

Which values for which Europe?

Prodigies and the confusion of the “European identity”

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Abstract

More than for Georgia, the EU's Association Agreement of 2014 could be seen as a chance for Europe. European states are linked by History and Culture. But, with the development of international organizations, political discourses have progressively turned juridical. More precisely, legal tools (i.e. European treaties and case-law) have subsumed the more decisive arguments derived from political discourses, dealing with values and a supposed to be shared “European identity”. Indeed, rooting European law in a set of values mentioned by treaties, the European Courts of Strasbourg and Luxembourg reinforce the myth of an everlasting Europe defined through its values, which is closely linked to the idea of “European identity”. Yet, in the context of European integration, it's important to be aware that such an identity can be nothing but a construct – to which each state interested in may contribute. It raises basically the question of who the European people want to be.

Key words: *discourse, European identity, European legal orders, myth, values*

Talking about Europe is – still – a pleasure. Talking about Europe in the Caucasus is a *great* pleasure. Talking about European values in the Caucasus is necessary and, obviously, hopeful. Accession to the European Union could be seen as a *chance* for Georgia – particularly since the EU's Association Agreement of 27 June 2014. I would rather argue that this kind of Agreement is a real chance for Europe itself!

“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.” Through this article 2 of the Treaty on European Union, the organization is rooted in a liberal axiology. Raising these fundamental values that they affirm to share, the contracting Governments try to establish (or reestablish) their strong and indestructible ties, this “*future common destiny*” already mentioned in the preamble to the Treaty establishing the European Coal and Steel Community (signed in Paris, on 18 April 1951). This is the so-called “process of creating an ever closer union among the peoples of Europe”, seen as one of the aims of the European construction itself in the preamble to the Treaty of Rome, signed on 25 March 1957.

Undoubtedly, these ties find their origin in the history and culture of the European States. But can we affirm that they find their origin in the *European* history and culture? This is not so clear. Because, actually, are the so-called “European values” only European ones? When the preamble pretends to “*draw inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law*”, isn’t it also the case of other international treaties, as for example the American Convention on Human Rights (1969), deeply characterized by rationalist and individualist philosophy shaped in Europe? Isn’t it definitely the case of each international instrument claiming its universal vocation – *id est* the whole UN instruments?

The challenge then is to show how these values constitute in fact a wide enough *substratum* to embody a kind of universal standard in the protection of human rights. And how, contrary to what is too often contended, instead of isolating Europe from its neighbors, these values can also facilitate the reception, within the contracting States, of those which expect to join the European organization reclaiming the same axiological roots. Such an assertion considers the fact that European identity – if there’s one – isn’t *carved in stone* but continuing to evolve. Like other identities, European identity isn’t given but built. Moreover, the speech on European identity is above all a rhetoric, thus a *tool*. Although this notion of “identity” is a juridical one (and not only a political one), the performativity of the legal discourse makes the norm become reality. As Pierre Bourdieu (1982) wrote: “*jurists are the masters of speech*”. Yet, more than ever in this time of major crisis in Europe (economic, politic and migratory crisis, rising xenophobia, Brexit...), the European Union seems to look for its identity. The issue is its capacity to embody the economic, legal and politic model it pretends to be.

Here we can draw from the great philosopher Jacques Bouveresse (1999). Although the idea he develops may seem very different, as he criticizes postmodernism and cognitive relativism denouncing in particular the adventurous streak that can lead any to establish false similarities between philosophy and

scientific laws, we would like to raise awareness here on risks which are generated by an hidden form of cultural relativism, learning from Bouveresse that we must be wary of evidences. For that purpose, seeking the *myth of an everlasting Europe defined through its values* across the European treaties will permit to demonstrate that European identity is actually an open-ended question that offers strong development potentials.

I. The myth of an everlasting Europe defined through its values

First of all, to explain why a definition of Europe, which would be based on a set of supposed to be everlasting values should be considered as a *myth*, we have to provide an overview on how these values are omnipresent in European discourse(s). Then we can try and explain why we can talk about a *myth* here.

Omnipresence of values in «European» discourse(s): describing the myth

Nowadays, discourses on Europe seem to be saturated by values... As they have always been. In fact, values are always associated with political discourses, particularly in a context as ambitious as the one of creating an integrative Europe. Thus, the founding States' approach has to find its origin and its fundamental purpose in the idea of sharing values, which constitute a kind of common heritage and a same democratic ideal. There is no need to multiply examples. It only has to be reminded the words of the Treaty establishing the European Economic Community (TEEC), signed in 1957, which preamble mentioned an "*ideal*" consisting in "*strengthen[ing] the safeguards of peace and liberty*". The preamble to the Treaty of Amsterdam, signed in 1996, although it insisted on economic dimension and consolidation of the "*acquis communautaire*", also stressed the Member States' commitment to "*reinforce[e] the European identity and its independence in order to promote peace, security and progress in Europe and in the world*" thanks to a Common Foreign and Security Policy, setting as a goal to "*assert its identity on the international scene*" (art. B). It also inserted a new article F.1: "*the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*". Moreover, according to the new article J.1: "*The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be: to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter [...]*".

Adopted in 2007, the Treaty of Lisbon marked a turning point in the European construction: after the rejection of the draft Constitution, Europe was seeking for a second breath, which research appears clearly in the preamble. Indeed the signatory States affirm as self-evident to have been “*inspired*” by “*the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law*”. As they are “*resolved to mark a new stage in the process of European integration*”, Governments “*recall [...] the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe*”. They “*confirm [...] their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law*” and claim to be “*desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions*” (they are also “*resolved to promote economic and social progress for their peoples*”). The new article 2 will reaffirm and develop the principle laid down in 1996: “*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*”.

Purpose of the axiological discourse: clarifying the myth

This development of the axiological argument in the primary legislation deriving from the Union Treaties can be explained in two steps because what is at stake is the legitimacy of the organisation. First of all, the mention of “European values” seems to be inherent to the European integration itself. Indeed, with a strong connection with the philosophy of the Enlightenment, this search for legitimacy is ultimately based on values: Europe was born from a democratic exaltation of values of peace and justice. World War II has raised awareness on Human Rights and the necessity to protect them against States themselves. The construction of a true political Europe symbolize this willingness to cooperate for this purpose. As for the Council of Europe, the first political organisation founded on May 1949 in order to promote democracy, its Statute reflects the same concern and priorities. “*Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilization*”, the contracting Governments “[*r*]eaffir[*m*] their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”. They maintain they’re “[*b*]elieving

that, for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is a need of a closer unity between all like-minded countries of Europe”.

Nevertheless, secondly, through the adoption of these international treaties, political Europe turned out to be also legal. That’s how the “European values” quickly appeared in legal discourse: as we can see by looking at their more recent integration in treaties themselves (and not only in their preambles, which constitute above all political declarations), values are nowadays something more than an ideal. From treaties to case-law, they figure the European democratic project, and European judges – that is to say the Court of Justice of the European Union in Luxembourg and, above all, the European Court of Human Rights in Strasbourg – use them as legal concepts, to establish, develop or modify their solutions. Values are all over the preamble to the European Convention on Human Rights, adopted in 1950: “*Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend*”, member States proclaim they are “*likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law*”. Yet, since it was set up in 1959, the European Court of Human Rights, which main function is to rule on individual applications alleging violations of the different rights set out in the European Convention on Human Rights, has increasingly used these values to found its legal argumentation, examining applications firstly reading the Convention “*in light of the preamble*”, and secondly without using articles of the Convention themselves but only the values of the preamble. According to that, the European Court of Human Rights is able to strengthen its most important solutions (for example: ECHR, *Soering v. United-Kingdom*, App. n.14038/88, 7 July 1989, § 88).

It should be stressed that values of the “little Europe of the 28” are the same as those of the “great Europe of the 47”, from Iceland to Azerbaijan, since the Court of Justice ensures respect of fundamental human rights enshrined in the general principles of Community law, as explained in its *Stauder* case (29/69, 12 November 1969: “*respect for fundamental rights forms an integral part of the general principles of law protected by the court of justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community*”). Six years after, in the *Rutili* case (36/75, 28 October 1975), it specified that the fundamental human rights protected in Luxembourg must be understood as those embodied in the European Convention on Human Rights and already guaranteed in Strasbourg.

This transition from political field to juridical field supports and shows a research of legitimacy even more essential when the integrative process is at stake: through values, the European institutions allow themselves to constantly remind to the European peoples what they share... in order to facilitate the integration. Thanks to this useful reference to “European values”, infringements of sovereignty could be better accepted, whether or not they are authorized by law. Yet, the increasing presence of the concept of “European identity” in political and legal discourses is just as spectacular as this development of the political and legal use of “European values”.

II. The open-ended question of the European identity

As the great anthropologist Claude Lévi-Strauss (1977) once said, “*each use of the notion of identity begins with its criticism*”. We would like to pay attention to a twofold problem. On the one hand, identity is built in regards to others, to look like them or not. In this way, through one’s own identity, it’s the others’ that appear. The same applies for the European identity. On the other hand, belonging doesn’t mean identity, as pointed out by the American sociologist Rogers Brubaker (2000, p. 2): “*Conceptualizing all affinities and affiliations, all forms of belonging, all experiences of commonality, connectedness, and cohesion, all self-understandings and self-identifications in the idiom of ‘identity’ saddles us with a blunt, flat, undifferentiated vocabulary*”. Moreover, comparing it with a “*candy floss*”, a “*sticky substance*” of which it’s difficult to get rid, that picks up every little thing around, Erving Goffman (1963, p. 57) considered that identity “*has to do with the assumption that the individual can be differentiated from all others and that around this means of differentiation a single continuous record of social facts can be attached, entangled*”. Thus, each identity means a distinction between *oneself* and *others*. Considering European identity in legal discourse requires to keep in mind this difficulty. In doing so, we can analyse it both as a major issue of the European integration and as a fantasy, which presents strong potentialities for a greater Europe.

European identity, a key issue for the European integration

In fact, “European identity” goes together with “European values”. In 1994, the law professor Alain Fenet (1994) wrote: “*At this stage, the organizations and institutions working to demonstrate the existence of a European entity are not creating a European identity. At the very most, they can serve its protection and its continuity. But, as a second step, they can bring the framework of a new development of this identity*”. In fact, proclaiming a “European identity” constitutes an essential brick in the European construction,

from the ground floor of peoples and states... It's a very simple rhetorical effect to observe: if protecting the European identity is the very purpose of political and legal Europe, then European identity *must exist*.

Many authors explain that this development of an argumentation based on European identity is the result of an evolution from a defensive conception of the notion of "national identity" (used by states to defend their identity, from their perspective) to a gradual appropriation by European jurisdictions looking for a unifying approach (thanks to the notion of "European identity") (Levade, 2004, Burgorgue-Larsen, 2011, Szymczak, 2011 & Rousseau, 2011). However, a transversal analysis demonstrates the opposite (Husson-Rochcongar, 2014), since both notions have been introduced in most of the European treaties (for the European Union as for the Council of Europe) by their member states – *on behalf of Europe they pretend to embody* – before they were took up in case-law. And the notion of "European identity" appeared here before the one of "national identity".

In fact, the integrative process provides the framework for an explanation. Indeed, close to the idea of "identity", the specificity of the Community system used to be stressed by the Court of Justice, stating from the very beginning of its case-law that "Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights" (Case 26/62, 5 February 1963, *Van Gend and Loos*), and enforcing immediately a principle of "precedence of Community law" over national law:

"[T]he integration into the laws of each member state of provisions which derive from the community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question" (Case 6/64, 15 July 1964, *Costa c. ENEL*).

"In accordance with the principle of the precedence of community law, the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the

*territory of each of the member states – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions. Indeed any recognition that national legislative measures which encroach upon the field within which the community exercises its legislative power or which are otherwise incompatible with the provisions of community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by member states pursuant to the treaty and would thus imperil the very foundations of the community” (Case 106-77, 9 March 1978, *Simmenthal*).*

One could see also Advocate General Jääskinen’s conclusions in the *Römer* case: “*The principle of primacy is, therefore, absolute in effect. If that were not the case, the consequence would be to jeopardize the unity and even the effectiveness of Union law*” (C-147/08, 15 July 2010, § 165). Therefore, it’s not only to develop cohesion between member states, but also to strengthen legitimacy of this legal order in an international framework that European identity has been introduced in the Declaration adopted at the 1973 European summit in Copenhagen. This collective identity fulfils there a “classical” double function: looking outwards, it allows to distinguish member states from other states which aren’t members of the organization; looking inward, it creates a greater sense of belonging. Nevertheless, nowadays, the European identity is no longer really the same as it was in 1973. It must be understood differently from time to time and according to the legal systems considered. That’s why attention should be payed to today’s reality of the European identity, which is fragmented, and to its potentialities for Europe’s partners and, finally, for Europe itself.

Today’s reality of a fabulous “European identity”... and its potentialities

From the beginning, the mention of a shared European identity has expressed the search for greater legitimacy on the international stage – where the Community has to prove its effectiveness. But, it has also tighten the links between member states claiming that a specificity unites themselves and separate them from “others”. This double aim appears particularly when the Declaration of Copenhagen underlines that “*[i]nternational developments and the growing concentration of power and responsibility in the hands of a very small number of great powers mean that Europe must unite and speak increasingly with one voice if it wants to make itself heard and play its proper role in the world*” (§ 6) or that “*[t]he Nine Member Countries of the European Communities have decided that the time has come to draw up a document on the European Identity. This will enable them to achieve a better definition of their relations with other countries and of their responsibilities and the place which they occupy in world affairs*”

(preamble). Moreover, entitled *The European Identity in Relation to the Word*, the second part of this Declaration clearly reflects a wish for cooperation with non-European states: “*The Europe of the Nine is aware that, as it unites, it takes on new international obligations. European unification is not directed against anyone, nor is it inspired by a desire for power. On the contrary, the Nine are convinced that their union will benefit the whole international community since it will constitute an element of equilibrium and a basis for co-operation with all countries, whatever their size, culture or social system. The Nine intend to play an active role in world affairs and thus to contribute, in accordance with the purposes and principles of the United Nations Charter, to ensuring that international relations have a more just basis; that the independence and equality of States are better preserved; that prosperity is more equitably shared; and that the security of each country is more effectively guaranteed. In pursuit of these objectives the Nine should progressively define common positions in the sphere of foreign policy*” (§ 9)... Not without a bit of arrogance: “*In future when the Nine negotiate collectively with other countries, the institutions and procedures chosen should enable the distinct character of the European entity to be respected*” (§ 10 b).

In parallel, specifying that they “*have decided to define the European Identity with the dynamic nature of the Community in mind*” (preamble), the member States reveal that they consider this identity essentially as a process, as much *construct* as *given*, and dependent from the evolution of the European construction. Moreover, “*reaffirm[ing] their intention of transforming the whole complex of their relations into a European Union before the end of the present decade*”, they stress how this Union would participate to the affirmation of a European identity – that’s why the latter is often mistaken for the “*Union’s identity*”, as Professor Vlad Constantinesco (2010) pointed out. In a meaningful way, they notice that “*[t]he construction of a United Europe [...] is open to other European nations who share the same ideals and objectives*”, which is really significant. Indeed, stating that participation to this construction is essential to European identity means that such an identity could only be of variable geometry, following a progressive enlargement of the Union. In this regard, they specify they “*intend to strengthen their links, in the present institutional framework, with the Member Countries of the Council of Europe, and with other European countries with whom they already have friendly relations and close co-operation*” (§ 11). Yet, such a discourse raises the three questions of the heads of state and government’s legitimacy to proclaim such an identity, of the efficiency of such a method and of the complexity it leads to, axiologically.

In this way, various approaches have been taken by the European institutions – particularly jurisdictions – using the “European identity” concept to legitimize their own existence. Indeed, a cross-analysis of the instruments and case-law of the two European legal orders reveals a significant difference: despite rising numbers of applications on identity matters, the notion is still used sparingly in Strasbourg, where the institutions of the Council of Europe seem to consider it as a divisive factor. In particular, the European Court of Human Rights prefers to entrench its legitimacy right in the Convention’s preamble. On the contrary, we can notice an increasing use of the notion within the EU system, where it acts as a unifying factor. This difference in the field of argumentation reflects a difference in the approach.

Indeed, for the European Court of Human Rights, the preservation of a democratic ideal resulting from the Convention and uniting the member States is preminent. Beyond the principle of effectiveness (according to which interpreting an international treaty or agreement must always produce effects), international Human Rights law is characterized by pragmatism. Here, seeking for efficiency is a direct consequence of the proclamation of fundamental rights. That’s the perspective in which the Court has developed one of its most significant jurisprudential strategies: thanks to the Convention’s preamble, which mentions the “*common heritage of political traditions, ideals, freedom and the rule of law*” of the member states and claims that guaranteed rights “*are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend*”, the Court has gradually established a very protective case-law, through a method we have named a “*recourse to the values*” (Husson-Rochcongar, 2012). On the opposite, the notion of “European identity” was introduced in EU law in order to underline the integration process and its singularity. In doing so, the institutional players reinforce the role of the organization on the international stage. In Brussels and Luxembourg, the European identity is thus a *potential reservoir of legitimacy* (Husson-Rochcongar, 2012). Implicit and material in the framework of the Council of Europe, the identity question becomes rather explicit and formal in the framework of the European Union, contributing to relations between member states and European institutions. In this constant effort to balance the interests, the Court of Justice often uses values supposed to be the European ones... This jurisprudential method allows this Court to be more flexible in interpreting the treaties, without giving the impression that “*the only recognizable identity of Europe stands in diversity, cacophony and apparent disorder*” (Schneider, 1988, p. 63).

In any case, it comes as no surprise that the notion of “identity” is always a *fiction*. As such, it acts as a source of interpretation of European law. Talking about the *performative nature* of law means here that

law “*is a creative speech, which statements become real*”, as Pierre Bourdieu explained in *Ce que parler veut dire* (Bourdieu, 1982). Making reference to European identity reinforce thus cohesiveness between member States, uniting them in a single entity. However, as well as the notion of “values”, the notion of “identity” can mask the occurrence of inconsistencies... or generate them. Obviously, these “European” values are in fact universal values, through the deep aspiration to universality expressed in most of international legal instruments. Moreover, it's up to law to universalize (Bourdieu, 2011).

From this point of view, Georgia should be already seen as an integral part of Europe. Not only this Europe “*from San Francisco to Vladivostok*”, ironically mentioned by André-Jean Arnaud (1991) to illustrate the international influence of European thought, expressing equally its creative and military powers. First of all, Georgia is obviously part of Europe through its history and culture. *If Europe is “a cultural thing”*, Georgia is therefore already part of it. Then, Georgia is already part of the “great Europe” as it is the forty-first Member State of Council of Europe since 27 April 1999. As such, it has taken part in the institutional framework (particularly the European Court of Human Rights) and in the permanent redefining of the European democratic model for almost twenty years. *If Europe is a “legal thing”*, through this participation Georgia is therefore already part of it. Finally, by concluding an Association Agreement with the European Union, Georgia has demonstrated its interest for the economic factors of the EU project (its interest for democratic factors was obvious since its accession to the Council of Europe). With the full entry into force of the Association Agreement on 1 July 2016, links with EU will only be tightened. So, *if Europe is an “economical thing”*, Georgia moved ahead swiftly to be part of it. As Europe is above all a *political project*, these three aspects (Culture, Law and Economy) are essential. Only the desire to belong to Europe is able to create this belonging: the willingness *to be part of it*. In this sense, feeling European is almost already been European. A few years ago, in a conference dedicated to the concept of “national identity” (Husson-Rochcongar, 2014), I suggested a definition of Europe: *various representations and one hope – a political and economic hope*. That remains my view. And, in these troubled times in which European credibility is eroded, stay the course seems to be a necessity. That is what “European values” are for when they are asserted in juridical argumentation.

This aspiration that drew people to a universal reflection founded the European post-war project. Here is this “*common heritage of political traditions, ideals, freedom and the rule of law*” mentioned in the European Convention on Human Rights through its preamble. With this in mind, I would like to conclude with the words of a poet who didn't hesitate to give his life to fight brutality, because this

struggle has founded the contemporary Europe. And, somehow, plainly Europe – for what was Europe in the pre-war situation apart from a continent? This poet is Antoine de Saint-Exupéry – and here his fox, talking to his Little Prince: “*For me, you’re still a little boy, similar to 100 000 other little boys. And I don’t need you. And you don’t need me. For you I’m only a fox similar to 100 000 other foxes. But if you tame me, then we shall need each other. To me, you’ll be unique. To you, I’ll be unique...*” That he has translated otherwise: “*In being different to me, brother, far from damaging me, you are enriching me*”. And what if this was Europe?...

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