

The Invisible Core of Values in the European Integration Project

‘Europe will shrink because it moves away from the source of strength.’ These harsh words from Sudanese author Leila Aboulela were recently reported in an interview for a Dutch daily newspaper.¹ She referred to growing materialism and the absence of spiritual values in EU policies. One does not have to adhere to the author’s religious views, or to any religion at all, to see the truth in her words. More and more, the European project has become a technocratic one, with complex rules and byzantine decision-making which lacks true transparency. A return to principles and values, inspired by Europe’s cultural, religious and humanist heritage,² would imbue the integration project with meaning beyond the technocratic and the market, and might enhance the connection between the rule setters and the rule takers, i.e. the companies and citizens of Europe. Awareness of our spiritual values should not be lip service. It should translate in to actual policies and conduct. A few words on each of these issues: complexity, transparency and values.

First, complexity. My own field of study, the law of the Economic and Monetary Union (EMU), is one of the most impenetrable, with budgetary rules – applying to core issues of democracy – so profuse and complex³ that they lend themselves to lack of enforcement and to abuse in the populist discourse. The dispersion of provisions regulating national budgets over twelve different legal acts at various levels⁴ and of a varying degree of binding, combined with a tendency to rely on variations and exceptions, makes for a ‘budget book’ that has become unreadable.

¹ *Trouw*, 20 Jan. 2018. Quote (my translation): ‘When one denies the spiritual, one will be surrounded by materialism. I think that power comes from the almighty God. The more Europeans move away from the concept that God is great, the smaller they are. Europe will shrink because it moves away from the source of strength.’

² ‘DRAWING 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’: third recital of the preamble to the Treaty on European Union.

³ *Sustainable Economic and Monetary Union in Europe in Turbulent Times*, ADEMU Lecture delivered by René Smits in Florence on 10 Oct. 2016, <http://ademu-project.eu/sustainable-economic-and-monetary-union-in-europe-in-turbulent-times/>, accessed 30 May 2018.

⁴ From primary law (TFEU and Protocols) to secondary law (regulations, directives), soft law (1997 Resolution of the European Council and 2015 Communication of the Commission) and to international law (‘Fiscal Compact’ Treaty: the 2012 Treaty on Stability, Coordination and Governance in the economic and monetary union).

This is not a plea for senseless simplicity of rules in complex matters. Yet, honing complications down to rules and principles that can be more easily explained is a worthwhile aspiration. I have pleaded for a *Single Fiscal and Economic Governance Rulebook* for economic governance to replace the current hotchpotch of rules, like the *Single Rulebook* in EU banking regulation.⁵ In other fields, similar exercises may be needed, beyond the results of the ‘Better Regulation’ and the Regulatory Fitness and Performance (REFIT) programmes.

Second, as to transparency, ‘Better Regulation’ and REFIT also concern this aspect of law-making. Yet, there is room for progress as recent developments make clear. The Treaty-given open process of a first and second reading of draft legislation with the Council’s common position and Parliament’s stance accessible to public scrutiny, seems to have fallen in abeyance, as the *EU Observer* recently noted. This publication sought to obtain documents from the trialogue on regulation concerning organic farming and finally obtained the documents, so it reported⁶ – after the date set for the final vote on the legislation. A recent judgment of the General Court⁷ promises to see greater openness in legislative proceedings. The Court rejected a generic refusal to grant access to ‘the information included in the fourth column of [tables setting out the positions in the trialogue process]’, the column indicating next to (1) the Commission proposal, (2) the Parliamentary Committee orientation and (3) the amendments suggested by Council working groups (4) any suggested draft compromises. The Court noted that ‘[t]he principles of publicity and transparency are (...) inherent to the EU legislative process’.

This, in turn, reminds one of the transparency of European Parliament proceedings which are notoriously late in being officially reported. In September 2017, the Official Journal produced the texts of resolutions adopted two years earlier,⁸ in September 2015, noting that the minutes of the sessions therein reported had already been published a year before,⁹ still one full year after the event. Two years was actually short when one recalls that a March 2017 edition of Official Journal¹⁰ carried resolutions that were adopted three years before,¹¹ during a session of February 2014.

⁵ A Staff Discussion Note of the International Monetary Fund of 26 Mar. 2018 also calls for overhauling and simplifying the EU’s fiscal rules: Nathaniel G. Arnold, Bergljot B. Barkbu, H. Elif Ture, Hou Wang & Jiaxiong Yao, *A Central Fiscal Stabilization Capacity for the Euro Area* 17 <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2018/03/22/A-Central-Fiscal-Stabilization-Capacity-for-the-Euro-Area-45741> accessed 30 May 2018.

⁶ *Getting Secret EU Trilogue Documents: A Case Study*, by Peter Teffer, *EU Observer* (19 Apr. 2018).

⁷ Judgment of the General Court of 22 Mar. 2018 in Case T-540/15 (*Emilio De Capitani v. European Parliament, supported by the Council and the Commission*); ECLI:EU:T:2018:167.

⁸ *Official Journal* C 316 of 22 Sept. 2017.

⁹ *Official Journal* C 387 of 20 Oct. 2016 and *Official Journal* C 397 of 27 Oct. 2016.

¹⁰ *Official Journal* C 93 of 24 Mar. 2017.

¹¹ Again, with the minutes of that session having been carried a year after the session, in *Official Journal* C 30 of 29 Jan. 2015.

It may sound cheap to criticize the late production of the EU's official proceedings of parliamentary activities in twenty-four languages, from Gaelic to English, but early access to parliamentary business is a core element of transparent democracy. While some resolutions adopted may have been given prominence in media reports after their adoption, the slowness of their production in proceedings is staggering. An alternative to such a long interval between adoption and official publication may be to produce the proceedings' results in languages already available and filling in the other language editions later. An example of this approach, although one not to be copied thoughtlessly, comes from EMU law.

The incisive decision on the third Greek bail-out¹² was only published in English in all versions of the Official Journal after its adoption in the summer of 2015; it took eight months to publish this legal act in languages¹³ other than English, including Greek.¹⁴ After this author inquired about the publication of Council decisions on the sanctioning of Spain and Portugal in the context of the EU's budgetary rules, these were published in the *Official Journal*.¹⁵ Apparently, since decisions which specify to whom they are addressed do not need to be published in the *Official Journal* to enter into force (Article 297(2) TFEU), official publication is applied only to decisions which do not so specify, leaving the interested citizen unaware of them. When this concerns (non-)sanctioning of budgetary rules, such an omission is at variance with the requirements of open democracy and to be deplored.

Third, as to values. This requires more than adherence to openness and avoidance of inertia. Value-driven as the European integration process professes to be, this element is too often overlooked. The EU Charter of Fundamental Rights recalls the 'spiritual and moral heritage' of the European Union.¹⁶ In a recent trade mark ruling,

¹² Council Decision (EU) 2015/1410 of 19 Aug. 2015 giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, *Official Journal* L 219/8, 20 Aug. 2015, available in English in all language versions of the Official Journal of that day.

¹³ *Official Journal* L 91/18 of 7 Apr. 2016, with the following footnote: 'This act has originally been adopted in English only and published in OJ L 219, 20.8.2015, p. 8.' This edition also published other legal acts concerning the Greek programme, namely *Council Implementing Decision (EU) 2015/1181, of 17 July 2015, on granting short-term Union financial assistance to Greece* and *Council Implementing Decision (EU) 2015/1182, of 17 July 2015, approving the adjustment programme of Greece*, again mentioning that they had previously been published in *Official Journal* L 192/19 of 18 July 2015 in English only.

¹⁴ A similar lack of transparency affects the Greek 'capital controls': exchange restrictions on payments and capitals imposed in the summer of 2015 and since progressively relaxed. A comprehensive and up-to-date English version is absent at the time of writing: an impediment to trade with a significant part of the single market.

¹⁵ Council Implementing Decision (EU) 2017/2351 of 9 Aug. 2016 on imposing a fine on Spain for failure to take effective action to address an excessive deficit, *Official Journal* L 336/27, 16 Dec. 2017 and Council Implementing Decision (EU) 2017/2350 of 9 Aug. 2016 on imposing a fine on Portugal for failure to take effective action to address an excessive deficit, *Official Journal* L 336/24 (16 Dec. 2017).

¹⁶ 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the

the General Court¹⁷ made reference to these same values when it endorsed the views of the EUIPO Board of Appeal that ‘as a body of the European Union, EUIPO was required to take a firm stance in cases which transgressed the basic principles and values of European society and must therefore refuse registration, for breach of public policy, of any EU trade mark that might be deemed to support or benefit a criminal organisation’. The trademark *La Mafia* was considered to refer to a ‘criminal organisation [which] resorts to intimidation, physical violence and murder in carrying out its activities, which include, inter alia, drug trafficking, arms trafficking, money laundering and corruption’ which ‘breach the very values on which the European Union is founded, in particular the values of respect for human dignity and freedom’ (laid down in the Charter). The Court added: ‘Those values are indivisible and make up the spiritual and moral heritage of the European Union.’

When it comes to the term ‘spiritual’, lawyers and business people may recoil in abhorrence as if this element does not have a place in a business environment, in a contract or in the courtroom, certainly not in a society professing to be ‘secular’. Although the level of secularism may be a matter of debate, with many citizens adhering to religious codes and spiritual values, the secular aspect of our public governance is not disputed. Nor should it keep us from recognizing spiritual values in the public sphere.¹⁸ Ethical conduct must be based on spiritual values that are core to all religions and that are also part of a secular approach to values.¹⁹ When one loses touch with values, affairs may be conducted according to the law²⁰ but without a heart, or without a human face.²¹ What does this mean in practice?

Allow me to begin with an example from EMU law: the effects of austerity ‘on the ground’ seem to have escaped attention almost completely, except for a mere mention in the Memoranda of Understanding and legal acts²² and the adoption of

Union and by creating an area of freedom, security and justice.’ Second recital of the preamble to the Charter of Fundamental Rights of the European Union, Official Journal C 326/391, 26 Oct. 2012.

¹⁷ Case T-1/17 (*La Mafia Franchises, SL v. European Union Intellectual Property Office (EUIPO)*); ECLI:EU:T:2018:146.

¹⁸ On the relationship between law and religion, see *Islamic Finance and the Influence of Religion on the Law* (René Smits ed., 2012); panel proceedings of The Hague Conference of the International Law Association.

¹⁹ As the TEU preamble makes clear, as well as the example of a well-known religious leader who calls for a post-religious, secular global ethics, namely the Dalai Lama in *Beyond Religion: Ethics for a Whole World* (2013).

²⁰ An inverse position is taken by Philip Wood, a London financial law practitioner who, in his book *The Fall of the Priests and the Rise of the Lawyers* (2016), argues that society can function without a life philosophy or religion, but cannot survive without law; he sees lawyers replacing the priests of erstwhile. Woods argues that ‘law is the most important ideology we have’, while I argue that law, and policy, need to be imbued with values.

²¹ *The Human Face of the European Union* (Nuno Ferreira & Theodora Kostakopoulou eds, 2016).

²² See e.g. s. 2.5.3 *Social Safety Nets* in the 2015 Memorandum of Understanding with Greece, https://ec.europa.eu/info/sites/info/files/01_mou_20150811_en1.pdf accessed 30 May 2018.

the Commission's *ex ante* impact assessment²³ of the third Greek programme in 2015. Taking human values seriously implies a tough attitude in the face of the effects of policies on real people and their circumstances. Monitoring such effects, and giving honest feedback on the state of public health and general welfare, even of necessary economizing measures, should come natural to public officials who uphold values and who care. This seems to have been missing in the austerity discussions of the European sovereign debt crisis. It is also missed in the recent *Memorandum of Understanding on the working relations between the European Commission and the European Stability Mechanism*, which acknowledges 'the case-law of the European Court of Justice relevant to the tasks of each of the Parties which has emphasised that the Commission is bound to ensure that the memoranda of understanding signed by the Commission on behalf of the ESM are consistent with EU law' but does not elaborate on issues of human rights or social costs of conditionality, as one might expect in the context of the *Ledra* judgment.²⁴ Likewise, the effects on refugees and on local communities faced with immigrants are not a permanent element of the assessment of policies and pacts with third countries.²⁵ They should, when the European Union is truly attached to the values on which it is based.

Values also play an ever more prominent role in the approach to tendencies towards 'illiberal democracy' within the European Union. While upholding human rights has been an element of cooperation with third countries,²⁶ and a precondition to accession (the so-called *Copenhagen criteria*), how to enforce the rule of law in the Union itself has hitherto largely been a theoretical affair. Article 7 TEU has tentatively been put into effect.²⁷ Beyond the specific cases of Poland²⁸ and

²³ *Assessment of the Social Impact of the New Stability Support Programme for Greece*, Commission Staff Working Document, SWD(2015) 162 final (19 Aug. 2015); https://ec.europa.eu/info/sites/info/files/economy-finance/ecfin_assessment_social_impact_en_0.pdf, accessed 30 May 2018.

²⁴ Judgment of 20 Sept. 2016 in Joined Cases C-8/15P to C-10/15 P (*Ledra*), notably para. 67; ECLI:EU:C:2016:701. The ESM/Commission MoU of 27 Apr. 2018 is available at, https://www.esm.europa.eu/sites/default/files/2018_04_27_mou_ec_esm.pdf, accessed 30 May 2018.

²⁵ See the Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement (18 Jan. 2017), accessed 30 May 2018 <https://www.ombudsman.europa.eu/en/cases/decision.faces?sessionId=AA3BE4766B06B73EEBF5CB981AC682D6>.

²⁶ See the Cotonou Convention, notably Art. 96 and, previously, the Lomé Conventions between the European Community/Union and the ACP States: Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, *Official Journal*, L 317/3, 15 Dec. 2000, revised in 2010: *Official Journal*, L 287/3, 4 Nov. 2010.

²⁷ Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final (17 Dec. 2017), http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

²⁸ Commission Recommendation (EU) 2018/103 of 20 Dec. 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, *Official Journal* L 17/50 (23 Jan. 2018).

Hungary,²⁹ it is clear that shared values, and taking these values seriously, are at issue in the Union. Here, again, European Courts may have come to the aid of politicians who might forget the moral basis of the Union, when it adopted a decision in the Portuguese judges case. Queried by a Portuguese tribunal whether sizable reductions in the remuneration in the national public administration, also affecting judges in the *Tribunal de Contas* (Court of Auditors), were legal, the European Court of Justice found³⁰ that general austerity measures also affecting the judiciary do not violate the principle of judicial independence. Before so concluding, the Court dedicated explicit considerations to what judicial independence means, including a reference to Article 47 of the Charter, noted that only truly independent bodies may initiate a request for a preliminary ruling, and indicated what concretely judicial independence should entail.

A return to spiritual values requires an *esprit de corps*, a mindset which acknowledges them, beyond the preambles and political statements, into action and conduct.³¹ For values to be taken seriously, we should accustom ourselves to expressing them, in words and behaviour, and overcome our shyness in the face of matters that are conveniently considered ‘personal’ to keep them out of the public arena.

Taking values seriously is where the political becomes personal, where the exigencies of day-to-day policy-making and the legal profession meet the requirements of awareness of one’s own values. The Greek philosophy’s injunction of *γνῶτι σεαυτον* is relevant here: know thyself. Only when one addresses implicit assumptions and becomes aware of value judgments, can values be ‘lived’.

Values, and the source from which they emerge, are core to the European project. When one tends to doubt, forget or minimize these values, the project as such is at stake. Overreach in technical domains, or in geographical expansion, paying insufficient attention to the values at the core, may make Europe shrink instead of expand, as the African author quoted at the outset implied.³² Moving away

²⁹ See the Resolution of the European Parliament 17 May 2017 on the situation in Hungary, accessed 30 May 2018 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0216+0+DOC+XML+V0//EN>, and the Committee on Civil Liberties, Justice and Home Affairs’ Draft Report of 11 Apr. 2018, 2017/2131(INL), <http://www.europarl.europa.eu/resources/library/media/20180411RES01553/20180411RES01553.pdf> accessed 30 May 2018.

³⁰ Judgment of 27 Feb. 2018 in Case C-64/16 (*Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*); ECLI:EU:C:2018:117.

³¹ On how to translate values into action, see recent speeches by the Italian and Irish Presidents during the *State of the Union Conference 2018* on 10 May 2018: Address by the President of the Republic, Sergio Mattarella, on opening the conference *The State of the Union 2018, Solidarity in Europe*, Badia Fiesolana, <http://www.quirinale.it/elementi/Continua.aspx?tipo=Discorso&key=827>; accessed 30 May 2018 and Address by Michael D. Higgins, President of Ireland, *Solidarity in Europe – Achieving Authenticity in the European Street*, European University Institute, Florence, <http://www.president.ie/en/media-library/speeches/solidarity-in-europe-achieving-authenticity-in-the-european-street> accessed 30 May 2018.

³² In *The Unbearable Elusiveness of the European Union’s Spiritual Heritage*, 5(1) J. Study Spirituality 33–46 (May 2015), Alexandra Pimor quotes former Commission President Jacques Delors as saying, in 1992, that ‘we would not “succeed with Europe solely on the basis of legal expertise or economic know-how.

from our strength, which comes from values and the spirit with which they are imbued, diminishes and endangers the common undertaking that is Europe, a project of integration rooted in an open mind.³³

R.S.
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If in the next ten years we haven't managed to give a soul to Europe, to give it spirituality and meaning, the game will be up".

³³ Thus, being essentially open to the Other, an attitude that is not confined to those who share this continent.