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THE CONTRIBUTION OF THE COURT OF JUSTICE TO THE CODIFICATION OF THE FOUNDING VALUES OF THE EUROPEAN UNION

SALVATORE FABIO NICOLSI*

ABSTRACT: The road to the developing constitutional identity for the European Union (EU) culminated in the formal identification of the principles enshrined in former Article 6 TEU as founding values, first in terms of Article I-2 of the defunct Treaty establishing a Constitution for Europe and eventually in Article 2 TEU, as introduced by the Lisbon treaty. Moving from this assumption, the research is aimed at investigating the scope of new Article 2 TEU from a case law perspective, paying attention to the contribution of the EU Court of Justice to the definition of each value. First of all, it will be underscored that, unlike the previous wording, the new provision clarifies and deepens the catalogue of fundamental values, adding a reference to human dignity and equality and inserting a specific reference to the rights of persons belonging to minorities. Secondly, it will be argued that, although a precise definition of each founding value is not easy, a valuable contribution to their interpretation may be found in the case law issued by the EU Court of Justice, which on several occasions made reference to the values of the EU.

KEY WORDS: EU founding values; EU Constitutionalism; Fundamental rights; jurisprudential interpretation; human dignity; freedom; equality; rule of law; democracy.

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LA CONTRIBUCIÓN DEL TRIBUNAL DE JUSTICIA A LA CODIFICACIÓN DE LOS VALORES FUNDAMENTALES DE LA UNIÓN EUROPEA

RESUMEN: El camino hacia el desarrollo de una identidad constitucional de la UE culminó con la identificación formal de los principios consagrados en el antiguo artículo 6 TUE como valores fundacionales, primero en el artículo I-2 del fallido Tratado por el que se establece una Constitución para Europa y, finalmente, en el nuevo artículo 2 TUE, introducido por el Tratado de Lisboa. Partiendo de esta base, la investigación está dirigida a analizar el alcance del nuevo artículo 2 del TUE desde una perspectiva jurisprudencial, prestando atención a la contribución del Tribunal de Justicia de la UE a la definición de cada valor. En primer lugar, se subraya que, a diferencia de la redacción anterior, la nueva disposición aclara y profundiza el catálogo de los valores fundamentales, añadiendo una referencia a la dignidad humana y a la igualdad e insertando una referencia específica a los derechos de las personas pertenecientes a minorías. En segundo lugar, a pesar de que una definición precisa de cada valor fundamental no es fácil, se argumenta que una valiosa contribución a su interpretación puede encontrarse en la jurisprudencia del Tribunal de Justicia de la UE, que en varias ocasiones hace referencia a los valores de la UE.

PALABRAS CLAVE: valores fundacionales; constitucionalismo europeo; derechos fundamentales; interpretación jurisprudencial; dignidad humana; libertad; igualdad; Estado de derecho; democracia.

LA CONTRIBUTION DE LA COUR DE JUSTICE À LA CODIFICATION DES VALEURS FONDATRICES DE L'UNION EUROPÉENNE

RÉSUMÉ: La route vers le développement d'une identité constitutionnelle pour l'Union européenne (UE) a abouti à l'identification formelle des principes codifiés dans l'ancien article 6 TUE en tant que valeurs fondatrices, d'abord aux termes de l'article I-2 du défunt Traité établissant une Constitution pour l'Europe et, enfin, dans l'article 2 TUE introduit par le traité de Lisbonne. La recherche vise à étudier la portée du nouvel article 2 TUE du point de vue de la jurisprudence, en accordant attention à la contribution de la Cour de justice de l'UE pour la définition de chaque valeur codifiée dans l'article 2. Tout d'abord, il sera souligné que, contrairement à la formulation précédente, la nouvelle disposition précise et approfondit le catalogue des valeurs fondatrices, en ajoutant une référence à la dignité humaine et à l'égalité et l'insertion d'une référence spécifique aux droits des personnes appartenant à des minorités. Deuxièmement, même si une définition précise de chaque valeur en question n'est pas facile, une contribution précieuse à leur interprétation peut découler de la jurisprudence de la Cour de justice, qui, à plusieurs reprises a fait référence aux valeurs communes de l'UE.

MOTS CLÉS: valeurs fondatrices de l'UE; Constitutionnalisme européen; droits fondamentaux; interprétation jurisprudentielle; dignité humaine; liberté; égalité; État de droit; démocratie.

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Art. 2—Treaty on the European Union (TEU)

SUMARIO:

I. CONTEXT: A EU IDENTITY FOUNDED ON A CODE OF VALUES.—II. THE PROTECTION OF FUNDAMENTAL RIGHTS AS A FOUNDATION FOR THE EU SYSTEM OF VALUES.—III. THE SCOPE OF THE EU FOUNDING VALUES THROUGH THE LENS OF THE EU COURT OF JUSTICE.—1. THE PIVOTAL ROLE OF HUMAN DIGNITY. 2. FREEDOM AND EQUALITY AS SPECIAL VALUES IN THE EU LEGAL ORDER. 3. THE «INSTITUTIONAL» VALUES OF DEMOCRACY AND RULE OF LAW. 4. MINORITY RIGHTS AMONGST THE EU FOUNDING VALUES. 5. SOLIDARITY AS A EUROPEAN EMERGING VALUE.—IV. GOVERNING THE EU FOUNDING VALUES IN THE LIGHT OF PRACTICE.—V. CONCLUDING REMARKS.

I. CONTEXT: A EU IDENTITY FOUNDED ON A CODE OF VALUES

The road to the construction of the political identity of the European Union (EU), following a constitutional approach,¹ culminated in the formal definition of the principles enshrined in Article 6 TEU as «founding values»,

¹ Literature on European constitutionalism is abundant, see especially, Christian JOERGES, «Legitimacy without Democracy in the EU?: Perspectives on the Constitutionalisation of Europe through Law», in Miguel MADURO, Karlo TUORI and Suvi SANKARI (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge, 2014, p. 248-268; Giacinto DELLA CANANEA, «Is European Constitutionalism Really ‘Multilevel’?», *ZaöRV*, vol. 70, 2010, p. 283-317; Jan WOUTERS, Luc VERHEIJ and Philipp KIIVER (eds.), *European Constitutionalism beyond Lisbon*, Intersentia, Antwerpen, 2009; Joseph H.H. WEILER and Joel P. TRACHTMAN, «European Constitutionalism and Its Discontents», *Northwestern Journal of International Law & Business*, vol. 17, 1997, p. 354-393; Deirdre CURTAIN, «The Constitutional Structure of the European Union: A Europe of Bits and Pieces», *Common Market Law Review*, vol. 30, 1993, p. 17-69.

first by Article I-2 of the defunct Treaty establishing a Constitution for Europe,² and later in the new Article 2 TEU, introduced by the 2007 Lisbon treaty. This acknowledgment represents the core of the uninterrupted «constitutional process» of the European Union.³

Unlike the previous formulation, the new provision clarifies and deepens the catalogue of values, adding a reference to human dignity and equality and inserting a specific reference to the rights of persons belonging to minorities. The proposal to include a reference to the religious identity was not eventually accepted, although in the Preamble the cultural, religious and humanist heritage of Europe, from which the universal values of the inviolable and inalienable rights of the human being, of freedom, democracy, equality and the rule of law developed, is held as a general source of inspiration.

Such amplification of the EU founding values is complemented by the legally binding effectiveness that the Treaty of Lisbon granted, through Article 6 (1) TEU, to the Charter of Fundamental Rights of the EU, adopted in 2000 and adapted in 2007.⁴ The Charter is a document structured around a

² Cf. *Treaty establishing a Constitution for Europe*, signed in Rome on 29 October 2004 (OJ C 310, 16.12.2004).

³ Teresa RUSSO, «Art. 2 TUE», in Carlo CURTI GIALDINO (ed.), *Codice operativo dell'Unione europea - TUE e TFUE commentati articolo per articolo*, Edizioni Simone, Napoli, 2012, p. 54. In general, see Laurence POTVIN-SOLIS (ed.), *Les valeurs communes dans l'Union européenne*, Bruylant, Bruxelles, 2014; Joël MOLINIER (ed.), *Les principes fondateurs de l'Union européenne*, Presses universitaires de France, Paris, 2005. See also Timothy MOORHEAD, «The Values of the European Union Legal Order: Constitutional Perspectives», *European Journal of Law Reform*, vol. 16, 2014, p. 3-18; Joël RIDEAU, «Les valeurs de l'Union européenne», *Revue des affaires européennes*, vol. 19, 2012, p. 329; Florence BENOIT-ROHMER, «Valeurs et droits fondamentaux dans le Traité de Lisbonne», in Estelle BROSSET, Constance CHEVALLIER-GOVERS, Vérane EDJAHARIAN and Catherine SCHNEIDER (eds.), *Le Traité de Lisbonne: reconfiguration ou déconstitutionnalisation de l'Union européenne?*, Bruylant, Bruxelles, 2009, p. 145-164; Joseph H.H. WEILER, «Nous ne coalisons pas des états - nous unissons des hommes: objetivos, valores y principios políticos de la Unión europea», in José María BENEYTO PÉREZ (dir.), *Tratado de Derecho y Políticas de la Unión Europea. Tomo I: Desarrollo histórico y caracteres básicos de la Unión Europea. Naturaleza, valores, principios y competencias*, Aranzadi, Madrid, 2009, p. 405-424; Vlad CONSTANTINESCO, «Les valeurs dans le traité établissant une Constitution pour l'Europe», in Samantha BESSON, Francis CHENEVAL and Nicolas LEVRAT (eds.), *Des valeurs pour l'Europe?*, Academia-Bruylant, Bruxelles, 2008, p. 71.

⁴ The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the Presidents of the European Parliament, the Council and the Commission at the Summit of Nice of 7-9 December 2000, finalising the works of the *Convention*, started in 1999; the

system of values, as recalled in the Preamble, where it is reiterated that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity, and is based on the principles of democracy and the rule of law. Significantly, the Charter establishes a considerable link between the founding values of the EU and the protection of fundamental rights, placing the «individual» at the heart of its scope through the establishment of the European citizenship and by creating an area of freedom, security and justice.

The values enshrined in Article 2 TEU, supplemented by the Charter of Fundamental Rights, constitute a set of principles which are common to the EU and its Member States that the latter envisioned to put at the foundation of the supranational community, in order to enhance its legitimacy and democratic action.⁵

As to the substantive scope, although a precise definition of each value under discussion is not easy, a valuable contribution may stem from the case law of the Court of Justice, which, on several occasions, has referred to the values of the EU.

Following this premise, the article will move from the assumption that the protection of fundamental rights has been the *leitmotif* for the development of a code of founding values. Next, the role of the Court of Justice of the EU (CJEU) in interpreting the scope of each value will be investigated and, accordingly, the research will prove how the EU Court of Justice played a piv-

text of the Charter was marginally amended in Strasbourg in 2007 for reasons of compatibility with the new Lisbon treaty, see OJ 303, 14 December 2007, p. 1-16, and the consolidated version (OJ 326, 26.10.2012, p. 391-407). For further references and commentaries to the Charter of Fundamental Rights, see Steve PEERS, Tamara HERVEY, Jeff KENNER and Angela WARD (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Hart, Oxford, 2014; Cristina MONEREO ATIENZA and José Luis MONEREO PÉREZ (eds.) *La Europa de los derechos: estudio sistemático de la carta de los Derechos Fundamentales de la Unión Europea*, Comares, Granada, 2012; Giacomo DI FEDERICO (ed.), *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument*, Springer, London, 2011; Bertrand FAVREAU (ed.), *La Charte des droits fondamentaux de l'Union européenne après le Traité de Lisbonne*, Bruylant, Bruxelles, 2010; William B.T. MOCK and Gianmario DEMURO, *Human rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, Carolina Academic Press, Durham, 2010.

⁵ For an incisive evaluation, see Christine KADDOUS, «The European Union's Common Values and National Identities: Convergence or Contradiction?», in Thomas GIEGERICH, Oskar J. GSTREIN and Sebastian ZAEITZMANN (eds.), *The EU between 'an Ever Closer Union' and Inalienable Policy Domains of Member States*, Nomos, Baden-Baden, 2014, p. 81-106.

otal role in outlining the content of each founding value. Furthermore, the effectiveness of the monitoring mechanism, established by Article 7 TEU, will be shortly examined, discussing the recent debate to reform it and recommending a more incisive role for the Court of Justice, conceived of as a «constitutional judge», which should monitor Member States' respect for the founding values. The research will ultimately contribute to the jurisprudential theory, according to which the respect for fundamental rights is inherent in the EU legal order: «without it, common action by and for the peoples of Europe would be unworthy and unfeasible».⁶

II. THE PROTECTION OF FUNDAMENTAL RIGHTS AS A FOUNDATION FOR THE EU SYSTEM OF VALUES

The gradual rooting of human rights in the sterile middle of EC law written provisions⁷ thanks to the Court's «heroic» jurisprudence⁸ contributed

⁶ In his Opinion Advocate General Poiares Maduro, *Centro Europa 7 Srl*, C-380/05, EU:C:2007:505, paragraph 19, also claimed that «[i]n that sense, the very existence of the European Union is predicated on respect for fundamental rights.»

⁷ Among the most recent and significant contributions on fundamental rights protection in the EU, see Marton VARJU, *European Union Human Rights Law*, Edward Elgar, Cheltenham, 2014; Bruno NASCIBENE, «Les droits fondamentaux vingt ans après le traité de Maastricht», *Revue des affaires européennes*, vol. 19, 2012, p. 259-271; Florence BENOIT-ROHMER, «L'Union européenne et les droits fondamentaux depuis l'entrée en vigueur du Traité de Lisbonne», *Revue trimestrielle de droit européen*, vol. 47, 2011, p. 145-173; Elena PACIOTTI, (a cura di), *I diritti fondamentali in Europa*, Viella, Roma, 2011; Xavier GROUSSOT and Laurent PECH, «La protection des droits fondamentaux dans l'Union européenne après le traité de Lisbonne», *Question d'Europe*, n. 173, 2010, available at www.robert-schuman.eu/question_europe.php?num=qe-173 (last accessed on 16.5.2015); Claudio ZANGHÌ, «Les droits de l'homme et l'Union Européenne après Lisbonne 2007», in *Mélanges à la mémoire de Dali Jazi*, Centre de Publications universitaires de Tunisie, La Manouba, 2009, p. 455-468.

⁸ As noted by Philip ALSTON and Joseph H.H. WEILER, «An 'Ever Closer Union' in Need of a Human Rights Policy», *European Journal of Human Rights*, vol. 9, 1998, p. 709, «the ECJ deserves immense credit for pioneering the protection of fundamental human rights; within the legal order of the Community when the Treaties themselves were silent on this matter». Reference is made to the prolific case law that the Court developed as of its first judgment in this area, relating to the *Stauder* affair, C-29/69, EU:C:1969:57, p. 419, where the Court held that fundamental rights shall be guaranteed as general principles of the Community (now Union) law. Later, the Court pinpointed that fundamental rights protection is «inspired by the constitutional traditions common to

to the sedimentation of a European legal system that has progressively associated to and even put before the original market-driven objectives a code of values essentially political in nature. Such values not only constituted the criteria and conditions that a State must meet, in order to be admitted to the EU, but they also contribute to shape the identity of the EU, as a new legal subject.

By obtaining full legal personality pursuant to Article 47 TEU, the Union, which «shall replace and succeed the European Community,»⁹ encompasses a legal system, that seems to be substantially enriched by a «constitutional» substrate.¹⁰ The process of European integration, in fact, has evolved autonomously by bridging the gaps that the lack of a «constitution» has undoubtedly marked, it might be even argued that a constituent process continues to exist in a European legislation progressively more detailed and precise as well as in the meticulous case law issued by the Luxembourg Court, that also played a wise role as regards the definition and appreciation of values, which the Court did not hesitate to classify as constitutional principles.¹¹

Within such a process, the protection of fundamental rights represents the milestone upon which, as pointed out by the Court, the legitimacy for the EU legislation is based,¹² representing the primeval core of the EU founding values. One of the distinctive features of the Lisbon Treaty is, in fact, its deep entrenchment in fundamental rights, that was formerly the prerogative of the

the Member States», cf. Judgment of the Court in *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114, p. 1125, and judgment of the Court in *Nold KG v Commission*, C-4/73, EU:C:1974:51, p. 491.

⁹ Art. 1 (3) TEU, as amended by the Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, entered into force, 1 December 2009 (OJ C 306, 17.12.2007).

¹⁰ As confirmed by Cesare PINELLI, «Il Preambolo, i valori, gli obiettivi», in Franco BASSANINI and Giulia TIBERI (eds.), *Le Nuove Istituzioni Europee. Commento al Trattato di Lisbona*, Il Mulino, Bologna, 2010, p. 80, the «new stage» reached by the Treaty of Lisbon is always in the direction outlined by the Constitutional Treaty.

¹¹ See especially judgment of the Court in *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joint cases C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 285. On this occasion, the Court held that «obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty».

¹² *Ibid.*

Constitutional Treaty,¹³ in which human rights represented «the very heart and soul of the document».¹⁴

Such fundamental rights-based approach was visible in the Declaration on European identity adopted by the nine Heads of State and Government in 1973 at the Conclusion of the Copenhagen summit. On that occasion, for the first time the principles of representative democracy, the rule of law, social justice and respect for fundamental rights were recognized as «fundamental elements of the European identity».¹⁵ Nonetheless, the original Community Treaties for a long time remained impervious to the implementation of standards containing precepts and values of a political nature. Following the establishment, through the 1992 Treaty of Maastricht, of the European Union as a political entity tasked with organising «in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples»,¹⁶ the preconditions were settled for the development of a European identity based on the respect for values centering in on fundamental rights protection, to which the Treaty of Maastricht dedicated the specific provision enshrined in Article F that later became Article 6 (1) TEU.¹⁷

Indeed, in the Preamble of the EU Treaty, Member States confirmed their attachment to «the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law», but it is only with the 1997 Treaty of Amsterdam that the Union, according to new Article 6 (1) TEU, was clearly founded on such principles, «... which are common to the

¹³ Cf. Jean-Claude PIRIS, *The Lisbon Treaty: a legal and political analysis*, Cambridge University Press, Cambridge, 2010, p. 83.

¹⁴ Jeremy RIFKIN, *The European Dream: how Europe's vision of the future is quietly eclipsing the American Dream*, Polity, Cambridge, 2004, p. 212, confirming that «much of the constitution is given over to the issue of fundamental human rights».

¹⁵ Cf. *Declaration on European Identity*, Copenhagen, 14 December 1973, *Bulletin of the European Communities*, No. 12 (1973), p. 118-122. At the Copenhagen European Summit of 14 and 15 December 1973, the Heads of State or Government affirmed their determination to introduce the concept of European identity into their common foreign relations.

¹⁶ Cf. original Art. A of the Maastricht Treaty on European Union (TUE), 7 February 1992 (OJ C 191, 29.07.1992).

¹⁷ Art. 6 (2) TEU affirmed, in fact, «The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law».

Member States». ¹⁸ Apart from improving the previous formulations, this new wording embedded the process of European integration in the wake of the liberal-democratic constitutionalism.¹⁹ This contributes to develop a community of law along a route paved with constitutional models based on the tight intertwining of values and founding principles, which are likely to influence the relations between the organization and its Member States.²⁰

III. THE SCOPE OF THE EU FOUNDING VALUES THROUGH THE LENS OF THE EU COURT OF JUSTICE

The evolution of the founding principles of the EU into a code of values must be interpreted as one step further into the formal «constitutionalisation» of EU law, a process in which the legal scholarship is extremely steeped.²¹ Nevertheless, being especially linked with fundamental rights protection, the definition of the scope of each value listed in Article 2 TEU has received scant attention in literature that, apart from reasoning through their actual effectiveness within the EU and its Member States, paid lip service to it without extensively contributing to the substantive definition and hermeneutical process of each founding value.²²

To a certain extent such a vacuum has been bridged by the case law of the Court of Justice that over the years has greatly contributed to the consolidation of the EU values. It may be even argued that Article 2 TEU is the

¹⁸ Cf. the amendment made through Art. 1.8 of *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts* (OJ C 340, 10.10.1997). For an extensive analysis see Ugo VILLANI, «Osservazioni sulla tutela dei principi di libertà, democrazia, rispetto dei diritti dell'uomo e stato di diritto nell'Unione europea», *Studi sull'integrazione europea*, vol. 2, 2007, p. 27.

¹⁹ Armin VON BOGDANDY, «Founding Principles of EU Law: A Theoretical and Doctrinal Sketch», *European Law Journal*, vol. 16, 2010, p. 106, argued that «the legal approach pursued here with its substantive notion of what a founding principle is spells out the political decision voiced in the Amsterdam Treaty that a European political Union is to be founded on the postulates of liberal-democratic constitutionalism».

²⁰ See KADDOUS, loc. cit. note 5.

²¹ See in particular Arthur DYÈVRE, «The Constitutionalisation of the European Union: Discourse, Present, Future and Facts», *European Law Review*, vol. 30, 2005, p. 165-189.

²² In this regard, see VON BOGDANDY, «Founding...», loc. cit. note 19, p. 95.

landing place of an ongoing case law that from fundamental rights protection gradually evolved to include certain principles as core values of the EU legal order.

The EU values listed in Article 2 are intrinsically linked to fundamental rights protection, which is a value itself, although, some of them, as it will be noted, reflect other peculiarities of the EU legal order: this is the case of the rule of law and democracy which may be considered as «institutional values», as they mainly contribute to the structural development of the EU also in its relationship with Member States and third countries. Despite the fact that such values codify principles which are common to international law, such as democracy, equality or freedom, the Court of Justice deserves the credit to spotlight each value against the special background of EU law. Although taking into account the extensive case law that the Court has developed over the years is not easy, the following paragraphs will pay special attention to the most significant rulings.

1. THE PIVOTAL ROLE OF HUMAN DIGNITY

The fundamental rights-based approach is particularly noticeable with reference to the key-value of the EU legal order, namely dignity, which stands as the basic foundation for all other values as well as the whole system of fundamental rights protection. Indeed, while drafting the Charter of fundamental rights within the Convention, dignity was usually addressed as «the mother basic right».²³

The scope of human dignity entails thorough respect for the integrity of the human being, defined in his physical and moral essence: it is, therefore, linked to human life, even while preceding the actual birth and it also continues after death, since respect for human dignity even extends to the commemoration of a person.²⁴

²³ Cf. *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, elaborated by the EU Network of Independent Experts on Fundamental Rights, established by the European Commission, on a proposal by the European Parliament, documents are available at http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm (last accessed on 17.5.2015).

²⁴ For references see Aurora PLOMER and Dimitrios TSARAPATSANIS «The Asymmetry of Human Dignity as a Constitutional Value and Fundamental Human Right in Europe», *Global Community*, vol. 12, 2012, p. 113.

Nonetheless, despite often mentioned in case law,²⁵ only since 2001 the Court acknowledged the value of human dignity as a general principle and fundamental right. In the Opinion on the case of *Kingdom of the Netherlands v European Parliament and Council*, in fact, Advocate-General, Jacobs, affirmed that «the right to human dignity is perhaps the most fundamental right of all».²⁶ At that time, human dignity was specifically codified in Article 1 of the Charter of Fundamental Rights of the EU, which states that human dignity is inviolable and must be respected and protected. The wording of such provision follows the formulation of Article 1 (1) of the German Constitution, which reads «human dignity is inviolable», and «[t]o respect and protect it is the duty of all state authority».²⁷ Although, as known, before the treaty of Lisbon, the Charter was not legally binding, the Court referred to it in an attempt to consolidate fundamental rights in the EU legal order.

Similarly, in its ruling on the *Omega* case of 2004, the Court reiterated that «the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law,» to serve as a justification for the restriction of economic freedoms.²⁸ In its reasoning, the Court referred to the Advocate General's comments that had emphasised the crucial importance of human dignity conceived of as rooted in the European civilization.²⁹

In the most recent *Brüstle* case, the Court eventually reiterated the preeminent value of human dignity over the economic freedoms and development.³⁰ On that occasion, the Court ruled that the patentability of all inven-

²⁵ See especially judgment of the Court in *P. v S.*, C-13/94, EU:C:1996:170, paragraph 22.

²⁶ Opinion of Advocate General Jacobs in *Kingdom of the Netherlands v European Parliament and Council of the European Union*, C-377/98, EU:C:2001:329, paragraph 197.

²⁷ Article 1 (1) of the Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 11 July 2012 (Federal Law Gazette I p. 1478), available at www.gesetze-im-internet.de/englisch_gg/ (last accessed on 17.5.2015).

²⁸ Judgment of the Court in *Omega*, C-36/02, EU:C:2004:614, paragraph 35. For further references see also Fabrizio POLITI, «Il rispetto della dignità umana nell'ordinamento europeo», in Stelio MANGIAMELI (a cura di), *L'ordinamento europeo*, Giuffrè, Milano, 2006, vol. I, p. 80.

²⁹ See Opinion of Advocate General Stix-Hackl in *Omega*, C-36/02, EU:C:2004:162, paragraphs 74-94.

³⁰ Judgment of the Court in *Oliver Brüstle*, C-34/10, EU:C:2011:669, paragraphs 31-35. For interesting comments see Shawn H.E. HARMON, Graeme LAURIE and Aidan COURTNEY, «Dignity, Plurality and Patentability: the Unfinished Story of Brüstle v Greenpeace», *European Law Review*, vol. 38, 2013, p. 92.

tions resulting in the destruction of the human embryo, at the various stages of its formation and development, including germ cells, should not be allowed so as to respect the fundamental principles safeguarding the dignity and integrity of the person. On this point, Advocate General Yves Bot, in its opinion of 10 March 2011 asserted that «human dignity is a principle which must be applied not only to an existing human person, to a child who has been born, but also to the human body from the first stage in its development»,³¹ confirming the pivotal role of dignity in the fundamental rights architecture of the EU.

It is also worth noting the crucial role played by the value of dignity in some delicate matters of EU law, such as migration and asylum. In this regard, in *Cimade and Gisti* the Court held that material reception conditions of asylum-seekers have to be identified as a question of dignity,³² emphasizing how this is the crucial aim of the Reception Directive 2003/9/EC (lately replaced by Directive 2013/32/EU), which seeks to ensure full respect for human dignity.³³ With reference to the value of human dignity, it must be mentioned that recently the Court of Justice was called to touch upon the delicate matter of surrogate motherhood, which is an emergent ethical and legal issue. Unfortunately, the Court of Justice did not read through the case from the angle of human dignity and missed the opportunity to underscore the interconnection between the basic value of human dignity and other founding values, such as equality. On this occasion, in fact, the Court considered that the principle of equal treatment for men and women does not preclude a refusal to provide paid leave equivalent to maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement.³⁴ It is clear that the human dignity of the surrogate

³¹ See Opinion of Advocate General Bot in *Oliver Brüstle*, C-34/10, EU:C:2011:138, paragraph 96.

³² Judgment of the Court in *Cimade and Groupe d'information et de soutien des immigrés (GISTI)*, C-179/11, EU:C:2012:594. For further references see Evangelia TSOURDI, «Reception Conditions for Asylum Seekers in the EU: Towards the Prevalence of Human Dignity», *Journal of Immigration, Asylum and Nationality Law*, vol. 29, 2015, p. 9-24.

³³ See Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31/18, 6.02.2003), recently replaced by Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180/96, 29.06.2013).

³⁴ Judgment of the Court in *Z v A Government Department, the Board of Management of a Community School*, C-363/12, EU:C:2014:159.

mother may be violated inasmuch as she cannot enjoy a special protection under EU law, being the EU legislation still silent on this issue.

Overall, human dignity represents a cross-value which is likely to impact on a number of policies, as it better reflects the centrality of the human being in the EU legal order.³⁵

2. FREEDOM AND EQUALITY AS SPECIAL VALUES IN THE EU LEGAL ORDER

Two values, namely freedom and equality, are also intrinsically linked to fundamental rights, even though the Court of Justice gradually construed them as special values of EU law, providing broad connotations interrelated to different EU policies.

As regards freedom, since the earliest stage of development of the European integration process, this principle has been associated to the four basic economic freedoms, notably free movement of goods, persons, services and capital,³⁶ before being acknowledged within the treaty itself as a fundamental right of European citizens, according to the current provision under Article 21 TFEU.

The Court of Justice in a number of judgments pointed out the direct effect of the right to free movement and residence, since the cases of *Martínez Sala* and *Baumbast*,³⁷ with reference to which the Court also had the opportunity to appraise the content of the European citizenship. In *Baumbast*, in fact, the Court stated that «a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC» [now Article 21 TFEU].³⁸

Nevertheless, the value of freedom as codified under Article 2 TEU and echoed by Chapter II of the EU Charter includes a much broader scope than

³⁵ Jackie JONES, «Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice», *Liverpool Law Review*, vol. 33, 2012, p. 291.

³⁶ See Peter OLIVER and Wulf-Henning Roth, «The Internal Market and the Four Freedoms», *Common Market Law Review*, vol. 41, 2004, p. 407-411.

³⁷ Judgment of the Court in *María Martínez Sala*, C-85/96, EU:C:1998:217, and in *Baumbast*, C-413/99, EU:C:2002:493.

³⁸ *Ibid.*, para. 94.

the mere typically functionalist concept of free movement and residence within the EU. Through a systematic interpretation of the Charter, the value of freedom may be conceived, in fact, as a container of other fundamental rights based on liberal-democratic ideals, such as the right to privacy, private property, freedom of thought, religion, expression, information, education.³⁹ Over the years, the Court has decided many cases that deal with fundamental freedoms, such as freedom of religion,⁴⁰ freedom of association,⁴¹ freedom of expression,⁴² and its case law has been incorporated also in secondary legislation. A clear example is Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.⁴³ Article 7, in fact, significantly states that the Decision «shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression».

The Lisbon Treaty included among the founding values of the Union the principle of equality. Since the beginning of the integration process, such principle has had non-discrimination on grounds of nationality as an essential and specific component,⁴⁴ as the Court of Justice has even recently reiterated.⁴⁵

³⁹ Ugo VILLANI, *Istituzioni di Diritto dell'Unione europea*, Cacucci, Bari, 2013, p. 33, argues that apart from the many freedoms conferred by the Treaties, the value at issue must be understood from its political interpretation as a guarantee of respect of a sphere of autonomy of citizens claimed against public authorities and free from their interference.

⁴⁰ Judgment of the Court in *Prais v Council*, C-130/75, EU:C:1976:142.

⁴¹ Judgment of the Court in *Union Syndicale-Amalgamated European Pub. Serv. Union v Council*, C-175/73, EU:C:1974:95.

⁴² Judgment of the Court in *VBBB & VBVB v Commission*, Joined Cases C-43 and C-63/82, EU:C:1984:9.

⁴³ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008).

⁴⁴ Originally the TEC included especially the principle of non-discrimination on grounds of nationality (Art. 7). For references see Mark BELL, «The Principle of Equal Treatment: Widening and Deepening», in Paul CRAIG and Gráinne DE BURCA (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford, 2011, p. 611-640.

⁴⁵ Cf. Judgment of the Court in *EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) e Coopérative du Trieux*, C-15/95, EU:C:1997:196, paragraph 35. See also judgment of the Court in *Racke*, C-283/83, EU:C:1984:344, and in *Karlsson*, C-292/97, EU:C:2000:202

Originally encoded in the treaties, as being functional to the realisation of economic integration, over the years equality has been regularly echoed by the Court which has amplified its cross-nature impacting on several areas.

The Court recognized equality as one of the general principles of law in 1977⁴⁶ and, since 1978, as part of fundamental human rights,⁴⁷ in relation to any kind of discrimination within the ambit of application of EC/EU law, especially discrimination on the grounds of gender.⁴⁸ This trend is even apparent in EU secondary legislation with the adoption, for instance, of a number of provisions, addressing gender inequality and aimed at setting a legal framework for women's equality in employment and working conditions.⁴⁹

After the inclusion through the Treaty of Amsterdam of Article 13, providing instruments for combating discrimination on a broad range of grounds, including «sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation»,⁵⁰ the Court buttressed a further process of deepening and widening of the principle of equality.⁵¹ Akin to the value of freedom, equality has been expanded to encompass a number of rights enshrined in Chapter III of the Charter of Fundamental Rights of the EU, which refers to religious, cultural and linguistic diversity (Article 22), to minors (Article 24), the elderly (Article 25) and persons with disabilities (Article 26), thus contributing to the developing of the EU social identity. With reference to the Charter's

⁴⁶ Judgment of the Court in *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen; Diamalt AG v Hauptzollamt Itzehoe*, C-117/76 and C-16/77, EU:C:1977:160.

⁴⁷ Judgment of the Court in *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, C-149/77, EU:C:1978:130, points 31-39. The Court specifically emphasised that the elimination of sex discrimination formed part of fundamental rights.

⁴⁸ See judgment of the Court in *P. v S.*, C-13/94, EU:C:1996:170. According to Takis TRIDIMAS, *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford, 2011, p. 104, this case «provides a prime example of the way the Court views the principle of equality as a general principle of EC law transcending the provisions of Community legislation».

⁴⁹ See, e.g., the early Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L39/40, 14.2.1976), and the recent Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614 final, 14.11.2012.

⁵⁰ This provision is now consolidated in Article 18, Article 19 and Article 157 TFEU.

⁵¹ BELL, *op. cit.* note 44, p. 612.

rights and the value of equality, it is worth mentioning the recent case law which applies this legal instrument as primary source of EU law. In *Association Belge des Consommateurs*,⁵² for instance, the Court declared that Article 5 (2) of Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services⁵³ was not valid, as contrasting with Articles 21 and 23 of the Charter on non-discrimination and equality between men and women respectively.

Therefore, while equality and non-discrimination, in particular on grounds of nationality, were originally conceived of as «a means of securing market integration»,⁵⁴ by now the Court has elaborated it in its different components and has even been explicit in letting the social purpose overtake the economic goals. In the *Schröder* case, concerning the principle of equal pay, as enshrined in former Article 119 TEC (today Art. 157 TFEU), in fact, the Court concluded that «the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right». ⁵⁵ Social considerations have become paramount and have weakened the nexus between economic integration and non-discrimination, with the result of providing individuals, including migrant workers, with social benefits.⁵⁶

3. THE «INSTITUTIONAL» VALUES OF DEMOCRACY AND RULE OF LAW

Article 2 TEU includes democracy and the rule of law amongst the EU founding values. In contrast to the other values that impact on the function-

⁵² Judgment of the Court in *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, C-236/09, EU:C:2011:100.

⁵³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, p. 37–43).

⁵⁴ Christopher MCCRUDDEN and Sacha PRECHAL, «The Concepts of Equality and Non-Discrimination in Europe: A practical approach», Report by the European Network of Legal Experts in the Field of Gender Equality, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, 2009, p. 6.

⁵⁵ See judgment of the Court in *Schröder*, C-50/96, EU:C:2000:72, point 57. The reasoning was more recently echoed by the judgment of the Court in *Commission of the European Communities v Italian Republic*, C-46/07, EU:C:2008:618, point 57.

⁵⁶ See, *inter alia*, judgments of the Court in *Vera Hoeckx*, C-249/83, EU:C:1985:139; *ONEM v Deak* C-94/84, EU:C:1985:264; *O'Flynn*, C-237/94, EU:C:1996:206.

ing of the EU legal order, these two values establish the institutional paradigm within which the new subject, namely the EU, is framed; thus they can be considered as «institutional values», as they pervade the whole of EU law.

The value of democracy seems to reflect the most advanced aspect of the new EU identity after the Lisbon Treaty and the consequent inclusion of the democratic principles under Title II (Articles 9-12 TEU). Prior to such specific codification, it was assumed that the principle of democracy acted as a source of inspiration for the case law on the general principles of law.⁵⁷ In cases such as *Roquette Frères*, *Les Verts*, *Chernobyl*, and *Titanium Dioxide*, the Court has, in fact, especially relied on the principle of democracy to legitimize the European Parliament as an institution responsible for representing the interests of the European citizens within the EU decision-making process.⁵⁸ As, emphasised, «the EU has, in a short period of time, gone from no requirement of democracy in the constituent treaties to a specific requirement of democracy along with detailed enforcement procedures».⁵⁹ Over time, as regards the value of democracy, in its case law the Court has even established a substantial connection with the principle of fundamental rights protection that «constitutes the fundamental pillars of a democratic society».⁶⁰

The significant contribution offered by the CJEU case law to the clarification of the value of democracy further widens the scope of representative democracy (Article 10 TEU) and participatory democracy (Article 11 TEU),

⁵⁷ See RIDEAU, «Les valeurs...», loc. cit. note 3, p. 335.

⁵⁸ See in this regard the abundant case law developed by the Court since its ruling of 19 October 1982 in *SA Roquette Frères v Council of the European Communities*, C-179/80, EU:C:1982:357, judgment of the Court in *Parti écologiste «Les Verts» v European Parliament*, C-294/83, EU:C:1986:166; judgment of the Court in *European Parliament v Council of the European Communities*, C-70/88, EU:C:1991:373; judgment of the CJEU in *Commission of the European Communities v Council of the European Communities*, C-300/89, EU:C:1991:244. See also judgment of the Court in *Maizena GMBH v Council of the European Communities*, C-139/79, EU:C:1980:250; judgment of the Court in *European Parliament v Council of the European Union*, C-21/94, EU:C:1995:220. For references see Koen LENAERTS, «The Principle of Democracy in the case law of the European Court of Justice», *International and Comparative Law Quarterly*, vol. 62, 2013, p. 271-315.

⁵⁹ Richard BURCHILL, «International Law of Democracy and the Constitutional Future of the EU: Contributions and Expectations», *Queen's Papers on Europeanisation*, 3/2003, available at <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/EuropeanisationFiles/Filetoupload,38411,en.pdf> (last accessed on 17.5.2015). p. 8.

⁶⁰ Judgment of the Court in *Eugen Schmidberger*, C-112/00, EU:C:2003:333, paragraph 79.

both aim at strengthening the value of democracy not only through the traditional channel of political representation but also by means of direct participation.⁶¹ In this context, the ground-breaking European citizens' initiative (ECI), for the first time introduced in the EU system by the Lisbon treaty as the utmost expression of participatory democracy, allows not less than one million citizens who are nationals of a significant number of Member States to take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.⁶² The case of *Martinez v Parliament* decided by the Tribunal of First Instance (today General Court), is illustrative of the complexity of the concept of democracy at the supranational level.⁶³ Democracy results based on the direct link with the citizens stemming from the election of the Member of the European Parliament, it is represented by political groups within such democratic institution and implemented by promoting all EU citizens' rights and interests.⁶⁴

Nonetheless, democracy is also an overriding principle of secondary legislation, especially in the area of foreign and security policy. Based on Article 2 TEU, a recent Regulation establishes a European Instrument for Democracy and Human Rights (EIDHR) for the period 2014-2020, under which the Union shall provide assistance to the development and consolidation of democracy and the rule of law and of respect for all human rights and fundamental freedoms.⁶⁵

Given its quintessential political nature, aside from an interpretation as overarching principle of the EU institutional system, the value of democracy

⁶¹ On democratic principles extensively see Massimo STARITA, *I principi democratici nel diritto dell'Unione europea*, Giappichelli, Torino, 2011.

⁶² Cf. Art. 11 (4) TEU, the European Citizens' Initiative (ECI) is regulated by Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, (OJ L65, 11.03.2011, p. 1–22). See Víctor CUESTA LÓPEZ, «The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy», *European Public Law*, vol. 16, 2010, p. 123–138.

⁶³ See judgment of the General Court, T-222/99, *Martinez and Others v Parliament*, EU:T:2001:242 (confirmed on appeal by the Court in *Front National v Parliament*, C-486/01P, EU:C:2004:394).

⁶⁴ For references see LENAERTS, op. cit. note 58, p. 289–290.

⁶⁵ Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide (OJ L 77, 15.03.2014, p. 85–94).

constitutes a parameter of legality for the EU external action.⁶⁶ Although in this area its jurisdiction is very limited, the Court is competent to assess the compatibility of international agreements as well as secondary legislation with Article 2 TEU. In a recent judgment, for instance, the Court has ensured that a minimum degree of democratic and judicial scrutiny applies to the EU's Common Foreign and Security Policy (CFSP).⁶⁷

The definition of the value of the «rule of law» is more controversial, owing to the broad vagueness that the concept may acquire within the EU legal order, given the lack of a specific notion. The numerous treaty revisions as well as the case law of the Court of Justice have gradually contributed to underpin European integration conceived of as the developing of a community of law. The rule of law principle is borrowed from the modern conception of the State, as opposed to the model of the absolute state, and it generally provides for the submission of the society and public authorities to law. The enshrinement of the rule of law amongst the Union's founding values thus reflects a «widespread reliance on the rule of law as one of the defining principles on which all modern and liberal constitutional regimes are formally based».⁶⁸ Accordingly, with reference to the EU, the rule of law expresses the need for all institutions, bodies, Member States, citizens and legal persons, to be subject to compliance with the law resulting from the Treaties, the secondary legislation and any law applicable within the EU.⁶⁹ In a recent Communication, the European Commission has elaborated a comprehensive notion of the principle of rule of law, confirming that it «has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers

⁶⁶ See Cesáreo GUTIÉRREZ ESPADA, «A propósito de los 'valores' de la Unión como parámetros de legalidad de su acción exterior: la 'Cláusula democrática' y el derecho internacional de la responsabilidad», in Fernando MARIÑO MENÉNDEZ (dir.), *Derecho internacional y Tratado constitucional europeo*, Marcial Pons Ediciones, Madrid, p. 63-81.

⁶⁷ Judgment of the Court in *European Parliament v Council of the European Union*, C 658/11, EU:C:2014:2025.

⁶⁸ Laurent PECH, «'Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law», *EuConst.*, vol. 6, 2010, p. 362.

⁶⁹ In this regard see Neil WALKER, «The Rule of Law and the EU: Necessity's Mixed Virtue», in Gianluigi PALOMBELLA and Neil WALKER (eds.), *Relocating the Rule of Law*, Hart, Oxford, 2009, p. 119. For further references, see Armin VON BOGDANDY and Michael IOANNIDIS, «Systemic deficiency in the rule of law: What it is, what has been done, what can be done», *Common Market Law Review*, vol. 51, 2014, p. 59-96.

act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts».⁷⁰

Nonetheless, as correctly observed by Laurent Pech, national constitutions frequently fail to define the rule of law and it is left to national courts to define more precisely its substance.⁷¹ Likewise, the Court of Justice carved out the rule of law as an «umbrella principle», aimed to serve as an interpretative guide and as a source from which more specific legal standards may be derived.⁷²

Despite the slight reference in the *Granaria* case,⁷³ the Court for the first time mentioned the rule of law in its judgment of 1986 on the *Les Verts* case, emphasising that «the European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty».⁷⁴ On that occasion, Advocate General Federico Mancini linked the rule of law with fundamental rights, as he essentially suggested equating it with the right to an effective remedy and the right of access to an impartial tribunal and more comprehensively to judicial review.⁷⁵ This particular linkage was later empha-

⁷⁰ Communication from the Commission to the European Parliament and the Council, «A New EU Framework to Strengthen the Rule of Law», COM (2014) 158 final, 11.03.2014.

⁷¹ PECH, «'Union...», loc. cit. note 68, p. 369.

⁷² Ibid.

⁷³ The Court of Justice made an earlier reference to «the principle of the rule of law within the Community context» in judgment of the Court in *Granaria BV*, C-101/78, EU:C:1979:38, paragraph 5: «Thus it follows from the legislative and judicial system established by the Treaty that, although respect for the principle of the rule of law within the Community context entails for persons amenable to Community law the right to challenge the validity of regulations by legal action...».

⁷⁴ Judgment of the Court, *Parti écologiste «Les Verts» v European Parliament*, C-294/83, EU:C:1986:166, paragraph 23. For further references see Joël RIDEAU (ed.), *De la Communauté de droit à l'Union de droit. Continuité et avatars européens*, L.G.D.J., Paris, 2000. More recently, judgment of the Court, *Criminal proceedings against E and F.*, C-550/09, EU:C:2010:382, paragraph 44, the Court reiterated that «the European Union is based on the rule of law and the acts of its institutions are subject to review by the Court of their compatibility with EU law and, in particular, with the Treaty on the Functioning of the European Union and the general principles of law».

⁷⁵ Opinion of Advocate General Mancini in *Parti écologiste «Les Verts» v European Parliament*, C-294/83, EU:C:1985:483.

sised in the *Unión de Pequeños Agricultores* case, where the Court highlighted that «[t]he European Community is... a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights».⁷⁶ Such approach has been especially upheld in the most recent judgments framed within the EU attempts to fight against terrorism. In *Kadi and Al Barakaat*, the Court went one step further to highlight the complementarity between fundamental rights and rule of law, pinpointing that fundamental rights are to be considered expression of constitutional guarantee in a Community based on the rule of law.⁷⁷

In other words, the Court clarified that the rule of law constitutes a principle aimed at favouring the protection of the individual against the arbitrary or unlawful exercise of public power. The codification of Article 2 TEU thus strengthens the compliance with the principle of the rule of law as far as the Union's constitutional framework is concerned both internally and externally. Like democracy, in fact, the rule of law serves as a parameter for the EU external action and usually complements the promotion of democracy and human rights, as confirmed by the secondary legislation adopted in relation to third countries.⁷⁸ Ultimately, a number of soft law instruments, such as Declarations or Resolutions, as well as EU external agreements and unilateral trade, technical and financial instruments, confirm the intrinsic coherence between the EU internal and external spheres, within which democracy and rule of law are considered «substantial components».⁷⁹ This was recently confirmed by Advocate General Paolo Mengozzi in a recent Opinion, by which he stated clearly that «[r]espect for human rights and fundamental freedoms

⁷⁶ Judgment of the Court in *Unión de Pequeños Agricultores v Council of the European Union*, C-50/00 P, EU:C:2002:197, paragraphs 38-39.

⁷⁷ Judgment of the Court in *Kadi and Al Barakaat*, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 316.

⁷⁸ See especially Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries (OJ L 120, 8.05.1999, p. 8-14).

⁷⁹ For more references see Laurent PECH, «Rule of law as a guiding principle of the European Union's external action», *Centre for the Law of EU External Relations (CLEER) Working Papers*, 2012/3, available at www.asser.nl/media/1632/cleer2012-3web.pdf (last accessed on 17.5.2015), p. 13.

and the principle of the rule of law are therefore an ‘internal’ dimension, being a foundation of the Union and a criterion for assessing the legality of the action of its institutions and of the Member States in the matters for which the Union has jurisdiction, and an ‘external’ dimension, as a value to be ‘exported’ beyond the borders of the Union by means of persuasion, incentives and negotiation».⁸⁰

4. MINORITY RIGHTS AMONGST THE EU FOUNDING VALUES

Article 2 TEU included the fundamental rights of persons belonging to minorities amongst the founding values of the EU. This latter aspect is of utmost importance especially with reference to last enlargements and in prospect of a future enlargement towards other eastern European states that historically represent a greatly composite puzzle of ethnic and cultural identities.⁸¹

The reference to the rights of persons belonging to minorities corroborates the system of fundamental rights protection in the EU and provides a legal basis that in this specific field has been missing in a long time. Originally in the Treaties there was no explicit reference to the protection of minorities and it is worth reminding that, during the process of adoption of the Charter of Fundamental Rights of the EU, Member States abandoned the proposal of the European Parliament to insert specific minority rights, apart from the general right of non-discrimination, into the catalogue of fundamental rights. By and large, the European legal order was required to tackle such issue, as the phenomenon was common to almost all Member States.

Hitherto, the Court has pursued an approach to the protection of minorities against the backdrop of the principle of equal treatment and non-discrimination especially with reference to the situation of linguistic minorities.⁸² Two cases are illustrative of this approach. In the *Mutsch* case, the Court

⁸⁰ Opinion of Advocate General Mengozzi in *Gestoras Pro Amnistía and Others v Council*, C-354/04 P, EU:C:2006:667, paragraph 79.

⁸¹ See Gaetano PENTASSUGLIA, «The EU and the Protection of Minorities: The Case of Eastern Europe», *European Journal of International Law*, vol. 12, 2001, p. 3-39. For an extensive study on Minorities in EU law see Kyriaki TOPIDI, *EU Law, Minorities and Enlargement*, Intersentia, Antwerp, 2010.

⁸² See for example judgment of the Court in *Servet Kamberaj*, C-571/10, EU:C:2012:233.

argued that the guarantee of certain linguistic rights exclusively to the particular members of national minority permanently settled on the territory of a Member State contravenes the non-discrimination principle.⁸³ This particular case, in fact, arose in the situation when a Luxembourg citizen demanded the possibility to use the German language during the criminal procedure in Belgium according to a special law that guaranteed this specific linguistic right to the German minority.⁸⁴

Similarly, to avoid any possible case of indirect discrimination, in the 1998 ruling in *Bickel and Franz*, the Court acknowledged that the protection of minorities «may constitute a legitimate aim» so as to justify any limitations to the traditional economic freedoms provided for by the Treaties. The Court stated, in fact, that the purpose of the measures that aim the specific protection of ethno-cultural minority settled in the province of Bozen, cannot justify the different treatment between the members of this minority and other persons who are not members of this minority but share the same linguistic characteristics.⁸⁵ In the present case the right to use the German language in the pending criminal proceedings was thus upheld by the Court.

Overall, the explicit reference to the fundamental rights of minorities in the list of founding values under Article 2 TEU reflects the growing interest and a renewed awareness of the subject matter, especially following the recent enlargements, which incorporated into the EU a relevant number of minorities.

5. SOLIDARITY AS A EUROPEAN EMERGING VALUE

The code of EU founding values enshrined in Article 2 TEU is complemented by the second part of the provision aimed at contextualizing the aforementioned values which are defined as «common to Member States» in

⁸³ Judgment of the Court in *Criminal proceedings against Robert Heinrich Maria Mutsch*, C-137/84, EU:C:1985:335, paragraph 18.

⁸⁴ *Ibid.* The Court acknowledged the possibility that criminal proceedings take place in a language other than the language normally used in proceedings before the court, if workers who are nationals of the host Member State have that right in the same circumstances.

⁸⁵ Judgment of the Court in *Criminal proceedings against Horst Otto Bickel and Ulrich Franz*, C-274/96, EU:C:1998:563, paragraph 29. This case stemmed from the situation when the citizens of Austria and Germany demanded to use the German language before a criminal court as it was guaranteed to the German linguistic minority in Bozen.

a society in which «pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail».

Such a specification does not constitute simply the legal environment where the EU founding values are meant to be cultivated; it even represents the rich soil for the developing of further values. The EU Charter of Fundamental Rights enshrines, for example, solidarity as the key value of the rights under Chapter IV, encompassing the main social and economic rights. The treaty of Lisbon, on its side, codified in a specific provision, namely Article 80 TFEU, a new principle of law, expressly stipulating that the policies of the Union on borders checks, asylum and migration «shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States».

Article 80 is only the most specific of several calls for solidarity in the Treaties.⁸⁶ Significantly this provision constitutes a distinctive feature of the controversial common asylum and migration policies. In particular, it requires that, when drawing up legislation on these policies, the EU institutions shall ensure, through appropriate measures, the observance of this principle, which is likely to represent a potential constitutional value, as the Court has reiterated on several occasions.⁸⁷ Nevertheless, while affirming the need of solidarity between Member States, the Treaty fails to give precise indications as regards its implementation, and asylum legislation contains scant references to the application of solidarity measures. In this context, the recent European Agenda on Migration,⁸⁸ released by the Commission on 13 May 2015, may constitute a valuable attempt to generate solidarity among Member States by proposing «a temporary distribution scheme for persons in clear need of international protection to ensure a fair and balanced participation of all Mem-

⁸⁶ For more references see Iris VITINI, «El Principio de Solidaridad en los procesos de integración, especialmente en la Unión Europea», *Revista Tribuna Internacional*, vol. 3, 2014, p. 149-158. See also Andrea SANGIOVANNI, «Solidarity in the European Union», *Oxford Journal of Legal Studies*, vol. 33, 2013, p. 213-241.

⁸⁷ Judgment of the Court in *Commission of the European Communities v French Republic*, C-6/69 and C-11/69, EU:C:1969:68, paragraph 16/17; judgment of the Court in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-128/78, EU:C:1979:32. For references see generally Jean-Victor LOUIS and Thierry RONSE, *L'ordre juridique de l'Union européenne*, L.G.D.J., Paris, 2005, p. 184, see also RIDEAU, «Les valeurs...», loc. cit. note 3, p. 346.

⁸⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, «A European Agenda on Migration», COM (2015) 240 final, 13.5.2015, see especially p. 4.

ber States to this common effort». Despite the fact that most Member States over the years have repeatedly refused to adopt binding rules on this issue, the proposal constitutes a significant attempt to instil into Member States a real model of solidarity, based on criteria such as GDP, size of population, unemployment rate and past numbers of asylum seekers and of resettled refugees, to tackle one of the most appalling challenges to the integration process, such as the developing of the common migration and asylum policies.

By and large, solidarity, justice and tolerance, represent the ethical substrate where the EU and its Member States must cultivate the values listed in Article 2, in order to strengthen the European identity and avoid any risk that, as the practice of States demonstrates, could result detrimental to the whole Union and the process of European integration.

IV. GOVERNING THE EU FOUNDING VALUES IN THE LIGHT OF PRACTICE

Following the paradigm outlined by the defunct European Constitution, the Lisbon Treaty does not assign a merely rhetorical bearing to the values enshrined in Article 2 TEU.⁸⁹ It has been argued in literature, in fact, that these values must be considered as principles, since they do not only represent ethical precepts but they stand as primary and constitutive legal norms,⁹⁰ introduced through a treaty revision procedure, now regulated by Article 48 TEU. Since the Treaty of Amsterdam, the aforementioned founding values have been playing a crucial role, determining considerable consequences both on the outside of the EU legal order, serving as benchmarks for the admission of new States into the EU, and internally with the possibility to apply sanctions to Member States that do not comply with their respect.

Article 2 TEU, in fact, codifies the «homogeneity clause» as a means of safeguarding the axiological heritage upon which the European Union is based. The respect of such clause represents the essential condition of new States to be admitted within the EU and it even constitutes a fundamental parameter to evaluate Member States' political conduct.⁹¹

⁸⁹ BENOIT-ROHMER, «Valeurs...», note 3, p. 150.

⁹⁰ See VON BOGDANDY, «Founding...», loc. cit. note 19, p. 106.

⁹¹ See especially Stelio MANGIAMELLI, «The Union's Homogeneity and its Common Values in the Treaty on European Union», in Hermann-Josef BLANKE and Stelio MANGIAMELLI (eds.), *The European Union after Lisbon. Constitutional Basis, Economic Or-*

From the first point of view, Article 49 TEU, which regulates the procedure for the admission of new Member States, expressly provides that «any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union». The wording of such provision contributes to substantiate the scope of those criteria of a political nature whose full compliance by the applicant State is required before the Council decides unanimously on the admission upon the agreement of the European Commission. These criteria, defined in the 1993 European Council of Copenhagen and complemented during the 1995 European Council of Madrid require, in fact, as a prerequisite for admission to the EU the political stability of institutions ensuring democracy, the rule of law, human rights and protection of minorities.⁹² The political monitoring on the respect of these parameters is the rudder of the process of enlargement towards the Balkans and Turkey. The accession negotiations with the latter, in fact, have reached deadlock especially owing to the lack of sufficient guarantees as regards the respect of the values enshrined in Article 2 TEU.⁹³

From the internal perspective, within the Union, a serious and persistent breach of the values referred to in Article 2 could result in the activation of the special procedure under Article 7 TEU, with the possibility to inflict sanctions, such as the suspension of certain rights deriving from the application of the Treaties, including the voting rights of the representative of the government of that Member State in the Council.⁹⁴

This monitoring mechanism is the result of a gradual evolution on the basis of the practice of EU Member States. Originally, the provision consisted solely of a sanctioning mechanism that limited itself to an *ex post facto*

der and External Action, Springer, Heidelberg, 2012, p. 21-46; Vincenzo ATRIPALDI and Roberto MICCÙ (eds.), *L'omogeneità costituzionale nell'Unione europea dopo il «caso Austria» e la Carta dei diritti fondamentali*, Cedam, Padova, 2003, p. 98.

⁹² Cf. European Council of Copenhagen, 21-22 June 1993, *Presidency Conclusions*; European Council of Madrid, 15-16 December 1993, *Presidency Conclusions*.

⁹³ See, in this regard, especially Ergun OZBUDUN and Füsün TURKMEN, «Impact of the ECtHR Rulings on Turkey's Democratization: An Evaluation», *Human Rights Quarterly*, vol. 35, 2013, p. 985-1008.

⁹⁴ See Art. 7 (2) TEU. On this special procedure see: Denys SIMON, «The Sanction of Member States' Serious Violations of Community Law», in *Liber amicorum in Honour of Lord Slynn of Hartley*, Kluwer Law International, London, 2000; Pierre-Yves MONJAL, «Le Traité d'Amsterdam et la procédure de constatation politique de manquement aux principes de l'Union», *Revue du Marché commun*, vol. 3, 1998, p. 69-84.

control on the Member State's conduct. Such approach soon proved to be unproductive owing to the lack of preventive effectiveness.

The consequences of the 1999 elections in Austria had shown, in fact, the limits of the mechanism under Article 7 TEU. Following the establishment of a government coalition that included the openly xenophobic and ultra-nationalist far-right party, *Freiheitliche Partei Österreich* (FPÖ), the other Member States, worried about the situation, identified Article 7 TEU as the only provision to refer to. Nevertheless, the procedure at issue could not be activated since the possible establishment of a government by a xenophobic and ultra-nationalist party could not in any way constitute a breach, the less serious and persistent, of the Union's fundamental principles.⁹⁵ After an evaluation of the situation in Austria, carried out by a committee of three wise men appointed by the Commission,⁹⁶ it was concluded that the Austrian government's compliance with the obligation to respect the rights of minorities, refugees and immigrants was not lower than in other Member States. However, the Committee recommended the development of an early warning mechanism for a preventive monitoring on the State compliance with the EU values, in order to avoid another situation like the Austrian case, likely to determine a crisis in the European integration process.⁹⁷

In an attempt to match such need, the revision accomplished by the adoption of the Treaty of Nice in 2001, added the new paragraph 1 to Article 7 TEU, which enabled the Council to determine the existence of a «clear risk of a serious breach» by a Member State of the values now enshrined in Article 2

⁹⁵ For further references to the Austrian case see Wojciech SADURSKI, «Adding bite to a bark: the story of Article 7 E.U., Enlargement and Jörg Haider», *Columbia Journal of European Law*, vol. 16, 2010, p. 385; Heather Berit FREEMAN, «Austria: The 1999 Parliament Elections and the European Union Members' Sanctions», *Boston College International and Comparative Law Review*, vol. 25, 2002, p. 109-124.

⁹⁶ The Committee included the former President of Finland, Martti Ahtisaari, Professor Jochen Frowein, Director of Max Planck Institute for Comparative Public Law and International Law (former Vice-President of the European Commission of Human Rights), and Minister Marcelino Oreja, former Spanish Minister of Foreign Affairs, former Secretary-General of the Council of Europe and former member of the European Commission). See the Report adopted in Paris on 8 September 2000, available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HOSI-1.pdf> (last accessed on 17.5.2015).

⁹⁷ *Ibid.*, paras. 117-118. See Alison DUXBURY, «Austria and the European Union – The Report of the 'Three Wise Men'», *Melbourne Journal of International Law*, vol. 1, 2000, p. 169-174.

TEU. Nonetheless, the monitoring procedure under Article 7 has never been put into practice, not even in the most recent events occurred in Hungary.

On 18 April 2011, in fact, the Hungarian government, led by Prime Minister Viktor Orban, adopted a new Constitution, which came into force on 1 January 2012, and other laws on the freedom of the media, the independence of the judiciary, the electoral system, all appear to conflict with some basic values of the European Union, thus making Hungary «the first EU member state ever sliding into an illiberal authoritarian political regime».⁹⁸ Despite the immediate reaction by other Member States and the Venice Commission of the Council of Europe,⁹⁹ the action of the EU institutions was limited to the adoption of resolutions and monitoring reports. In particular, in February 2012 the European Parliament adopted a resolution expressing concern about the situation in Hungary with regard to the exercise of democracy, the rule of law, respect for and protection of human and social rights, the system of checks and balances, equality and non-discrimination.¹⁰⁰

Despite the serious risk of hampering the fundamental values of the EU, no action was taken against Hungary on the basis of Article 7 TEU. Yet, the practice would seem to suggest at least the use of the early warning procedure formalised by the Treaty of Nice, following the previous Austrian case, this time being even more obvious the risk of a serious breach to the fundamental values, stemming from a constitutional revision that, as the European Commission acknowledged, was likely to affect seriously and persistently the rule of law within the EU. Indeed, the Hungarian situation could even perpetrate an immediate violation of the fundamental values of the EU, since the adoption of a constitution that compromises the independence of the judiciary could be, as has been noted, a violation of instantaneous character.¹⁰¹

⁹⁸ Bojan BUGARIÈ, *Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge*, 29 April 2013, available at <http://dx.doi.org/10.2139/ssrn.2257935> (last accessed on 17.5.2013), p. 2. For further comments see the Editorial Comments, «Hungary's new constitutional order and European unity», *Common Market Law Review*, vol. 49, 2012, p. 871-883.

⁹⁹ European Commission for Democracy through Law (Venice Commission), *Opinion 621/2011 on The New Constitution of Hungary*, 18 June 2011, para. 144. Documents available at www.venice.coe.int/webforms/documents/?country=17&year=all (last accessed on 17.5.2013).

¹⁰⁰ European parliament, Resolution 16 February 2012, (2012/2511(RSP)).

¹⁰¹ MONJAL, op. cit. note 94, p. 78. See also Armin VON BOGDANDY (ed.), *Constitutional crisis in the European constitutional area: theory, law and politics in Hungary and Romania*, Hart Publishing, Oxford, 2015.

In the unlikelihood to implement the procedure under Article 7, the European Commission and the Court of Justice played a key role in tackling the situation in Hungary through the traditional infringement procedures according to Article 258 TFEU. In two judgments, in fact, the Court held Hungary responsible of not complying with EU legislation on key matters that are likely to entail also a breach of the EU founding values. In November 2012, the Court ruled that the Hungarian legislation was incompatible with EU law. The Court stated that, having adopted a national regulation which requires the cessation of professional activity of judges, prosecutors and notaries who are at least 62 years of age, leading to a difference of treatment on the ground of age, Hungary failed to fulfill its obligations deriving from the principle of equal treatment in matters of employment and working conditions, thus attempting, albeit indirectly, to the value of equality as well as the principle of the rule of law enshrined in Article 2 TEU.¹⁰²

Likewise, in April 2014 a new judgment held that by prematurely bringing to an end the term served by the supervisory authority for the protection of personal data, Hungary has failed to fulfil its obligations under EU law on the protection of individuals with regard to the processing of personal data and on the free movement of such data, thus indirectly affecting the value of fundamental rights protection.¹⁰³

The recent situation in Hungary has fuelled a debate on the possibility to reform again the mechanism under Article 7, considering a series of options, such as: providing the Fundamental Rights Agency of the EU (FRA) with a special competence in this regard, establishing an *ad hoc* body tasked with monitoring the political conduct of States; performing a treaty revision.¹⁰⁴

In March 2014, the Commission adopted a new framework for addressing systemic threats to the rule of law in any of the EU Member States. This new tool is placed between the infringement procedure for breaches of EU law and the political procedures under Article 7. It would have thus a complementary character, aiming at establishing another early warning system allowing the Commission to enter into a dialogue with the Member State concerned, in or-

¹⁰² Judgment of the Court in *European Commission v Hungary*, C-286/12, EU:C:2012:687, paragraph 81.

¹⁰³ Judgment of the Court, *European Commission v Hungary*, C-288/12, EU:C:2014:237, paragraph 62.

¹⁰⁴ See, in this regard, the proposal elaborated by the European Parliament, Resolution of 12 December 2012 on the situation of fundamental rights in the European Union (2010-2011), para. 31.

der to prevent the escalation of systemic threats to the rule of law.¹⁰⁵ If no solution is found within the new EU rule of law framework, Article 7 will always remain the last resort to resolve a crisis and ensure compliance with European Union values. The establishment of a new early warning mechanism does not come without criticism. In fact, this potential solution reflects, on the one hand, the excessive proceduralization of EU law, and, on the other hand, the perception that a tacit consensus has been set on the fact that the procedure under Article 7 should never find application, as it will jeopardize the mutual trust between EU and Member States that in a period of crisis could affect the general development of a harmonious integration process.

V. CONCLUDING REMARKS

As it has been emphasised, over the years the Court of Justice has played a major role in shaping the EU political identity, contributing with its case law to the consolidation of the founding values enshrined in Article 2 TEU. In contrast to the original treaties that were silent about the principles upon which the supranational organization was founded, since the adoption of the Single European Act of 1987, more detailed references have been made to the European values until their formal enshrinement in Article 2 TEU. This provision may represent the landing place of a substantial jurisprudence.

The values listed in Article 2 TEU, supplemented by the Charter of Fundamental Rights of the EU, constitute a set of principles common to the EU and the Member States, meant to lay down the foundation of a supranational constitutional community, and aimed at fostering the legitimacy of the EU legal order and its democratic sustainability. Each value is part of the constitutional code that the Court of Justice has gradually shaped. Therefore, it is worth mentioning that there is no hierarchy in such a system of values: they are not distinct from one another, as they rather represent a consistent code providing the EU with a genuine constitutional identity, which is a common heritage to all Member States.¹⁰⁶

¹⁰⁵ Communication from the Commission to the European Parliament and the Council, «A New EU Framework to Strengthen the Rule of Law», COM (2014) 158 final, 11.03.2014.

¹⁰⁶ The Preamble of the TEU as well as the Preamble of the Charter of Fundamental Rights of the EU reiterate that the Union contributes to the development of these common

The case law of the Court of Justice has contributed to strengthen the consistency of such code of values, and, to appraise the complementary nature of each of them. Paradoxically, although the Court has been contributing to define the content of each founding value, the Luxembourg judges are deprived from any direct jurisdiction on Article 2 TEU, being the political procedure under Article 7 the only mechanism that could be enabled to impose sanctions on Member States. The possibility to provide the Court with an extended direct competence on Article 2 has not even been recently under discussion within the debate on the reform of Article 7.

This is a significant caveat within the EU legal order. Whether, on the one hand, the Court on several occasions has contributed to define and enrich the «constitutional» identity of the EU, it is not, on the other hand, in the condition to act as a constitutional judge and monitor, in conjunction with the European Commission, the compliance of Member States with Article 2 TEU. Providing the Court, as impartial judge, with a more incisive role in governing the respect for the EU founding values would indeed contribute to strengthen the mutual trust between the EU and its Member States and would allow the Court to further enrich the code of values which are the backbone of the European integration process, and enhance the protection of a common code of fundamental rights that «constitutes an existential requirement for the EU legal order».¹⁰⁷

values «while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States...».

¹⁰⁷ Opinion Advocate General Poiares Maduro, *Centro Europa 7 Srl*, C-380/05, EU:C:2007:505, paragraph 19.



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