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# The EU Founding Values – Constitutional Character and Legal Implications

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**Summary:** Recent developments in certain Member States of the European Union have revealed that the values of the Union mentioned in Article 2 TEU are jeopardized. This holds true with regard to the respect for rule of law, the principle of democracy and human rights in particular. These tendencies have triggered a discussion as to the meaning and the implications of the values enshrined in Article 2 TEU. The author pursues the thesis that these values can be described as constitutional principles underscoring that the Union is a public authority which relies on a constitution with substantive foundations. Moreover, these values are not of a purely meta-legal character but also permeate the whole legal order of the Union. As binding legal norms they inform the institutional system of the Union and shape the legal relationship between the Union and the Member States on the one hand and between the Member States on the other hand. The values may also serve as a yardstick for judicial review by the ECJ.

**Keywords:** constitutional order, European Union, Article 2 TEU, values, rule of law, democracy, human rights, constitutional principles, legal principles, homogeneity, judicial review

## 1. Theoretical basis

### 1.1. The constitutional order of the Union

The Union is not an intergovernmental organisation like others, but has a particular “basic constitutional charter” as the Court of Justice of the European Union (ECJ) put it.<sup>1</sup>

The conceptual basis of acknowledging the foundational treaties as the European constitution can be found in the early 60ies when Walter Hallstein designated the (then) European Communities as a “Rechtsgemeinschaft” (community

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<sup>1</sup> Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23.

based on law).<sup>2</sup> By using this term he sought to emphasise that the Community did not dispose of coercive instruments but was based solely on the Member States' respect for the law of the Community in particular and for the rule of law in general.<sup>3</sup> More than twenty years later Hallstein's idea was taken up by the ECJ in an attempt to constitutionalize the European legal order. As the Court of Justice underscored in the Case *Les Verts v EP*, “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”.<sup>4</sup> This choice of terminology implies that the legal order of the Union is founded on certain constitutional principles and structures which are comparable to domestic constitutional law.<sup>5</sup>

Yet, this “constitution”, originally, used to represent a purely economic order as becomes manifest in the *EEA I* Opinion of 1991. Accordingly, the EEC Treaty “aims to achieve economic integration leading to the establishment of an international market and economic and monetary union”.<sup>6</sup>

It was only in the 2004 Treaty establishing a Constitution for Europe that the treaty foundations of the Union were systematically approximated to national constitutions, notably by putting in the Treaty a series of foundational provisions concerning the values of the Union, its competences, its institutions, its legal acts, and its procedures. This process was supplemented by relying on explicit constitutional semantics and symbolism such as the flag or the anthem.

As is commonly known, this Constitutional Treaty never entered into force.<sup>7</sup> In terms of content, the Lisbon Treaty embodies much of the Constitutional Treaty, but avoided the constitutional symbolics in order not to endanger the ratification process in the Member States once again.<sup>8</sup> There is consensus that – from a functional perspective – the Union is a public authority<sup>9</sup> that can directly

<sup>2</sup> See W Hallstein, in Th Oppermann (eds.), *Walter Hallstein – Europäische Reden*, Stuttgart 1979, p. 109; E Fuß, *Die Europäischen Gemeinschaften und der Rechtsstaatsgedanke*, 1968, p. 16 f.

<sup>3</sup> W Hallstein, *Der unvollendete Bundesstaat*, Düsseldorf 1969, p. 33.

<sup>4</sup> Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23.

<sup>5</sup> Already developed by E Fuß, *Die Europäischen Gemeinschaften und der Rechtsstaatsgedanke*, 1968, p. 16 f; W Hallstein, *Der unvollendete Bundesstaat*, p. 41 und 48 f; J P Jacqué, *Cours général de droit communautaire*, *Collected Courses of the Academy of European Law* 1990-I/1, 237, 277 et seq., G C Rodríguez Iglesias, *Zur „Verfassung“ der Europäischen Gemeinschaft*, *EuGRZ* 1996, 125, 131.

<sup>6</sup> Opinion *Avis 1/91 Avis I v 91* [1991] ECR I-6079, para 17.

<sup>7</sup> J-C Piris, *The Lisbon Treaty- a Legal and Political Analysis*, 2010, p. 25.

<sup>8</sup> P Bergman, *From Laeken to Lisbon: The Origins and Negotiation*, in: a Biondi/P Eeckhout/S Ripley (eds.), *EU Law after Lisbon*, 2012, p. 25, 26.

<sup>9</sup> Opinion *Avis 1/78 Avis I v 78* [1979] ECR 2871, para 7.

create legal obligations for both the Member States and the Union citizens.<sup>10</sup> It thus exercises public authority that is in need of a constitution so that this authority is controlled. In the end, it is not of particular importance whether this fundamental order is – in a formal perspective – qualified as an international treaty or as a constitution *sui generis*.<sup>11</sup>

## 1.2. Values according to Article 2 TEU as constitutional basis

In addition to formal provisions on institutions, competences and legislative and judicial procedures, every constitution has its material or substantive foundations.<sup>12</sup> These can be found, for instance, in the qualification of Austria as a “democratic republic” in Article 1 of the Austrian Federal Constitutional Law<sup>13</sup> or in Article 1 of the German Fundamental Law where human dignity and the submission of all stataal powers to fundamental rights is defined as the basis and point of departure of the constitution.<sup>14</sup>

### 1.2.1. *Implicit values in the economic constitution of the EEC*

In the EU, para. 4 of the preamble of the TEU and Article 2 first sentence of the TEU have precisely this function. In these provisions, the EU and its Member States explicitly profess to certain values, namely human dignity, freedom, democracy, equality, the rule of law and respect for fundamental rights, including the rights of persons belonging to minorities. I shall call these values “constitutional values” in the following.<sup>15</sup>

From the beginning of the 1980s, i.e. even before the creation of this provision, the ECJ has developed specific substantive constitutional principles such as, for instance, unwritten fundamental rights that are binding upon the Union institutions as well as the Member States. In addition, even before the express inclusion in the Treaties, the Court of Justice has addressed the principles of

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<sup>10</sup> Case C-6/64 *Costa v E.N.E.L.* [1964] ECR 585, pp 593; Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1, p 12.

<sup>11</sup> F Snyder, General Course on the Constitutional Law, in Academy of European Law (ed), Collected Courses of the Academy of European Law (1995) Vol VI, 41, 53 et seq.; W Schroeder, Das Gemeinschaftsrechtssystem, 2002, p. 341 et seq.

<sup>12</sup> A von Bogdandy, Founding Principles, in: a von Bogdandy/J Bast (eds.), Principles of European Constitutional Law, 2nd. Ed. 2009, p. 11, 16.

<sup>13</sup> M Stelzer, An introduction to Austrian constitutional law, 3rd ed., 2014.

<sup>14</sup> See BVerfGE 7, 198, 205 et seq. – Lüth: the fundamental rights under the German Basic law are the manifestation of a set of values underpinning the German legal system; cf. U Di Fabio, Grundrechte als Werteordnung, JZ 2004, 1, 5 et seq.

<sup>15</sup> A von Bogdandy, Founding Principles, in : a von Bogdandy/J Bast (eds.), Principles of European Constitutional Law, 2nd. ed. 2009, p. 11, 13 and 22.

rule of law in *Les Verts* in 1986 and of democracy in *Roquette Frères* in 1980 as foundation of the Union.<sup>16</sup>

On the one hand, this was remarkable, given the fact that the EEC was an economic, not a political community. On the other hand, already the Schuman Plan had made clear that European integration was never a purely economic enterprise, but was supposed to bring about political integration by virtue of functionalist dynamics.<sup>17</sup>

This goal was also based on common values of the Member States which are at least alluded to in the preambles of the Treaties. Without a minimum amount of common values of the Member States, such as peace or political freedom, the project of European integration would not have been possible at all.<sup>18</sup>

It appeared consistent, therefore, that the Member States sought to provide these values with an explicit treaty status as the political orientation of European integration became more visible in the early nineties.

Article F para. 1 of the 1992 Treaty of Maastricht laid down that the systems of government of the Member States must be “founded on the principles of democracy”.

Subsequently, the principles adopted by the Copenhagen European Council of 1993 defined as criteria for accession to the Union the demand for “stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities”.<sup>19</sup>

This was emphasised in the 1997 Amsterdam Treaty which in Article 6 para. 1 TEU referred to the “principles” of liberty, democracy, respect for human rights and the rule of law, on which the Union is founded and which are common to the Member States.

In Article 2 of the Treaty establishing a Constitution for Europe, these principles turned into “values” – but with putting human dignity in front! This wording was maintained in Article 2 TEU as enshrined in the Lisbon Treaty of 2007.<sup>20</sup>

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<sup>16</sup> Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23 ; Case C-138/79 *Roquette v Council* [1980] ECR 3333, para 33.

<sup>17</sup> J Monnet, *Mémoires*, Paris 1976, p. 353; E Haas, *The Uniting of Europe*, Stanford 1958, p. 16 et seq.; H P Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 176 et seq.

<sup>18</sup> Ch Calliess, in: Ch Calliess/M Ruffert (eds.), *EUV/AEUV, Commentary*, 4th ed. 2011, Art 2 EUV para. 1.

<sup>19</sup> *BulleEU* 6-1993, para. I.13.

<sup>20</sup> Cf. the description of the genesis of Art 2 TEU at F Schorkopf in E Grabitz/M Hilf/N Nettesheim (eds.), *Das Recht der Europäischen Union*, commentary, looseleaf, Art 2 EUV para. 1 et seq.

### ***1.2.2. Explicit values as indication of the constitutionalisation of the Union***

If one refers to the “constitutional nature” of such values, this is to be understood in a descriptive sense inasmuch as the values in Article 2 TEU represent the traditional structural features of the liberal constitutional state.<sup>21</sup> Against this background, they may also be termed constitutional values.

This characterisation testifies to the fact that Union law cannot be understood any more (only) as an internal market law. It is conceived as European constitutional law<sup>22</sup> and the analysis of the values of the Union in Article 2 TEU forms part of a constitutional discourse in Europe.<sup>23</sup> The entrenchment of the constitutional values in the TEU thus symbolises a paradigm shift in terms of legitimation of the Union. The original understanding of EU law as an economic planning regime combined with an overall general political concept which was still present in the EEC Treaty as well as the EC Treaty has obviously lost its power of persuasion from the point of view of the Member States. The constitutional values of Article 2 TEU have therefore replaced the former objectives in Article 2 EEC Treaty, which had a specific focus on economic policy. This change also becomes manifest in the fact that the new provision on the aims of the Union (Article 3 para. 1 TEU) expressly refers to the values of the Union.

The cited provisions indicate the European Union has evolved from an internal market organisation to a “community of values” whose legal norms shape the society and politics in the Member States.

### ***1.2.3. Constitutional basis and homogeneity***

The constitutionalisation of a set of legal rules through constitutional values is typically linked to the idea that these values do not only permeate the Constitution itself, but the legal order as a whole. This idea has its basis in *Hegel's* legal philosophy and has particularly become manifest in the “Wertordnungsdenken” of German constitutional law.<sup>24</sup> Thus, the German Constitutional Court has ruled

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<sup>21</sup> F Schorkopf in E Grabitz/M Hilf/N Nettesheim, para. 9; a von Bogdandy, *Founding Principles*, in a von Bogdandy/J Bast (eds.), *Principles of European Constitutional Law*, 2nd ed. 2009, p. 11, 22.

<sup>22</sup> See E Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, *AJIL* 75 (1981) 1; J H H Weiler, *The Community System*, *YEL* 1 (1981) 267, 274; T Hartley, *Federalism, Courts and Legal Systems: The emerging constitution of the European Communities*, *AJCL* 34 (1986) 229, 231 et seq.; F Mancini, *The making of a constitution for Europe*, *CMLR* 26 (1989) 595 et seq.; K Lenaerts, *Constitutionalism and the many faces of federalism*, *AJCL* 38 (1990) 205 et seq.; J P Jacqué, *Collected Courses of the Academy of European Law 1990-I/1*, 265.

<sup>23</sup> Cf. St Mangiameli, in H-J Blanke/St Mangiameli (eds.), *The Treaty on European Union (TEU)*, 2013, Art. 2 TEU para. 11.

<sup>24</sup> A von Bogdandy, *Founding Principles*, in: a von Bogdandy/J Bast (eds.), *Principles of European Constitutional Law*, 2nd. ed. 2009, p. 11, 16.

since the 1950s that the fundamental rights enshrined in the Basic Law penetrate the whole legal order.<sup>25</sup>

In my opinion, the characterisation of the values common to the Union and its Member States (as stated in Article 2 TEU) as “homogeneity principles” therefore does not suffice. To be sure, they shall describe, and guarantee, the general homogeneity of the constitutional system, both horizontally among the Member States and vertically in their relationship to the EU.<sup>26</sup> However, they have additional functions. But their constitutional “radiation intensity” reaches far beyond their original scope of application – the control of the accession to and of the behaviour of Member States within the Union according to Articles 7 and 49 TEU.<sup>27</sup> The values have a legitimatory effect for the Union and its identity. Furthermore, they aim at ensuring the functioning of the Union as a whole, since, pursuant to Article 13 para. 1 TEU, they also inform the institutional system of the Union.

### 1.3. Normative character of the values

The constitutional nature of the values is, without doubt, highly relevant for the “constitutionalisation” of EU legal norms I have just described. From a doctrinal point of view, however, one may challenge the designation of certain provisions as values. The doctrinal analysis must respond to specific questions: How are the constitutional values interpreted and applied? Are they subject to legal review?

#### 1.3.1. Legal norms

First, the question arises whether the values are legal norms at all or only political declarations of intent. The easy way out would be to simply state that the TEU, where they are enshrined is a legal text and that they thus have normative character. In this context, one can also refer to the Court’s jurisprudence on the normative character of the Treaty objectives formerly enshrined in Article 2 EC Treaty. The Court of Justice has left no doubt that the aims of the Community in Article 2 EC Treaty and the Preamble to the EC Treaty were certainly couched

<sup>25</sup> BVerfGE 7, 198, 205 et seq. – Lüth, see U Di Fabio, Grundrechte als Werteordnung, JZ 2004, 1, 5 et seq.

<sup>26</sup> F Schorkopf in Grabitz/Hilf/Nettesheim (eds.), Art 2 EUV para. 9 et seq.; St Mangiameli, in: H-J Blanke/St Mangiameli (eds.), The Treaty on European Union (TEU), Art. 2 Rn. 42 f; a von Bogdandy/ M Kottmann/C Antpöhler/J Dickschen/S Hentrel/M Smrkolj, Reverse Solange – Protecting the Essence of Fundamental Rights against Member States, CMLRev 49 (2012) 489, 509 et seq.

<sup>27</sup> Ch Ohler in Grabitz/Hilf/Nettesheim, Art 49 EUV para. 15 f; M Cremona, EU enlargement: solidarity and conditionality, ELRev 30 (2005) 3; see for the relationship between Art. 49 und Art. 7 TEU M Rötting, Das verfassungsrechtliche Beitrittsverfahren zur Europäischen Union, 2009, p. 232 et seq.

in very general terms, but that they, at the same time, did not only contain a political but also a normative programme.<sup>28</sup>

In addition, Article 2 TEU provides the entrenchment in positive law of European principles which were developed by the ECJ since the 1980s as unwritten provisions. This holds true for the fundamental rights, the rule of law or the democracy principle as well as the equality principle.<sup>29</sup> Against this background, Article 2 TEU appears to be rather of declaratory nature. The inclusion of the values in the Treaty works above all, in the light of the requirements of the principle of legal certainty, as a point of reference for the sanction procedure against Member States according to Article 7 TEU.

As the TEU departs from the assumption that these values are “common” to the Member States and that the Union is therefore “founded” on these values (Article 2 TEU), both the Member States and the Union are legally bound by these values.

### ***1.3.2. Values and principles***

Since the Constitutional Treaty and the Lisbon Treaty, the concepts referred to in Article 2 TEU are “values”. Before that, in the Amsterdam and Nice Treaty the identical reference was to “principles”. Most authors are of the opinion that this does not entail any change from the point of view of legal doctrine. They continue to use the concept of principles since this is generally accepted in legal hermeneutics.<sup>30</sup> To that effect, they rely on the jurisprudence of the ECJ which, in the context of the rule of law and fundamental rights, continues to refer to “constitutional principles”<sup>31</sup> and “principles”<sup>32</sup>.

<sup>28</sup> Case C-126/86 *Giménez Zaera v Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] ECR 3679, para 14; Case C-339/89 *Alsthom v Sulzer* [1991] ECR I-107, para 8f; H P Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 558 et seq.; K Lenaerts, *Le juge et la constitution aux États-Unis et dans l’ordre juridique européen*, 1988, Brussels, p. 258; J P Jacqué, *Collected Courses of the Academy of European Law 1990-I/1*, 273 et seq.

<sup>29</sup> Case C-29/69 *Stauder v Stadt Ulm* [1969] ECR 419, para 7: fundamental right; Case C-138/79 *Roquette v Council* [1980] ECR 3333, para 33: principle of democracy; Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23 ff: rule of law; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR 9609, para 34: human dignity.

<sup>30</sup> A von Bogdandy, *Founding Principles*, in: a von Bogdandy/J Bast, *Principles of European Constitutional Law*, 2nd. ed. 2009, 11, 22 f; Ch Calliess, in: Ch Calliess/M Ruffert, *Art. 2 EUV* para. 8 mwN; F Schorkopf, in E Grabitz/Hilf/M Nettesheim, *Art 2 EUV* para. 21.

<sup>31</sup> Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 285; Case C-355/04 *Segi and Others v Council* [2007] ECR I-1657, para 51; Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633, para 45.

<sup>32</sup> Opinion Avis 2/13 *Avis au titre de l’article 218, paragraphe 11, TFUE* ECLI:EU:C:2014:2454, para 167.

Yet, it is problematic from the legal point of view to conceive of legal norms as values as the latter is a meta-juridical and ethically charged concept.<sup>33</sup> Values shall guide the individual – beyond legal norms – to behave in ethically “correct” manner in situations of decision-making. From the legal point of view, value discourses have paternalistic features. In addition, value discourses are problematic inasmuch as the persons participating therein will generally not be able to agree on a fixed set and content of values.<sup>34</sup> That this is also a problem within the Union can be seen in the distinction between the values enshrined in Article 2 first and second sentence TEU which refer to the concept of the human kind represented by the enlightenment and to the European social model based on pluralism and solidarity.<sup>35</sup>

At a more fundamental level, the reliance on the concept of values in Article 2 TEU appears consistent also from the legal point of view. It could be very well that the concept of values as used in the TEU has a dual character:

- 1) On the one hand, values have an ethical-political dimension that exceed the legal sphere: The values in Article 2 TEU have also the function to articulate a common set of ideals<sup>36</sup> shared by the Member States or even the peoples of Europe and to provide the Union with a specific identity on the international plane<sup>37</sup>. This becomes well manifest when, according to Article 3 para. 1 and 5 TEU, the Union’s aim is to promote peace and its values, and to promote them also in its relations with the wider world. The European space, i.e. the neighbourhood policy pursuant to Article 8 TEU, shall be founded on the values of the Union and the institutions shall aim to promote these values, as enshrined in Article 13 para. 1 TEU. The values also play an important role in the framework of the Common Foreign and Security Policy, as indicated in Article 21 para. 2, Article 32 and Article 42 para. 5 TEU.

<sup>33</sup> N Luhmann: *Soziale Systeme – Grundriß einer allgemeinen Theorie*, Frankfurt a. Main 1984, p. 433.

<sup>34</sup> On the relativity of values cf. K R Popper, *The open society and its enemies*, part 1: *The spell of plato*, London 1945.

<sup>35</sup> St Mangiameli, in: H-J Blanke/St Mangiameli (eds.), *The Treaty on European Union (TEU)*, Art. 2 para. 7; see regarding the dispute on the inclusion of references to christianity and god in the preamble of the EU Constitution, F Schorkopf, in Grabitz/Hilf/Nettesheim, Art 2 EUV para. 14. See also W Schroeder, *The European Union and the Rule of Law*, in W Schroeder (ed.), *Strengthening the Rule of Law in Europe*, Oxford 2016, p. 3, 12

<sup>36</sup> U Di Fabio, *Grundrechte als Werteordnung*, JZ 2004,1, 3.

<sup>37</sup> Commission, *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based (Communication) COM (2003) 606 final*, p 3; Ch Calliess, *Europa als Wertegemeinschaft*, JZ 2004, 1034; a von Bogdandy, *Founding Principles*, in: a von Bogdandy/J Bast, *Principles of European Constitutional Law*, 2nd. ed. 2009, p. 11, 19; F Schorkopf, in Grabitz/Hilf/Nettesheim, Art 2 EUV para. 14.



- 2) In addition to that, as far as values are laid down in legal texts they often refer to doctrinal principles which shall instruct the decision-makers and which can be operationalised in the legal order by way of further adoption of specific provisions by the legislative, executive and judicial powers. Against this background, one can well understand the core of values in a legal perspective as principles. These are legal provisions in which values, interests and goods are identified as the elements legally relevant for a balancing judgment.

There exist different conceptions of principles.<sup>38</sup> In this context, they are understood as written or unwritten legal norms which do not take a stand on specific rights and duties, but which are of general nature and need to be further specified by the legislative, executive and judicial powers. They eventually serve the goal of structuring the Constitution and the rest of the legal order. For instance, the ECJ has derived the principle of legal certainty from the principle of the rule of law.<sup>39</sup> In such cases, principles can even turn into an independent standard of legal review.

This double nature of the values also becomes manifest in the distinction between the values in the meaning of Article 2 first sentence TEU and their societal foundations in the Member States pursuant to Article 2 para. 2 TEU. In this latter case, further values are enumerated as elements of the European model of society which are obviously of an extra-legal character and are non-binding. This also follows from the reference of the sanction procedure in Article 7 TEU which only includes the “values” in the meaning of Article 2 para. 1 TEU.

The double – ethical-political and normative-legal– understanding of the values has also left terminological traces in the case-law of the ECJ. In the *Omega Spielhallen* case, the Court of Justice refers to human dignity, on the one hand, as a “constitutional principle”, but speaks in the same context of “fundamental values prevailing in the public opinion” which are laid down in the national constitutions and eventually qualifies human dignity as a “general principle of law” of the Union legal order.<sup>40</sup>

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<sup>38</sup> J Bengoetxea, *The Legal Reasoning of the European Court of Justice*, 1993, p. 183 et seq; W Schroeder, *Das Gemeinschaftsrechtssystem*, 2002, p. 262 et seq.

<sup>39</sup> Case C-234/04, *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] I-2585, para 20 ff.

<sup>40</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 23, 32 and 34.

## 2. Legal consequences

### 2.1. Regulatory function of the values

As the TEU departs from the idea that the Union is “founded” on the values (Article 2 first sentence TEU), it is legally bound by these values. This is emphasised in Article 13 TEU which defines the values of the Union as a legal point of reference for its “institutional framework”.

Article 2 second sentence TEU underscores that “these” values are “common” to the Member States. Due to the systematic link of this sentence with the first one it is obvious that the behaviour of the Member States is to be assessed in the light of the values. This also becomes obvious from the references to the values in the sanction procedure according to Article 7 TEU and in the accession procedure according to Article 49 TEU. These references presuppose that the Member States are legally bound by the values.

This brings up the interesting question whether the Member States – just as with regard to the fundamental rights according to the ECJ’s jurisprudence on Article 51 paragraph 1 FRC – are only bound by the values “in the scope of application of the law of the Union”.<sup>41</sup> However, Article 2 TEU is not drafted in that manner: It constitutes a general duty to maintain the Member States’ legal order in conformity with the values. This is also presupposed by the sanction procedure of Article 7 TEU.<sup>42</sup> It is hardly imaginable that Member States’ behaviour that is hostile to the rule of law or democracy could be subject to a distinction as to whether it occurs inside or outside the scope of application of EU law.<sup>43</sup>

### 2.2. Legal content of the values

It becomes difficult when one seeks to define the content of the constitutional values.<sup>44</sup> The chances are comparably good in regard to the fundamental rights

<sup>41</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105 para 22; Case C-198/13 *Victor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others* EU:C:2014:2055, para 33ff; C Latzel, *Die Anwendungsbereiche des Unionsrechts*, EuZW 2015, 658.

<sup>42</sup> Cf. a von Bogdandy/ M Kottmann/ C Antpöhler/ J Dickschen/ S Hentrel/ M Smrkolj, *Reverse Solange – Protecting the essence of fundamental rights against memberStates*, CMLRev 49 (2012), 489, 509; F Schorkopf in E Grabitz/ M Hilf/ N Nettesheim, Art 2 EUV Rn 18.

<sup>43</sup> Commission, *Communication on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based*, COM(2003) 606 final para 1.1; M Ruffert, in C Calliess/ M Ruffert (eds.), *EUV/AEUV, Commentary*, 4th ed., 2011, Art 7 EUV para 4.

<sup>44</sup> Cf. Commission, vgl. COM(2014) 158 final, 4. See W Schroeder, *The European Union and the Rule of Law*, in W Schroeder (ed.), *Strengthening the Rule of Law in Europe*, Oxford 2016, p. 3, 10 and 19.

or the principle of equality, as these principles are laid down in binding manner in the Fundamental Rights Charter.

However, already when it comes to human dignity such a consensus cannot be identified any more. As the ECJ has stated in regard to the prohibition of killing games and the freedom to provide services in the case *Omega Spielhallen* in 2004 it is compatible with EU law that “the principle of respect for human dignity has a particular status” in certain Member States reflecting the fact that there exists no “common conception” of human dignity among the Member States.<sup>45</sup>

Also regarding the other elements, i.e. democracy and rule of law, even though the preamble of the ECHR speaks of a “common heritage of political traditions, ideals, freedom and the rule of law” in Europe and even though the preamble of the TEU regards the values enshrined in Art 2 TEU as values of “universal” character, a common conception among the Member States cannot be figured out<sup>46</sup>, at least with respect to the details so that one cannot actually speak of homogeneity in the proper sense. Already if one compares Austria and Germany it is hard to make clear-cut statements on common democratic and rule of law-constitutional arrangements.

This is understandable bearing in mind that it is one of the main tasks of a constitution to express and to preserve the national political identity of the state in question.<sup>47</sup> For this reason, the Treaty accepts in Article 4 para. 2 TEU that the identity of the Member States which the Union has to respect is based on their constitutional structures, so that in spite of the common values there exist structural constitutional differences which become manifest in a peculiar understanding of the rule of law and democracy. By acknowledging this constitutional pluralism within the Union, Article 4 para. 2 TEU marks a major achievement in the relations between the Union and its Member States.<sup>48</sup>

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<sup>45</sup> *Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 34 and 37.

<sup>46</sup> P Cruz Villalón, Vergleich, in: a von Bogdandy/P M Huber/P Cruz Villalón (eds.) *Handbuch Ius Publicum Europaeum*, Band I: Grundlagen und Grundzüge staatlichen Verfassungsrechts, 2007, § 13 para. 60.

<sup>47</sup> R Barents, The Fallacy of European Multilevel Constitutionalism, in: M Avbelj/J Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond*, 2012, p. 153, 161; regarding the identities of national constitutions cf. G Jacobsohn, The formation of constitutional identities, in T Ginsburg/R Dixon (eds.), *Comparative Constitutional Law*, p. 129.

<sup>48</sup> As regards constitutional pluralism in Union law see EU J Baquero Cruz, The Legacy of the *Maastricht-Urteil* and the Pluralist Movement, *ELJ* 14 (2008) 389 and the contributions in M Avbelj/J Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond*, 2012; N MacCormick, The *Maastricht-Urteil*: Sovereignty Now, *European Law Journal* 1 (1995), 259; J H H Weiler, Prologue: global and pluralist constitutionalism – some doubts, in G de Búrca/J H H Weiler (eds.), *The Worlds of European Constitutionalism*, 2012, p. 8, 12 et seq opts for constitutional tolerance instead of constitutional pluralism.

Also vertically, i.e. in the relation between Union and its Member States, it seems difficult to affirm constitutional homogeneity. It was the ECJ itself that made clear in its *CILFIT* Judgment the Union law “uses terminology which is peculiar to it” and that legal concepts in Union law and in national law, even though similar concepts are used, “do not necessarily have the same meaning”.<sup>49</sup> Given the different structure of the Union as a community of integration, there exist different requirements as regards democratic participation compared to the Member States, as was accepted by both the ECJ and national constitutional courts.<sup>50</sup> There also exist significant differences as regards the principle of rule of law. The ECJ has interpreted this principle mostly in a procedural manner.<sup>51</sup> It thus varies from the “Rechtsstaatsprinzip” in the German or Austrian tradition which has substantive connotations, too.<sup>52</sup>

In the final analysis, there will be only consensus on a narrow common ground of legally relevant values in the meaning of Article 2 TEU which are common to the Union and the Member States. In relation to the rule of law, this includes subprinciples such as the access to courts, effective legal protection, legal certainty, proportionality, independence of courts and separation of powers.<sup>53</sup> As regards democracy, the task already becomes more difficult. There will be no consensus in Europe beyond the demand of the Charter of Paris for political plurality, free, equal and secret ballot, and the right to establish political parties.<sup>54</sup> This means that Article 2 first sentence TEU enshrines a hard core of criteria which can be conceived of as *ordre public* of the Union. At the same time, the margins of this core are very much blurred.

It will therefore be the task of the jurisprudence and of the legislator to further concretise the constitutional values and principles.

<sup>49</sup> Case C-283/81, *CILFIT v Ministero della Sanità* [1982] ECR 3415, para 19.

<sup>50</sup> Case C-138/79 *Roquette v Council* [1980] ECR 3333, cf. BVerfG, NJW 1995, 2216; BVerfGE 89, 115 (182) – Maastricht; 123, 267 (370) – Lisbon.

<sup>51</sup> Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23; Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18.

<sup>52</sup> Cf. M Koetter, *Rechtsstaat* and *Rechtsstaatlichkeit* in Germany, in: M Koetter/G F Schupper (eds.), *Understandings of the rule of law in various legal orders of the world*, Rule of law working paper series No. 1, 2010; M Stelzer, *An introduction to Austrian constitutional law*, 3rd ed., 2014.

<sup>53</sup> COM(2014) 158 final, 4 and Annex 1. See W Schroeder, *The European Union and the Rule of Law*, in W Schroeder (ed.), *Strengthening the Rule of Law in Europe*, Oxford 2016, p. 3, 25.

<sup>54</sup> Cf. P Craig, *Integration, democracy and legitimacy*, in: P Craig/G de Búrca (eds.), *The evolution of EU law*, 2nd. ed. 2011, p. 13 et seq.; A. Peters, *European Democracy after the 2003 Convention*, 41 CMLRev (2004), p. 37.

### 2.3. Yardstick for judicial review by the CJEU

According to Article 19 paragraph 1, second sentence TEU, the Court of Justice shall ensure that in the interpretation and application of the Treaties the law is observed, and via that provision the ECJ has also access to the values of the Union, as enshrined in Article 2 TEU. Hence, as a matter of principle, the values are also justiciable even though Article 2 TEU constitutes a very open provision which leaves a significant scope of interpretation.

I have already indicated how the ECJ deals with norms consisting of objectives which are couched in very general terms. Their “programmatic character” does not at all entail that they do not have any legal effects.<sup>55</sup> Such general norms include a legal decision-making programme for the institutions of the Union and, via the principle of loyal cooperation, also for the Member States, inasmuch as they define limits which those have to respect when making use of the discretion assigned to them.<sup>56</sup>

In these norms, the “spirit of the Treaty” becomes a manifest on which the ECJ relies to identify the teleological substance of Union law.<sup>57</sup> In that sense, they are relevant for the interpretation of secondary law of the Union and domestic law in the light of primary law.<sup>58</sup> This means that in situations of collision when different provisions of Union law are in conflict with each other, the interpretation is to be preferred that is best compatible with the values. These values can also serve as a standard for legal review.

This jurisprudence regarding the treaty objectives does with even greater force apply for the application of the constitutional values and principles by the ECJ. Article 269 TFEU which expressly limits the competence of the Court of Justice in terms of legal review of the sanction procedure of Article 7 TEU, does not militate against, but *e contrario* in favour of the justiciability of the constitutional values.

This was also made clear by the ECJ in its famous *Kadi* judgment of 2008 when the Court, in view of legal action taken against “smart sanctions” imposed by the Union against persons suspect of terrorism, spoke of “constitutional principles” of the Treaties, the protection of which was entrusted to

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<sup>55</sup> Case C-126/86, *Giménez Zaera v Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] ECR 3697, para 14; cf. Case C-339/89 *Alsthom v Sulzer* [1991] ECR I-107, para 8 f.

<sup>56</sup> Case C-6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECR 215, para 24; Case C-14/68 *Walt Wilhelm and Others v Bundeskartellamt* [1969] 1, para 6 et seq.

<sup>57</sup> Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1, 25; Opinion Avis 1/91 *Avis I v 91* [1991] ECR I-6079, para 17 et seq.

<sup>58</sup> Case C-283/81, *CILFIT v Ministero della Sanità* [1982] ECR 3415, para 20.

the Court. In this regard, it not only referred to fundamental rights protection, but also to the principle of the Community based on the rule of law and even in explicit terms on the “principles” which then were enshrined in Article 6 paragraph 1 TEU at the same.<sup>59</sup> It thus made values and principles described in my presentation the standard for interpretation and validity of secondary Union law.

This was also the case when the Court recently had to deal with the accession of the Union to the European Convention on the Protection of Fundamental rights (ECHR). It held in its Opinion 2/13 that such “accession must be in conformity with the basic constitutional charter, the Treaties”. The Court then went on to state that the “essential characteristics of EU law ... have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States ... a set of common values on which the EU is founded, as stated in Article 2 TEU.” The judges further concluded that EU “fundamental rights must therefore be interpreted and applied within the EU in accordance with (this) constitutional framework”, i.e. in accordance with the common values.<sup>60</sup> Interestingly enough, the Court found that the accession treaty does not meet these requirements.

### 3. Résumé

The values which are enumerated in Article 2 first sentence TEU are meta-norms of Union law. I have undertaken to show that they are structural principles of constitutional nature which have concrete legal effects on the control of the system of the Union, i.e. the behaviour of the institutions and the Member States.

It should not come as a surprise that such meta-norms have only rarely been expressly referred to, notably not in the courts. The rule of law-character of the Union and its Member States and the democratic legitimacy of its activities are not in dispute every day.

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<sup>59</sup> Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 285; Case C-355/04 *Segi and Others v Council* [2007] ECR I-1657 para 51; Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633 para 45.

<sup>60</sup> Opinion Avis 2/13 *Avis au titre de l'article 218, paragraphe 11, TFUE* ECLI:EU:C:2014:2454, para 167 and 168.

There are, however, from time to time borderline situations, such as the *Kadi* judgment regarding sanctions imposed against persons suspect of terrorism, where these principles play an important role.<sup>61</sup>

Also in the relation between national law and Union law, these principles are more and more often applied, in particular in areas like the internal market law, where one would not suppose to find them. A remarkable example is the discussion of human dignity in the *Omega Spielhallen* judgment.<sup>62</sup> This makes clear that the constitutionalisation of the Union legal order progresses inexorably. The values enshrined in Article 2 TEU make an important contribution to this ongoing process.

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<sup>61</sup> Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 285.

<sup>62</sup> Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 para 285; Case C-355/04 *Segi and Others v Council* [2007] ECR I-1657, para 51; Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633, para 45.