' (Urban Institute 2014) 9, <http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/Language%20Access%20in%20Washington%20DC%200408%20final.pdf>, accessed 3 September 2017.

⁷⁹ D.C. Language Access Coalition, dclanguageaccess.org/about-the-dc-language-access-coalition.html, accessed 3 September 2017.

⁸⁰ American University, Washington College of Law, Immigrant Justice Clinic, *Access denied – The Unfulfilled Promise of the D.C. Language Access Act* (2012), www.wcl.american.edu/news/documents/AccessDenied.pdf, accessed 3 September 2017.

⁸¹ D. Hurwitz, 'Lawyering for Justice and the Inevitability of International Human Rights Clinics' [2003] Vol. 28, *Yale Journal of International Law* 517.

comers from outside of the EU. However, administrative procedure law is a dynamic law constantly ‘influenced by political, social, economic, technical and cultural circumstances and developments of its time’.⁸² In the future, the German Federal Constitutional Court will have to consider the matter in the context of a now more culturally diverse country due to migration. The goal would be to amend Sec.23 Administrative Procedure Act in favour of the concept of fair communication. For this, exceptions to Sec.23 Administrative Procedure Act, e.g. the translation of documents, could ensure that newcomers understood important information.⁸³

Besides legislative change, the more pressing goal is to enhance translation services in public services immediately. To reach this goal, not only does there need to be the establishment of additional ‘Welcome Centres’, but their remit also needs to be expanded beyond highly qualified newcomers. There are for instance plenty of citizens, who originate from Turkey, Russia or Syria, for the government to employ as translators. Furthermore, all websites of regional public services should be translated into foreign languages. As a short-term goal, a list of NGOs and companies, who provide translation services, can be made easily accessible online by uploading it on the website of relevant public services in various languages. The accomplishment of these goals may be time-intensive, challenging and frustrating in the short run, but at a potentially great contribution for an NGO or Human Rights Clinic concentrating on newcomer’s rights and access to justice in the long run.

In conclusion, the right to fair communication during administrative proceedings for newcomers has not yet evolved sufficiently. The work of the EU and the CoE that gradually develop policies towards fair communication concerning the individuals of their member states, is a welcome step towards establishing fair communication. In order to establish a concept of fair communication in administrative proceedings, the public opinion first needs to change. This is possible as the example of Washington, D.C. shows. Germany has proven the ability to make structural changes within public services to offer fair communication for the visually and hearing impaired as well as for national minorities. The country has also proven its interest in efficient and fair communication with newcomers through the establishment of certain public services, e.g. the ‘Welcome-Centres’. Most likely, the number of newcomers will only rise further in the coming decades. It is now time for advocacy strategies to

⁸² Seerden (n. 3) 39.

⁸³ B. Copur & B. Steller, ‘Etablierung von Willkommensstrukturen im Verfahren und in der Organisation der Zuwanderung’ [2013] Vol. 2, *Zeitschrift fuer Auslaenderrecht und Auslaenderpolitik* 58, 62.

accomplish practical and structural changes for newcomers. In the meantime, all hope is on the *Bureaucrazy* team to receive enough funding for their app.