The Justiciability of European Values in the EU's External Action

The question of European values, the question of the human rights culture fostered by the Union in both domestic and external policies, is the core fundament upon which rests Sine Qua Non's action. Central to Sine Qua Non's approach and core objective of the Union's action, the notion of values, often declined through reference to "human dignity, freedom, democracy, equality, the rule of law and respect for human rights"[1] remains nonetheless difficult to construe, especially from a legal perspective, and this despite the increasing role taken by such principles throughout the history of European integration.

The paper will argue that, though undoubtedly constituting the foundation of the Union's action, the absence of a clear, coherent and enforceable definition of these values highly affects the efficiency of the Union's ambitions as global actor, ergo the coherence of its action abroad. As such, exploring the process that has inspired the consecration of these core principles in the contemporary legal order is necessary to shed light on the effective definition of such broad principles with the aim of promoting a culture of accountability – counterpart to the conventionally consecrated obligation on human rights defense and promotion.

The European Union and its values, from the jurisprudential to the conventional consecration

Though built upon the core project of economic cooperation, the vertical deepening of the integration process and the horizontal enlargement of the European Communities' reach lead the Court of Justice to mark a shift in its jurisdictional politics, a shift that would definitively change the Union's role as global actor.

Facing the blockage of the German[2] and Italian[3] Constitutional Courts frustrated by the exclusively economic focus of the Union's ambitions, the Court of Justice initiated a process of recognition of European values and fundamental rights whose protection could constitute a legitimate restriction to the economic freedoms that constituted the core of the Union's activity.

Hence, by affirming the essential parallel progression of economic freedoms and human rights guarantees, the Court of Justice reinvigorated the initial impetus that stemmed from The Hague Conferences of 1948, where European States united, in the first truly European federalist moment, in order to affirm the need to ensure the protection of fundamental rights.

Breaking the fictitious barrier dividing fundamental rights and economic freedoms not only

1 Title I, Art. 2, Consolidated Version of the Treaty on European Union, Lisbon, 2008.

2 German Federal Constitutional Court, Solange I, [1974] 2 CMLR 540.

3 Italian Constitutional Court, Frontini [1974] 2 CMLR 372.

proved to be essential in order to guarantee the legal principles of primacy and direct effect but, most importantly, it renewed the Union's ambitions as global actor. By allowing the entrance of human rights considerations in its forum, the EU acknowledged that its oeuvre had much greater ramifications. As such, greater attention to the inviolable rights was required for it to retain its legitimacy.

Following its intuition, the Court proceeded to incorporate an ever-greater number of fundamental rights in the European legal order following a tripartite process.[4] Human Rights were incorporated, initially as General Principles of Community Law[5], subsequently through the referral to the "national constitutional traditions" thus allowing the Court in Luxembourg to stabilize its relationship with the domestic jurisdictions[6], *in fine* human rights were guaranteed by referring to international and regional human rights instruments as the European Convention on Human Rights.

The initial praetorian monopoly over fundamental rights gradually opened, allowing the legislative branch to complement and coordinate the jurisprudential rights. The codification of human rights within EU primary law initiated timidly as the Single European Act (1986) made reference to the Union's attachment to "democracy and [...] fundamental freedoms" in its preamble. From the preamble, the reference acquired greater legal stance as it moved to Art. F of the Maastricht Treaty (1992). The 1992 revision also went one step further with the introduction of Art. F(2) which provided normative content to the otherwise problematic notion of "human rights" the treaties previously referred to. Lacking a Communitarian definition of the notion, the treaty incorporated -through referral- the definitions provided by the ECHR, to which all of the Union's Member States are -since 1993- required to be parties.

Again, from a normative perspective, the conclusion of the Nice Treaty at the turn of the century marked a radical step in the Union's attachment to human rights as it coincided with the proclamation of the European Charter of Fundamental Rights. The Charter regroups in six titles (dignity, freedom, equality, solidarity, citizens' rights and justice) fifty human rights, precisely defined in terms of content and implementation regime, hereby raised to the level of Fundamental for the Union's action. The Charter's proclamation should be regarded as a landmark in the Union's deepening. First, it complemented the conventional framework with a thorough collection of rights that are distinctive of the Union, thus setting aside the role of the ECHR as mere interpretative reference. Second, it uniquely associates socio-economic and civil and political rights, traditionally object of distinct covenants, in one single document. The innovative structure epitomized by the Charter, however, seems to reflect the same distinction between the first and second-generation rights through the distinction between civil and political rights and socio-economic principles. The latter, more contested, second generation rights, acquiring absolute legal value only when "implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union".[7]

The normative circle opened by the CJEU in the late 1960s was closed with the adoption of the Lisbon Treaty in 2007. The latter not only crystallized the decision to grant to the Charter the same status as the funding treaties; also -and most importantly, it extended the scope of the Union's human rights attachment to European Foreign policy with the introduction of articles 21 and 3(5) TEU. If the Union's ambition as human rights actor domestically had been affirmed long before 2008, its adoption marked the opening of a new era for the Union's external projection as the promotion and advancement of "the universality and indivisibility of human rights and fundamental freedoms"[8] worldwide became in itself one of the core objectives of the Union's action, an objective which -when breached- could be object of sanctions.

4 Hennette-Vauchez S., Roman D., Droits de l'Homme et libertés fondamentales, Hyper Cours, Dalloz, Paris, 2017.

5 CJEC, Judgment of Judgment of the Court of 12 November 1969. Erich Stauder v City of Ulm – Sozialamt. Reference for a preliminary ruling: Verwaltungsgericht Stuttgart – Germany, Case 29-69.

6 CJEC, Judgment of the Court of 17 December 1970, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany, Case 11-70.

7 Chapter VII, Art. 52(2), Charter of Fundamental Rights of the European Union, 2000.

8 Title V, Chapter I, Art. 21(1), Consolidated Version of the Treaty on European Union, Lisbon, 2008.

European values and foreign policy. The Union as a global Human Rights actor

The entry into force of the Lisbon Treaty marked the mainstreaming of human rights considerations as guiding principles of the Union's foreign policy in both primary and secondary legislation.

With the 2007 Treaty, the Union considerably expanded its external competences, primarily through the acquisition of a legal personality[9], essential for the Union to act on the international arena as a legally existing, independent authority. The adoption of Art. 47 TEU was complemented by the structuring of the Union's institutional framework to match the newly established competence, through the creation of the High Representative for Common Foreign and Security Policy and the European External Action Service.

Drawing from Art. 21 TEU, the Union's attachment to fundamental freedoms increased with the deepening of its external policies on diplomatic, development, humanitarian and trade cooperation with third countries. This attachment clearly emerges from the increasing emphasis put on human rights in the Global Strategies setting the strategical framework for the Union's foreign policy. Thus, the European Neighbourhood Policy, one of the Union's major cooperation efforts, counts the protection and promotion of human rights and fundamental freedoms as its first manifest objective.[10] Likewise, human rights conditionality clauses have been systemized, providing for the suspension of agreements in case of breach of "human rights and democratic principles" in bilateral association agreements or other trade partnerships of the Union.

As European values are not merely a void declaration of intent but a binding obligation, Sine Qua Non's action aims to promote the inclusion of human rights considerations in the Union's foreign policy agenda as well as to develop a culture of accountability for the respect of such principles. As a matter of fact, Sine Qua Non's action will also focus on the notion of effectiveness as, assuming the need for an international policy while failing in achieving its goals, indirectly means renouncing to defend the rights the Union claims as its constitutional basis. In fact, despite the developing of the Union's human rights culture, the thorny question of what these values inherently are, especially in the field of foreign policy, remains unanswered. If the question could be answered, as the treaties did, by referring to the Charter -the only instrument providing a definition of the more abstract concepts of "human rights" or "fundamental freedoms"- its implementation in the field of multilateralism proves to be indeed more complex.

An overview of the Charter, especially its provisions on implementation, seems to provide for a straightforward answer to the issue raised, as Art. 51 underlines that its provisions are binding upon all EU institutions, without any distinction on the competence exercised. However, an examination of the Treaty on European Union and its two main provisions on domestic (Art. 6 TEU) and foreign (Art. 21 TEU) human rights protection will highlight a slight yet crucial lexical difference. As a matter of fact, if the first -domestic- provision explicitly refers to the applicability of the Charter and adopts the expression "fundamental rights" (the same as the Charter), the second provision on foreign policy adopts the definition of "human rights" and excludes any reference to the Charter. Without prejudice to the theoretical preference on the use of such expressions, from a legal perspective, the alternative use of the two has been construed as aiming at excluding the application of the Charter in the Union's foreign policy. The creation of a clear dichotomy would hamper considerably the evaluation of the policies' effectiveness, that Sine Qua Non sets as its aim, as no other European act provides for a definition of what these rights that the Union must promote actually are.

As analyzed by Romain Tinière[11], the creation of such dichotomy should be attributed to a will to shield the Union from relativist critiques of what could be labelled as a form of ethnocentric universalism and, especially, levelled against the idea of human rights promotion included in Art. 21 and 3(5) TEU. However, Tinière's analysis interestingly advances the idea of an opening to the application of the Charter in the legality review of the Union's foreign policy acts. As pointed out by the author, recent jurisprudential developments attest of the

9 Title VI, Art. 47, Consolidated Version of the Treaty on European Union, Lisbon, 2008.

10 Art. 2(2)(a), Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, OJ L 77, 15.3.2014, p. 27–43.

11 Tinière R., «L'influence croissante de la Charte des droits fondamentaux sur la politique extérieure de l'Union européenne», RDLF 2018 chron. n°02, 2018.

CJEU's willingness to widen the Charter's applicability as its standard of protection was applied in both the direct compatibility review of international agreements[12] and the indirect review of the Union's foreign policy instruments.[13] Despite the fact that the question of the Charter's general applicability in the Union's foreign policy was never directly answered by the Courts, these decisions seem at least not to contradict our intuition.

Unwilling to ignore this debate, highly relevant for the effective evaluation of the impact of the Union's foreign policy efforts against those principles that we deem as fundamental, Sine Qua Non argues in favor of the applicability of the Charter's standard of protection inasmuch as it constitutes the sole material definition of the Union's fundamental rights ambitions. As such, Sine Qua Non considers the Charter based on its potential as guiding instrument and our best attempt at ensuring that policies carried on the ground are indeed effective and human rights references do not remain empty declarations of intent. However, without ignoring critiques of relativism, Sine Qua Non advocates for a soft applicability of the Charter in the realm of bilateral relations, which pertains to the wider sphere of international law and, by definition, escapes the outright primacy of EU law.

If on the one hand, concerning absolute human rights, Sine Qua Non argues for a straightforward application as these are covered by an international consensus against which claims of cultural relativism strain to resist, Sine Qua Non stresses the need for the Union to capitalize on the mechanism of justifications provided for by Art. 52(1) of the Charter itself, in order to preserve its essence in foreign policy. This mechanism could be the source of a renewed dialogue over human rights and their definitions, indispensable for the achievement of the Union's human rights objectives and necessary to develop common definitions of values. Such dialogue has the ambition to promote a more interactive and multipolar universalism, one that is universal not only in output, but also in input, contributing to the clarification of a legal framework which is blurry to the least. Clear definitions of human rights boundaries to the Union's acts of foreign policy and bilateral agreements would considerably improve the enforcement and review mechanisms necessary to ensure the effectiveness and coherence of foreign policy. Clearly, human rights considerations should intervene at the phase of elaboration following more transparent and accessible procedures, and at the stage of review through the judicial dialogue over the legitimacy of the limitations or the effective breach of the jointly-defined values.

As it clearly emerges from the above, developing a clear image of these rights that the Union proclaims as its own proves to be an arduous task. Indeed, Human Rights are and should be a fluid notion. As their conception and definition has evolved within the Union's deepening, Sine Qua Non argues that these should evolve in space, together with the reach of the Union's action, towards fulfilling their ambition of foreign policy objective.

In order to ensure that the Union's foreign policy fulfills the ambitions of Art. 21 TEU, Sine Qua Non adopts a case-by-case approach, akin to the CJEU, addressing specific countries' situations in successive case studies. Sine Qua Non's research follows an inductive method, starting from facts on the ground, upstream.

The judicial protection of HR and its inherent challenges

Protection of human rights implies addressing human rights considerations both at the policy-elaboration level, and *a posteriori*, through appropriate review procedures. Given the opacity over the initial negotiations phase, and the factually limited agency granted to external actors at the elaboration level, the judicial system of review offered by the EU legal order remains a fundamental arena to discuss accountability and ensure that the Union's action is faithful to its objectives.

The first and most visible challenge to an *a posteriori* scrutiny of European acts of foreign policy is represented by the Union's Common Foreign and Security Policy (CFSP), the latter being subject to a regime of judicial immunity. Thus, given its sensitive focus, all CFSP acts, except the individual sanctions targeted by Art. 275(2) TFEU, escape the jurisdiction of the CJEU. The nature of such acts dramatically hampers the justiciability of foreign policy, regularly submitted to the CJEU's jurisdiction, thus frustrating the effectiveness of the European review system.

If the treaties provide for a number of actions to review the validity of the institutions' acts, the main instrument to test the Union's acts of foreign policy against its

12 CJEU, Opinion 1/15 of the Court (Grand Chamber) 26 July 2017.

13 CJEU, Case T-512/12: Judgment of the General Court of 10 December 2015, Front Polisario v Council, OJ C 68.

conventional human rights obligations is article 263 TFEU's action for annulment. Other mechanisms, as Art. 218 TFEU's treaty review system or Art. 340 TFEU extracontractual liability, are satisfying only partially. As such, the *a priori* review of international agreements, though essential in evaluating the potential impact of the Union's multilateral affairs, constitutes a rather limited instrument as, intervening prior to the entry into force of the contested agreement, its review is exclusively based on predictions. Alternatively, engaging the Union's extracontractual liability could constitute a potential avenue. However, the conditions listed in Art. 340 TFEU considerably limit the utility of such an action.

Holding the EU liable for violations of fundamental rights in foreign policy seems to be uniquely possible through the Union's action for annulment, which now allows individual access to the courts and as such constitutes an important instrument for the practice of rights-claiming through *ex post* review. Yet, to be admissible, an individual action brought under Art. 236 must not only respect the general two-month time-limit, but individuals must prove that they are directly and individually affected by an act, condition which is hardly ever fulfilled when acts -as foreign policy regulations and directives- are by definition of general scope.
However, such case scenarios are not utopist as one could envisage as potential plaintiff a natural or legal person benefitting from the Union's grants to implement one of its external policies.

As it emerges from the above, access to the review of instruments of European foreign policy proves to be an intricate exercise whose effectiveness should be addressed to ensure that access to justice and the right to an effective remedy both remain key notions of European law. Nonetheless, if the issue concerning the accessibility of judicial forum should be object of debate, it should be understood that other -non-judicial- avenues are available to discuss the validity and coherence of European foreign policy. Article 20(d) TFEU, introduced by the Lisbon revision presents a number of tools to enhance individual agency and access to the Institutions by granting any European citizens the right to "petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union".

The right to petition the European Parliament can be exercised individually or collectively, by any EU citizen or person residing within the Union's territory, on any matter falling within the scope of the Union's activity. Seemingly covering an extremely wide range of situations, the right is nevertheless limited to the existence of a direct link between the petitioner and the Union's field of competence at stake.[14]
Interestingly, the above procedure does not only provide for a means to promote discussion, but also entrusts in the Parliament the right to request the Commission to seize the CJEU, if it suspects a breach of EU law. As such, the political instrument constitutes itself a bridge to access judicial review. Similarly, the Parliament's decision on inadmissibility or the issuing of an unmotivated opinion both can be subject to appeal.[15]
As opposed to the specific framework on the above petition-right, the right to address the Union's institutions is more loosely framed. As such the institutions are not subject to any obligation regarding the form or content of the answer delivered, nor are they under an obligation to respond.

Lastly, the Mediator or European Ombudsman, constitutes one key actor complementing the Union's culture of political review. Innovation of the post-Lisbon era, the Mediator is empowered to review claims of maladministration attributable to the Union's "institutions, bodies, offices or agencies"[16] and directly suffered by any natural or legal person residing in the EU. Again, the primary obstacle to effectively resorting to this mechanism in the realm of foreign policy, are the standing requirements. As for the above, the directness of the link could be regarded as limiting the access when the maladministration is raised in the Union's external action. However, as it is the case for the parliamentary petition, the provision is broadly construed, in order to preserve the essence of the office. Conditions on personal standing could, *vice versa*, constitute a greater challenge as actors, directly concerned by the Union's foreign policy tend to reside outside of its borders. Nevertheless, depending on the treaty interpretation, European citizens or residents could argue in favor of directness basing their complaint on the intrinsic non-justiciability of a number of Union's actions rather than basing a claim on an effective breach of human rights occurring on the ground but outside the Union's territory.

Despite the obstacles, the European Ombudsman has the potential to generate the necessary discussion around the themes advanced, as admissible claims are shared with the concerned institution in order to gather its observations whilst the European Parliament is also provided with a final report. Moreover, depending on the gravity of the case the Mediator disposes of a number of

14 Chapter I, Section 1, Art. 227, Consolidated Version of the Treaty on the Functioning of the European Union, Lisbon, 2008.
15 CJEU, Judgment of the General Court (Sixth Chamber) of 14 September 2011, Ingo-Jens Tegebauer v European Parliament, Case T-308/07.
16 Chapter I, Section 1, Art. 228, Consolidated Version of the Treaty on the Functioning of the European Union, Lisbon, 2008.

tools to foster dialogue between the parties and it can go as far as organizing reunions between the parties on the issue in order to negotiate an agreement. Weighing on the utility of the mechanism is also the fact that decisions of the European Ombudsman are justiciable and can be object of an appeal before the CJEU. Nonetheless, appeals lodged against the Organ's decisions -as it is the case for parliamentary-petition appeals- will chiefly focus on the satisfactory nature of the remedy offered and not on the main object of the complaint, with form overriding substance.

Conclusion

The protection of European values and their promotion on the international scene being a clear concern and binding objective of the Union's external action, the substance of these values remains ambiguous. While the systematic reference to notions as human rights, democracy and the rule of law seem sufficient to convey the general spirit of the Union's approach to value-promotion, the absence of a clear enforceable definition severely hampers the achievement of the Union's objective as it excludes any form of effective review. Given the problematic application of the Charter's normative potential, the relevance of a number of *a posteriori* review-mechanisms should grow in order to obtain guidance from the CJEU in its interpretation prerogative. However, a number of procedural requirements severely obstruct the access to concerned individuals and groups to legal ways of review, access being *de facto* granted almost exclusively to those same institutions in charge of the elaboration of the Union's policies. Access to debate being exclusively available through political means of review, the coherence of the Union's foreign policy chiefly relies on the goodwill of the Union's institutions in applying if anything opaque and complex procedures.
Though opening access to judicial means of review remains one priority in order to ensure accountability -ergo effectiveness- considering judicial review a panacea would be nothing but deception. To the contrary, ex post review remains counterpart to the elaboration of clear and precise European foreign policies, mindful of the values the Union adheres to.

Sine Qua Non aspires to revive the debates and discussions around this very important notion in order to foster a common human rights culture governing not only internal European affairs, but also European international affairs. A culture that is not only at the forefront of the Union's doctrine, but also of its action.