Quaderni AISDUE - Rivista quadrimestrale
ISSN 2975-2698 - Fascicolo speciale n. 1/2024
Atti del V Convegno nazionale AISDUE
Padova, 2/3 novembre 2023

European identity through free movement law? The interactions between Union citizenship, free movement of persons, and EU values

Fulvia Ristuccia*

SUMMARY: 1. Introduction. – 2. Free movement of persons built around EU values. – 3. Free movement of persons as the tool for mediation of conflict on EU values. – 4. Conclusions.

1. *Introduction*

The composite European identity is an evolving concept that results from the conjunction of several processes where national, individual, and common identities interact in articulate ways. Recently, given the tensions concerning the rule of law backsliding, we are witnessing the development of an institutional narrative that defines the European legal identity as founded in the values under Article 2 TEU, which are not

* Assistant Professor in EU law, Maastricht University.

merely aspirational but have a legally binding nature.[1] As EU citizenship and free movement are themselves part of the apparatus of symbols and rights that form the European identity, one may wonder to what extent the formation of that identity through values has an impact on Union citizenship and not only on Member States and their (sometimes dubious) commitment to the values that underpin European integration.

The question builds on the rising scholarly interest[2] in the bond between Union citizenship, free movement of persons, and the territory of the Union as a legal space featuring common values and where citizens have the possibility to fully enjoy the potential of European integration and their European rights.[3] Indeed, a growing body of literature is analysing the case law on EU citizenship in light of the link that it establishes with the Union territory and what it represents in terms of rights and shared values across the EU.[4]

In particular, many authors have remarked that in the case law on the loss and acquisition of citizenship, that on «the genuine enjoyment of the substance» of citizenship rights (i.e. the *Ruiz Zambrano* doctrine),[5] and the cases on extradition of EU nationals, the Court is establishing a «link between Union citizenship and finding a home – cushioned by the security that this terms implies – within the Union

[1] The Court of Justice of the European Union (hereinafter "the Court" or the "ECJ") has identified Article 2 TEU as the provision defining the European Union legal identity. See Court of Justice, 16 February 2022, Case C-156/21, *Hungary v EP and Council*, para 232.

[2] See L. AZOULAI, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, Cambridge, 2017, pp. 178-203; N. NIC SHUIBHNE, *The "Territory of the Union" in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives*, in *YEL*, 2019; S. COUTTS, *The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights*, in *CYELS*, vol 21, 2019, p. 318; L. AZOULAI, *The Law of European Society*, in *CMLR*, vol. 59, 2022, p. 203; H. KROEZE, *EU Citizenship and Family Reunification: The Evolving Concept of a European Union Territory*, in T. KOSTAKOPOULOU, D. THYM (eds.), *Research handbook on European Union citizenship law and policy: navigating challenges and crises*, Cheltenham, 2022, p. 178.

[3] This is visible in case Court of Justice, 12 March 2019, Case C-221/17, *Tjebbes*, paras. 46-47. See also L. AZOULAI, *op. cit.* n. 2, p. 181; N. NIC SHUIBHNE, *op. cit.* n. 2, pp. 280–285 and 290.

[4] L. AZOULAI, *op. cit.* n. 2.

[5] Court of Justice, 8 March 2011, Case C-34/09, *Ruiz Zambrano*, para 42.

territory»,[6] which is not only a geographical area but epitomises the common values that form the Union identity.[7] As Azoulai noted, the EU legal order, and free movement in particular, by forcing «individuals to think of themselves as embedded into a transnational set of political, economic and social relations», is a «proxy for a sort of made-up "European society"».[8] According to the same author, the *Ruiz Zambrano* doctrine, which establishes a link between the territory of the Union and EU citizenship, «refers to Union territory as a metaphor for a certain conception of the space referred to in Article 2 TEU as "a [European] society […]". Following the ECJ's reasoning, leaving European territory means not only leaving Europe in the geographical sense, it also means leaving a community of ideals and values, it means being deprived of a certain mode of existence corresponding to the standards of European society».[9]

Against this background, the present contribution intends to start a reflection on how those values – and specifically the values as defined in Article 2 TEU, that define the normative identity of the EU[10] – interact with the most visible and cherished expression of Union citizenship:[11] i.e., free movement rights. The goal is to understand whether, how, and with what effects does free movement of Union citizens, which constitutes the backbone of the mechanisms to construct the European society, relate to the values that contribute to the building of a European identity.[12] There could be two perspectives on such an

[6] N. NIC SHUIBHNE, *op. cit.* n. 2, p. 285.
[7] L. AZOULAI, *op. cit.* n. 2; N. NIC SHUIBHNE, *op. cit.* n. 2; S. COUTTS, *op. cit.* n. 2; H. KROEZE, *op. cit.* n. 2.
[8] L. AZOULAI, *op. cit.* n. 2, p. 205.
[9] L. AZOULAI, *op. cit.* n. 2, p. 181.
[10] Case C-156/21, *Hungary v EP and Council*, cit., para 145.
[11] See e.g., Opinion of Advocate General Emiliou, 7 September 2023, Case C-128/22, *Nordic Info BV*, para 128.
[12] The choice of the term "identity" is due to the fact that the Court, in the case *Hungary v EP and Council* (cit., para 145) spoke of "identity" in relation to values under Art. 2 TEU. Nevertheless, the present author is hesitant in using the word "identity", as it carries the risk of conveying a message of exclusion towards non-European and to establish a uniform and hierarchical conception of values, and welcomes any comment and discussion on alternative definitions. Azoulai speaks convincingly of "European society" (L. AZOULAI, *op. cit.* n. 2, 205). For instance, sociology literature has been studying the effects of bi-national marriages born out of geographical mobility on the identification as "European". See J. DÍEZ MEDRANO,

interaction: on the one hand, a "top-down" movement where values influence the development of citizenship rights; on the other hand, a more "bottom-up" movement, where citizenship and free movement might be contributing to the definition of those values.

This paper only deals with the first of the two perspectives and inspects whether the link between Union citizenship, free movement, and EU values is apparent also beyond the protection of the connection with the territory of the Union. The focus of this research lies in two questions: first, to what extent is Union citizenship linked to the respect of and the identification in certain common values, so that the respect for those values conditions the possibility to exercise the rights attached to EU citizenship. Second, whether free movement is a tool to mediate conflicts of values in the EU and protect the common European values in domestic contexts. In order to answer those two research questions, the paper examines the case law of the Court that displays a connection between free movement of persons and EU values under Article 2 TEU, which has not happened frequently.

The crux of the analysis lies in assessing the legal consequences of this interaction: what are the implications of Union citizenship being imbued with values[13] and what is the role of values in appraising restrictions to free movement rights? The first hypothesis is that EU citizenship (and the attached rights) are becoming associated to the values under Article 2 TEU. Should the respect for those values turn into a condition for the exercise of rights, this would point to the creation of a European *ordre public* (section 2).[14] Moreover, free movement fosters those values through the protection of fundamental rights and thus contributes in itself to the development and safeguard of values in domestic context, even though the Court has not – so far – explored possible synergies with Article 2 TEU (section 3).

The contribution will conclude with remarks (or rather, open questions) on the possibility that both trajectories contribute to the

Europe in Love: Binational Couples and Cosmopolitan Society, London, 2020, pp. 151 and ff.

[13] L. AZOULAI, *op. cit.* n. 2, 208.

[14] L. AZOULAI and S. COUTTS, *Restricting Union Citizens' Residence Rights on Grounds of Public Security. Where Union Citizenship and the AFSJ Meet: P.I.,* in *CMLR*, vol. 50, 2013, p. 566; F. DE WITTE, *Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law,* in *CMLR*, vol. 50, 2013, p. 1559.

construction of a European identity through movement, the legal implications of which however are still to be fully worked out. The question concerns the role of Union citizenship and free movement in building a European identity based on common values and the expansion of the legal, social, and personal sphere of Union citizens.[15]

2. *Free movement of persons built around EU values*

As underlined above, there is a developing body of scholarship that highlights how the exercise of rights of EU citizens is increasingly connected to and shaped by common values. There are two dimensions to this bond between common values as part of the European identity and EU citizenship law.

First, speaking of the relationship between individuals and Member States, the protection of the tie between citizens and the Union territory points to the idea that the latter is the «special legal habitat» for Europeans.[16] That protection is engaged when Member States' action endangers the possibility for Union citizens to stay[17] or move to[18] the territory of the Union altogether, such as in cases on extradition from the host State[19] or *Ruiz Zambrano* cases.

This paper will not analyse this first dimension further, because the focus here is on free movement. As a matter of fact, the common trait for those situations is that the actual or possible engagement of free movement triggers what Nic Shuibhne has called the «protective narrative»,[20] i.e. the citizen's home is in the EU and that Member States should use tools at their disposal to allow the citizen to live in the EU where their rights are protected and public authorities are ultimately committed to the same shared values. Nevertheless, despite that link,

[15] N. NIC SHUIBHNE, *op. cit*. n. 2; S. IGLESIAS SÁNCHEZ, *A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism* cit.
[16] L. AZOULAI, *op. cit.* n. 2, p. 198.
[17] As in *Ruiz Zambrano*, cit., due to the expulsion of the parents of the Union citizens.
[18] As in Court of Justice, 22 June 2023, Case C-459/20, *Staatssecretaris van Justitie en Veiligheid (Mère thaïlandaise d'un enfant mineur néerlandais*).
[19] For instance, Court of Justice, 6 September 2016, Case C-182/15, *Petruhhin*, on an extradition order from a third country and protection against extradition only for nationals of the host State.
[20] N. NIC SHUIBHNE, *op. cit.* n. 2, p. 270.

when it comes to the line of case law on extradition, movement is merely the tool to establish EU law protection for citizens residing in a Member State other than that of nationality and this allows the activation of Art. 21 TFEU.[21] In the *Ruiz Zambrano* doctrine, the connection with movement is defined by the ECJ as "intrinsic", but it actually refers to the fact that the forced departure from the territory of the Union inevitably precludes the exercise of free movement, even when never exercised and in situations that otherwise would be purely internal.[22]

The second dimension of the relationship between common values as part of the European identity and EU citizenship law is much more closely connected to free movement, as it concerns cases of expulsion from the host State, i.e. the most straightforward form of restriction to free movement rights. As such, it will be the focus of this section, and in particular, the Grand Chamber ruling in *K. and H.F.*,[23] where the Court has made that link especially apparent by referring explicitly to Article 2 TEU.

As is known, a Member State can expel a mobile EU citizen on grounds public policy, public security or public health.[24] Scholarly debate has already noted how, in the area of expulsion of Union citizens on grounds of public policy or public security, supranational values are imbuing the exercise of free movement rights and the concept of integration for the purposes of the right to reside. What is more, the Court is increasingly relying on a EU-wide conception of public policy and public security – permeated with moral judgement and based on a connection with AFSJ and EU criminal law competences – especially when it comes to citizens who have committed very serious crimes,

[21] For a very clear explanation of this point, see N. NIC SHUIBNHE, *op. cit.* n. 2, p. 295.
[22] See S. REYNOLDS, *Exploring the "Intrinsic Connection" between Free Movement and the Genuine Enjoyment Test: Reflections on EU Citizenship after Iida*, in *ELR*, vol. 38, 2013, p. 376; N. NIC SHUIBHNE, *op. cit.* n. 2, pp. 284–285.
[23] Court of Justice, 2 May 2018, Cases C-331/16 and C-366/16, *K. & H.F.*
[24] Art. 27, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

such as in *P.I.* (sexual abuse against minors) and *Tsakouridis* (international drug trafficking).[25]

Both *P.I.* and *Tsakouridis* concerned the definition of "imperative grounds of public security" for the purposes of the increased protection for citizens who have lived in the host State for ten continuous years prior to the expulsion measure, under Article 28(3)(a) Directive 2004/38. In *Tsakouridis*, the Court held that while public security is a concept that encompasses «a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests»,[26] international dealing in narcotics may fall under that definition too. Indeed, the «devastating effects of crimes linked to drug trafficking» have prompted the EU legislature to take action in that field to protect «health, safety and the quality of life of citizens of the Union, and to the legal economy, stability and security of the Member States».[27] The seriousness of the crime and the Europeanisation of the level of protection, which testifies to the severity of the consequences of drug trafficking, gives leeway to the Member States to consider that those crimes «threaten the calm and physical security of the population as a whole or a large part of it», and thus qualify as public security concern.[28]

In *P.I.*, the Court held that sexual exploitation of minors is a crime so serious that the EU legislature can intervene (and has intervened) to fight against it. For this reason, precisely because the Treaties themselves regard sexual abuse against minors as a heinous and dangerous crime and give the Union competence to act, Member States can consider those crimes as falling within the concept of "imperative grounds of public security". The ECJ, thus, used Union criminal law

[25] L. AZOULAI, S. COUTTS, *op. cit.* n. 15; S. COUTTS, *Union Citizenship as Probationary Citizenship: Onuekwere*, in *CMLR*, vol. 52, 2015, p. 531; S. COUTTS, *The Expressive Dimension of the Union Citizenship Expulsion Regime: Joined Cases C-331/16 and C-366/16, K and HF*, in *EP*, vol. 3, 2018, p. 833; M. BENLOLO CARABOT, *Citizenship, Integration, and the Public Policy Exception: B and Vomero and K. and H.F.*, in *CMLR*, vol. 56, 2019, pp. 793–794.
[26] Court of Justice, 23 November 2010, Case C-145/09, *Tsakouridis*, para 44.
[27] *Tsakouridis*, cit., para 46.
[28] *Ivi*, para 47.

competences and EU values – not expressly referred to, but implicit in the array of conducts where the EU can intervene in the area of criminal law – to strengthen the Member States' stance on the violation of certain (State) values.[29] Still, in those cases, the Court was assessing those crimes from a transnational angle, as it reinforced the national perspective with the European one to support the classification of certain conducts as public security matters.

In *K. and H.F.*, the perspective changed and the link with Union values became much more explicit, as, for the first time in its case law on expulsion, the Court referred to Articles 2 and 3 TEU. The referring court had asked whether an EU citizen or a family member of an EU citizen could be expelled on the ground that they were suspected (without having been sentenced in that regard) of having committed war crimes or crimes against humanity respectively during the war in former Yugoslavia and in Afghanistan during the communist period.[30]

For what concerns our purposes here, Advocate General Saugsmandsgaard Øe's reasoning hinged on the fact that public policy/public security restrictions relate to the protection of the "fundamental interests of society" in the host State.[31] The Court, while overall upholding the Advocate General's reasoning shifted its focus on the protection of Union values.[32] True, in their submissions, France and the UK had referred to the values under Article 2 and 3 TEU too, as they argued that not expelling someone who is suspect of having committed international crimes would threaten the fundamental values of Member State and of the international order, endanger social cohesion, and undermine the «credibility of [Member States'] commitment to protect the fundamental values enshrined in Articles 2 and 3 TEU».[33] Yet, the Court went further as the reference to the TEU provisions was not only meant to reinforce the stance of Member States

[29] Court of Justice, 22 May 2012, Case C-348/09, *P.I.*, paras. 23-28.
[30] *K. & H.F.*, cit., paras 18 and 33, respectively for K. and for H.F. In particular, Dutch authorities wanted to expel the claimants based on the fact that their asylum applications had been rejected in the past on the basis of Article 1(F)(a) of the Geneva Convention, due to serious suspicions of having committed war crimes or crimes against humanity.
[31] Opinion of Advocate General Saugmandsgaard Øe, 14 December 2017, Joined Cases C-331/16 and C-366/16, *K. & H.F.*, paras 59 and ff.
[32] M. BENLOLO CARABOT, *op. cit.* n. 25, p. 794.
[33] *K. & H.F.*, cit., para 44.

but to *directly link the gravity of the crimes to the hostility towards Union values*, hence the need to protect the "European society" beyond «national particular perspectives».[34] This point is clearer if we refer to the words of the Grand Chamber itself: *«the crimes and acts that are the subject of Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95 seriously undermine both fundamental values such as respect for human dignity and human rights, on which, as stated in Article 2 TEU, the European Union is founded, and the peace which it is the Union's aim to promote, under Article 3 TEU».*[35]

Then, since under article 27 Directive 2004/38, the person should be a genuine, *present*, and sufficiently serious threat to public policy or public security, the ruling went on to point out that: *«however improbable it may appear that such crimes or acts may recur outside their specific historical and social context, conduct of the individual concerned that shows the persistence in him of* a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, *such as human dignity and human rights, as revealed by those crimes or those acts, is, for its part, capable of constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society».*[36]

Such a connection between expulsion grounds and the values of the Union shows three things: first, a shift – we do not know how permanent and how prominent – from the transnational dimension of integration in the host State to a greater accent on the supranational dimension of a relationship with the European society.[37] In this regard, individuals who show their hostility to those values are a danger for the Union and not solely for the host society. This is a step towards a closer link between the citizen and the supranational polity.

---

[34] M. BENLOLO CARABOT, *op. cit.* n. 25, p. 795.
[35] *K. & H.F.*, cit., para 45.
[36] *K. & H.F.*, cit., para 60, emphasis added.
[37] The traditional understanding of Union citizenship is anchored to its transnational nature that hinges on free movement, and integration in the host State, see A. ILIOPOULOU PENOT, *The Transnational Character of Union Citizenship*, in M. DOUGAN, N. NIC SHUIBHNE, E. SPAVENTA (eds.), *Empowerment and disempowerment of the European citizen*, Oxford, 2012, pp. 18–26; S. COUTTS, *Union Citizenship, Social Integration and Crime: Duties through Crime,* in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds.), *Constructing the Person in EU Law : Rights, Roles, Identities*, Oxford, 2016, pp. 225–226. S. COUTTS, *op. cit.* n. 25, p. 841.

Such a shift relates to a second element, that the values in Article 2 TEU seem to be not only obligations on the Member State and the EU but also on individuals, despite the text of those articles. This, of course, is not exceptional for the Union, since individuals have always had a key role in the European legal order. Moreover, we already know from the case law on citizenship and residence rights that the ultimate achievement of free movement is social integration and such integration has a qualitative nature[38] increasingly linked to the respect for the values of the host society.[39] Yet, what is interesting in *K. and H.F.* is that the ruling bridges the role of individuals as subjects of the Union legal system and their rights *and obligations* with a requirement of integration[40] through respect *for the founding values of the Union*. Not only is that connection symbolically important, but it also has relevant legal consequences, in that a "disposition hostile" to those founding values –expressed by past conducts for which there has been no sentence – can deprive citizens of the possibility to exercise the rights inherent to Union citizenship.[41] Understandably, those who are deemed being hostile to those values are not "good citizens" – once again in the words of Azoulai – and are not meant to fully enjoy the prerogatives of Union citizenship.[42] This, in turn shows, that the Court's understanding of Union citizenship and its role in the construction of the European identity is value based.[43] Citizenship – and the rights attached to it – is shaped in connection with the values that found the Union's identity. As Benlolo Carabot highlighted, the Court «promotes human rights not primarily as universal values, but as EU foundations and part of EU identity».[44]

[38] See Court of Justice, 21 July 2011, Case C-325/09, *Dias*, para 64.
[39] See Court of Justice, 16 January 2014, Case C-378/12, *Onuekwere*, para 26. L. AZOULAI, S. COUTTS, *op. cit.* n. 15; S. COUTTS, *op. cit.* n. 25, pp. 539–543.
[40] That Art. 28 Directive 2004/38 is meant to protect as it establishes a gradual system of protection where the greater the integration the enhanced the protection (see F. RISTUCCIA, *"Cause Tramps like Us, Baby We Were Born to Run": Untangling the Effects of the Expulsion of "Undesired" Union Citizens: FS*, in *CMLR*, vol. 59, 2022, p. 910).
[41] M. BENOLO CARABOT, *op. cit.* n. 25. P. 796; S. COUTTS, *op. cit.* n. 25, p. 841.
[42] L. AZOULAI, *op. cit. n. 2*, p. 194.
[43] L. AZOULAI, *op. cit. n. 2*, p. 208.
[44] M. BENLOLO CARABOT, *op. cit.* n. 25, p. 794.

The third remark on the textual reference to the values enshrined in Article 2 and 3 TEU concerns the distribution of the burden of having to deal with a person whose "disposition" threatens the fundamental interest of society. Whereas, on the one hand, it is understandable that Member States do not accept within their borders individuals who are suspected of having committed international crimes, on the other hand, one Member State – that of nationality – is left with dealing with an individual who does not respect the values upon which the entire EU is founded. Precisely those common values that found the European identity and permeate Union citizenship are used to expel the citizen and exclude them from a portion of the Union territory or all of it except their State of nationality,[45] contrary to the notion of the Union as a space without internal borders.[46] Thus, after the expulsion, the danger to public security/public policy is displaced to a limited section of the EU territory, a section, however, that is also supposed to share the same values. If it is ascertained that those citizens constitute a danger because of their "disposition", the latter should be deemed to threaten the peace of mind of the population not only in the host State, but everywhere they go, even in their country of origin, which cannot refuse their entry or expel them.[47] Arguably, the same is likely to occur whenever a person's conduct endangers the fundamental interests of society. Nevertheless, when those fundamental interests characterise the European society as a whole, all Member States could potentially invoke the public policy public security justification – or even should, to show their commitment to the common values – irrespective of the behaviour of the person in the host State or the specific threat to that particular context. This means that the European-ness of the values at

[45] As Azoulai and Coutts underlined in respect to *P.I.* and its interaction with *AFSJ*: L. AZOULAI and S. COUTTS, *op. cit.* n. 15, p. 566.

[46] On the contradiction between regime of free movement and the possibility to expel citizens, see D. KRAMER, *On the Futility of Expelling Poor Union Citizens in an Open Border Europe*, in *EP*, vol. 6, 2021, p. 156.

[47] Then in the case, for instance, of K. who had Croatian and Bosnian nationality and who was suspected of having committed crimes against humanity while serving in the Bosnian Army, there might also be a question of safety in his Member State of nationality, that was the reason why he had claimed asylum in the first place. And this is especially thorny since K. was never sentenced for those crimes. Furthermore, arguably, the peace of mind of the population in the place where those crimes where possibly committed is even more in danger in the country of origin.

stake appears to change the parameters of the proportionality assessment to weigh the lawfulness of the expulsion. In a way, then, the defence of common values that characterise the whole Union territory seems almost to require a "confinement" of the individual in one part of the territory.

3. *Free movement of persons as the tool for mediation of conflict on EU values*

The past section dealt with the question the development of EU citizenship and free movement in conjunction with EU values, and the creation of a European legal space where Member States have an obligation to protect EU values and individuals an obligation to respect them to fully enjoy the rights associated to EU citizenship. The current section analyses whether and how free movement of persons is a tool to protect or affirm those values in domestic legal systems, i.e., if there is any role for those values in the assessment of EU-compliance of restrictions to free movement enacted by Member States. This concerns the relationship between the values shared at the EU level and the specific values of the Member States, when the exercise of free movement rights causes the interaction between those two sets of values.

The crux of the question lies much more in the role that free movement law can play in fostering those values rather than on the role of Article 2 TEU more broadly in the EU legal system. For this reason, I will not deal with questions of breach of those values under the point of view of the rule of law, although there is an evident connection between the protection of rights stemming from the EU legal system and the defence of the rule of law. Furthermore, before delving into the substance of the matter, it should be noted that this research is limited to the use of Article 2 TEU in free movement of persons cases and does not expand to free movement of services and freedom of establishment of legal persons.

The first finding is that there is no ruling – at the time of writing – where the Court has referred to Article 2 TEU in the assessment of a restriction to free movement of persons to check whether the Member State's values (expressed by the justification) can be in conflict with

common values.[48] The lack of rulings expressly referring to Article 2 TEU in EU citizenship law means that the Court is not – yet – fully considering to use free movement provisions as a jurisdictional trigger to prompt the application of Article 2 TEU on top of a fundamental rights assessment.[49] It has been underlined that Article 2 TEU adds a «new legal and political layer to the judicial development of core features of the EU legal order».[50] Yet, in the area of free movement of persons, we are not witnessing a synergy with those values, despite the clear connection between fundamental rights and the right to move and reside for Union citizens and their families.

To the best of the present author's knowledge, the only case where free movement of EU citizens and Article 2 TEU expressly interacted in the way just illustrated is the Opinion of Advocate General Kokott in *Pancharevo*.

This incidentally, shows a certain coalescence of the protection of common values around the rights of LGBTQI+ persons and against the questionable narrative of certain Member States' governments,[51] that establishes a dichotomy between the protection of an alleged "traditional family" and the non-discriminatory protection of the rights of rainbow families. Indeed, the rights of LGBTQI+ communities are also the focus of the recent infringement action against Hungary,[52] based – among others – on free movement of services and Article 2

[48] This is not the same as what happened in K. and H.F. The difference lies not in the type of cases – that concern always restrictions to free movement – but in the type if interaction between values and justifications. In K. and H.F., common values are the foundation of the restriction and the assessment does not concern a restriction liable to conflict with those values.

[49] See, on the need to engage the scope of EU law to apply the Charter, M. DOUGAN, *Judicial Review of Member State Action under the General Principles and the Charter: Defining the Scope of Union Law,* in *CMLR*, vol. 52, 2015, p. 1201. On the relationship between violations of Art. 2 TEU and the scope of EU law when it comes to infringement procedures, M. BONELLI, *Infringement Actions 2.0: How to Protect EU Values before the Court of Justice*, in *ECLR*, vol. 18, 2022, p. 30.

[50] T. T. KONCEWICZ, *Values*, in *The Oxford Encylopedia of EU Law*, 2023, para 23.

[51] M. BONELLI and M. CLAES, *Crossing the Rubicon? The Commission's Use of Article 2 TEU in the Infringement Action on LGBTIQ+ Rights in Hungary,* in *MJECL,* vol. 30, 2023, p. 9.

[52] Action brought on 19 December 2022, Case C-769/22, *Commission v Hungary*, OJ 2023/C 54/19.

TEU *as distinct grounds of infringement*,[53] a move so innovative that the scholarship has dubbed it as "crossing the Rubicon".[54]

The convergence of the debate on values on such themes, and the rights of rainbow families in EU citizenship law, however, is not so astonishing since this is inevitably a field dense with fundamental rights questions. What is more surprising is rather the opposite: I would have expected from the outset more references to those common values given that the rights of rainbow families have come to the spotlight in Union citizenship case law, and the protection against discrimination based on sexual orientation is one of the main battlefields of the conflict of values. In other words, if the Hungarian law that heavily discriminates against LGBTIQ+ communities has triggered an infringement procedure with those ground-breaking traits, one may wonder whether those values also play a role when it comes to cases on free movement of persons when the full enjoyment of free movement rights (and beyond) for rainbow families are at stake.

We already know from the case law that, in the assessment of a restriction to free movement of Union citizens (or more broadly measures affecting Union citizenship that have to comply with EU law, such as e.g. loss of nationality or *Ruiz Zambrano* cases), the State measure has to be proportionate and comply with fundamental rights.[55] One might therefore argue that there is no need to incommode EU values, since Charter rights constitute already strong and clear benchmark to assess restrictions to free movement, and free movement offers a good tool to protect those fundamental rights. Furthermore, despite the advantages that could derive from a more upfront use of fundamental rights in free movement cases[56] that puts them at the centre of the analysis and not as a step of the assessment of the justification,[57]

---

[53] M. BONELLI and M. CLAES, *op. cit.* n. 51, pp. 4–5.
[54] *Ivi*.
[55] First and foremost, Court of Justice, 11 July 2002, Case C-60/00, *Carpenter*.
[56] The scholarship has praised the move towards a clearer and more transparent use of fundamental rights review of Member States action that transcends from its instrumentality to free movement. See Opinion of Advocate General Kokott, 5 March 2020, C-66/18, *European Commission v Hungary (CEU)*, para 180 highlighted by M. BONELLI, *op. cit.* n. 49, p. 42.
[57] To be kept distinct from the use of fundamental rights as justifications to restrictions to free movement, on which, see S. REYNOLDS, *Explaining the Constitutional Drivers*

there is still a difference between violations of fundamental rights or EU law more generally and violation of founding values under Article 2 TEU.[58] Breaches of founding values engage a deeper, systemic, and more symbolic dimension of the conflict with domestic systems. As one can see from the infringement against Hungary mentioned above, where Article 2 TEU was used autonomously, it is the severity of the violations of fundamental rights – brought within the scope of EU law by restrictions to free movement – that justifies the use of Article 2 TEU.[59]

The reliance on Article 2 TEU moves the battle to a different level, that of the core values, which escalates the symbolic and political dimension of the conflict.[60] If, as it seems widespread opinion in the scholarship, the severity of the breach of the values is the key to the use of Article 2 TEU, it is not so unconceivable that – as long as systemic threats to Union values are not at stake in Union citizenship law – the Court has not used that provision to assess justifications to free movement of persons restrictions. As Von Bogdandy and Spieker have argued, Article 2 TEU protects the essence of fundamental rights and, even in the form of a judicial application of the "reverse Solange" doctrine, it would only come into operation in exceptional circumstances, when the essential standards are under threat.[61]

---

behind a Perceived Judicial Preference for Free Movement over Fundamental Rights, in *CMLR*, vol. 53, 2016, p. 643.

[58] T.T. KONCEWICZ, *op. cit.* n. 50, para 39; M. BONELLI, *op. cit.* n. 49, pp. 47–48.

[59] See press release at ec.europa.eu/commission/presscorner/detail/en/ip_22_2689 and on the doubts on the autonomous use of Art. 2 TEU due to the gravity of the violations or simply because of the enactment of the law, see M. BONELLI and M. CLAES, *op. cit.* n. 51, p. 6.

[60] See indeed for the critiques on the autonomous use of Art. 2 TEU, M. BONELLI and M. CLAES, *op. cit.* n. 51.

[61] A. VON BOGDANDY, L. D. SPIEKER, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, in *ECLR*, vol. 15, 2019, pp. 395 and 409. The doctrine of "reverse Solange" is based on the presumption of compliance with founding common values, if that presumption is rebutted, the Court of Justice (or any European judge) would be empowered to carry out a review of any act of any Member State that is breaching those basic standards that also encompass the essence of Charter fundamental rights. It should be noted that the present contribution does not deal with the proposal – never upheld by the Court – on the use of the "reverse Solange" doctrine in *Ruiz Zambrano* cases, as the focus is on free movement law. See on this: A. M. RUSSO, *La cittadinanza «sostanziale»*

The "headspace" between breaches of free movement and Charter rights and violation of Article 2 TEU seems to be exactly what Advocate General Kokott had in mind in her Opinion in *Pancharevo,*[62] despite starting from different theoretical premises than the "reverse Solange" doctrine. Let me now clarify this point. In *Pancharevo*, the Advocate General used Article 2 TEU to gauge whether the essence of fundamental rights is respected even in an area where the EU does not have competence and that falls – according to the Member State concerned – within the scope of the national identity clause under Article 4(2) TEU. Without entering in the details of the case, suffices it here to recall that the Bulgarian authorities had invoked Article 4(2) TEU to justify the refusal to issue a Bulgarian birth certificate to the child, born in Spain from a Bulgarian citizen and her wife both registered in Spain as mothers.

Advocate General Kokott first argued that Art. 4(2) TEU is not "merely" a legitimate objective to derogate to free movement provisions, but it constitutes a limit to negative integration and the scope of EU law. Since, in this way, Article 4(2) TEU limits the reach of Union law, the Advocate General held that Member States can only rely on it to safeguard core aspects of national identity. Following this reasoning, the Opinion maintained that, when a Member State invokes those critical aspects of national identity to justify restrictions to free movement, and that justification corresponds to genuine concern on the pillars of the national identity, the Court should not carry out a proportionality review. According to Advocate General Kokott, the definition and regulation of family structures is precisely such a fundamental element of national identity, since it pertains to the basic unit of societies, i.e. the family.[63]As a key element of family law, rules on parentage fall within that core of national identity. Thus, even if those rules restrict free movement, and the failure to release a birth

dell'UE alla luce della proposta del Gruppo di Heidelberg: verso una «reverse Solange»?, in *Federalismi*, 2014, p. 12 and ff; S. IGLESIAS SÁNCHEZ, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison*?', in *ELJ*, vol. 20, 2014, p. 464; A. VON BOGDANDY, L. D. SPIEKER, *op. cit.* n. 61, p. 411.

[62] Opinion of Advocate General Kokott, 15 April 2021, C-490/20, *Stolichna obshtina, rayon „Pancharevo"*.

[63] *Ivi*, paras. 75-79.

certificate to the child identifying the claimant and her wife as the parents was deemed an obstacle to the right to move,[64] the proportionality review cannot take place at EU level.[65]

However, since the recognition of the national identity defence cannot amount to a blank cheque for Member States to derogate to EU values, the Advocate General proposed the review to be carried out in light of Article 2 TEU, used as a minimum threshold to ensure respect for the common values.[66] In this sense, Article 2 TEU would only cover the essence of fundamental rights and would not amount to a fundamental rights review in light of the Charter (that includes a proportionality assessment). Just like in the reverse Solange doctrine, the reasoning of the Advocate General gives Article 2 TEU legal effects limited to the establishment of a minimum common ground – corresponding to the core of fundamental rights – without uprooting the foundations of national identity.[67] In this way, Article 2 TEU acts as a countervailing provision to Article 4(2) TEU, which establishes a sort of carved-out area of national identity that needs to abide by a less extensive but also more fundamental standard of common values. This means, however, to waive proportionality and balancing on those issues and introduce an ultimate "red line" that cannot be surpassed. Article 2 TEU would «negatively determin[e] what is not allowed, without positively determining how it should be instead», «with regard to fundamental rights, such a red line approach concentrates on their "essence".»[68]

While the suggestion has been explored in the literature, this more "light touch" review does not square entirely with the Court's approach to free movement restrictions. And indeed, the ECJ in *Pancharevo*, did not uphold the Advocate General's reasoning and, arguably, it did not need to do so. Unlike Advocate General Kokott, the Court did not explore the possibility that the child was not a Bulgarian national due to domestic rules on parentage. By doing so, the judgment anchored

[64] *Ivi*, para 67.
[65] *Ivi*, paras. 95-96 and 107. That review, according to the Advocate General should be carried out at national level, see para 131.
[66] *Ivi*, paras. 116 and following.
[67] See for an explanation of the mechanism, A. VON BOGDANDY, L. D. SPIEKER, *op. cit.* n. 61.
[68] *Ivi*, p. 423.

straightforwardly the issue in free movement law, rather than on the shakier ground of the acquisition of nationality based on core family law. The Grand Chamber did not need to get into an analysis of conflict between fundamental values,[69] since, as Tryfonidou noted, it decided the case on the terrain of free movement and not on the minefield of the conflict of values.[70] The Court held that the denial of an identity document for a child with two mothers is contrary to free movement and *not* that Bulgaria was under the obligation to release a birth certificate (and bestow Bulgarian nationality) to that child for all legal effects.[71]

Furthermore, we already know that the Court is rather wary to use Article 4(2) TEU as a limit to its power to review breaches of EU law and carry out a proportionality assessment of those violations.[72] True, the ECJ is at times more lenient in its proportionality assessment or leave it mostly to the national judge in delicate cases where national identity is at stake,[73] so as to carefully balance countervailing interests. However, to completely waive proportionality assessment in cases of application of Article 4(2) TEU is not heard of especially when free movement law is at stake.[74]

This shows that EU free movement law already allows – without having to use Article 2 TEU – to scrutinise measures that could be at odds with fundamental rights and the degree of intensity of the review can be adjusted according to the complexity of the case. In *Pancharevo*,

---

[69] See on this, I. MARCHIORO, *Quali prospettive per il legislatore europeo dopo Coman e Pancharevo?*, in *I Post di AISDUE*, 2023, p. 17.

[70] A. TRYFONIDOU, *The ECJ Recognises the Right of Rainbow Families to Move Freely between EU Member States: The VMA Ruling*, in *ELR*, vol. 47, 2022, p. 546.

[71] Court of Justice, 14 December 2021, Case C-490/20, *Stolichna obshtina, rayon „Pancharevo“,* paras. 56-57.

[72] See e.g., Court of Justice, 22 December 2010, Case C-208/09, *Sayn-Wittgenstein*. Advocate General Kokott in *Pancharevo* discussed the differences between the line of case law on surnames and the case at stake: see paras 94-95. On the Court's use of proportionality when reviewing claims to the protection of national identity, see also F. DE WITTE, *op. cit.* n. 14, p. 1572.

[73] Compare e.g. the ruling and the Opinion of Advocate General Emiliou in *Cilevics* and their different proportionality assessment with regard to fundamental rights of minorities: Court of Justice, 7 September 2022, Case C-391/20, *Cilevičs and Others*, paras. 83-86 and Opinion of Advocate General Emiliou, 8 March 2022, Case C-391/20, *Cilevičs and Others*, paras. 95-116.

[74] M. BONELLI, *National Identity and European Integration Beyond "Limited Fields",* in *EPL*, vol. 27, 2021, pp. 544 and 549 and ff.

the focus on the restriction to free movement had the advantage of removing direct clash of values and facilitate compliance, since the solution that the Court found does not impose fundamental changes to the legal system as long as the Member State enacts any necessary adjustment to the form to issue identity or travel documents. In purely internal situations the legal arrangements may be left unchanged.[75] At the same time, however, it has rightly been noted[76] that the enjoyment of rights by rainbow families cannot only rest on free movement adjustments in countries where their rights are not equal to those of heterosexual/"traditional" families.[77]

The comparison between the approach of the ECJ and that of the Advocate General shows the implications of the different ways in which free movement could be a tool to safeguard EU common values in the domestic context, in case of clashes.

First, there is the possibility of applying free movement provisions and the proportionality review with it.[78] Such an approach entails a more intense review of the domestic policy and its Charter compliance, but, as it was the case in *Pancharevo* – or in *Coman* – allows to limit the effects to the transnational and free movement dimension (i.e., for instance, the recognition of homosexual marriage only for residence purposes or the recognition of parentage only for the issuance of an identity document, with a mutual recognition of family relationships established in another Member State).[79] The functional reasoning would protect EU values but in a limited fashion, avoiding a direct clash of

[75] With the evident problem of reverse discrimination.
[76] A. TRYFONIDOU, *op. cit.* n. 70, p. 547.
[77] This point is, under different points of view, the subject of the thought-provoking contributions of Lazzerini and Marchioro in the panel *Cittadinanza dell'Unione, tutela degli status personali e identità costituzionali nazionali: quale equilibrio?*, in the 5th AISDUE Annual Conference, *Il Diritto dell'Unione europea nei rapporti tra ordinamenti: tra collaborazione, integrazione e identità*, Università di Padova, 2-3 novembre 2023, to be published as conference proceedings.
[78] De Witte suggested that in cases of sensitive ethic or moral questions the Court could approach the proportionality review from a procedural point of view, that takes into account the external (European) perspective but without imposing external policy choices, as opposed to a substantive review that «rationalizes the national moral or ethical choice in reference to the transnational public space». See F. DE WITTE, *op. cit.* n. 14, pp. 1557 and 1570 and ff.
[79] For an analysis of the implications of the *Coman* and *Pancharevo* cases for the principle of mutual recognition, see: I. MARCHIORO, *op. cit.* n. 70, p. 27.

values without however solving the fundamental rights questions at stake and the legal implications of a recognition of family relationships only limited to movement.[80] Such an approach is at the same time more intrusive than the use of Article 2 TEU as a minimum safeguard and less intrusive because it only deals with the movement aspects.

When that solution is not available, the conflict could escalate to the engagement of Article 2 TEU, the application of which would be anyway engaged because free movement restrictions fall within the scope of EU law. Free movement of persons would be a jurisdictional trigger to then check whether the restriction complies with the essence of fundamental rights protected under Article 2 TEU. This could happen, as Advocate General Kokott reasoned in *Pancharevo*, when the stakes for the national identity are higher. At the same time, this would be a more "hands-off" review with much more profound and serious consequences if no balancing is possible and the clash between values breaks out. What remains unconvincing however, in the reasoning of the AG, is that this less intrusive review could preserve legal arrangements that still violate EU fundamental rights, albeit not in their core. This would also leave the Member State free to decide whether to grant or not a level of protection higher than the bare minimum, since there is no intrusive proportionality review carried out in light of "external" (i.e. Charter) parameters, even when affording a higher level of protection to the individuals would not fundamentally put in jeopardy the core of national identity. For instance, in *Pancharevo*, the Advocate General admitted that granting a birth certificate and Bulgarian nationality with it did not as such threaten the traditional conception of family, and yet, the protection of national identity could not tolerate such a balancing to take place at EU level.[81]

Another approach, that neither the Advocate General nor the Court went for in *Pancharevo* (nor in *Coman*), could be that the engagement of free movement helps strengthening fundamental rights in a more

[80] See Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final. The proposal is based on Art. 81 TFEU. For the competence implications on the choice between Art. 21 and Art. 81 TFEU as a legal basis, I. MARCHIORO, *op. cit.* n. 29.
[81] Opinion of Advocate General Kokott, *Stolichna obshtina, rayon „Pancharevo"*, cit. para 107.

comprehensive way by illuminating the interpretation of free movement (and attached fundamental rights) through the use of Article 2 TEU and the consistent interpretation of domestic law.[82] Indeed, in light of what Lazzerini convincingly argues in her contribution to the present conference proceedings,[83] the protection of the «right to lead a normal family life»[84] seems now increasingly distinct and additional from the right to exercise free movement without being compelled to choose between family and mobility. Then, if family reunification rights under free movement go beyond a mere tool to strengthen free movement itself, and the latter is rather the (powerful) jurisdictional trigger for those rights,[85] it would be logical that those family rights do not solely cover travel documents. In practical terms, obstacles to those rights are to be found also in areas other than residency and travel, and they may concern for instance, parental leave, schooling, succession, and all ordinary occurrences where the legal qualification of a family bond is pivotal. The recognition of family ties formed in another Member State would then have to be for all legal purposes to allow the protection of "normal family life".[86]

This would mean to take into account that the free-movement-only solution is not a silver bullet and that further steps might need to be taken that could lead to a more profound review of discriminatory national policies not limited to residence or travel rights.[87] In this scenario, Article 2 TEU could have the role of expanding the appraisal of discriminatory measures beyond strictly movement-related rights. As

---

[82] A. VON BOGDANDY, L. D. SPIEKER, *op. cit.* n. 61, p. 395.

[83] N. LAZZERINI, *Il diritto di condurre una normale vita familiare del cittadino dell'Unione "circolante": stato dell'arte e prospettive di sviluppo*, Relazione alla V Conferenza Annuale AISDUE, "Il Diritto dell'Unione europea nei rapporti tra ordinamenti: tra collaborazione, integrazione e identità", Università di Padova, 2-3 novembre 2023.

[84] Court of Justice, 14 November 2017, Case C-165/16, *Lounes*, para 52: «The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, in the host Member State».

[85] F. RISTUCCIA, *Ties That Bind and Ties That Compel: Dependency and the Ruiz Zambrano Doctrine*, in *CMLR*, vol. 60, 2023, p. 1227.

[86] A. TRYFONIDOU, *The Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: A Critical View of the ECJ's V.M.A. Ruling,* in *European Law Blog*, 21 December 2021, europeanlawblog.eu/2021/12/21/the-cross-border-recognition-of-the-parent-child-relationship-in-rainbow-families-under-eu-law-a-critical-view-of-the-ecjs-v-m-a-ruling/

[87] A. TRYFONIDOU, *op. cit.* n. 70, p. 547 and ff.

free movement would trigger already the scope of EU law and thus the application of the Charter, Article 2 TEU could act as a systemic benchmark that connect the single fundamental rights at stake (such as family life, non-discrimination).[88] The common values, including of course, equality, plurality, and non-discrimination, would then cast light on the way citizens and their families should enjoy equal participation in the European society and in its national dimensions when there is a cross-border element.

4. *Conclusions*

The analysis of the interaction between EU values and free movement of persons leads to a modest but honest doubt: does EU citizenship need explicit reference to Article 2 TEU? What are the advantages and the legal consequences of using that Article in combination with free movement and EU citizenship law?

Regardless of the answer, free movement remains a very useful tool as it confronts domestic systems with externalities and with other visions of the world that Member States need to address.[89] In this sense, EU free movement law – and EU citizenship in particular, thanks to its privileged connection to fundamental rights – offers a venue to introduce at least the question of how to protect identities and instances that lack recognition in domestic contexts, and this even if Article 2 TEU is not expressly used. Intra-EU movement, at the very least, exposes closed domestic context to alternative solutions and ensures the safeguard of a minimum standard of common values that contributes to the European identity made of plurality – even if this does not and cannot solve all issues.

Furthermore, what is interesting is that EU free movement of citizens, by epitomising both highly salient but abstract constitutional

[88] Perhaps this might seem far-fetched in light of the vagueness of Art. 2 TEU. However, that provision 2 TEU could be useful to assess the connections between the fundamental rights at stake and the way they are hindered systemically. In other words, Art. 2 TEU would serve as a "mutual amplification" similarly to what Spieker described in L.D. SPIEKER, *Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis*, in *GLJ*, vol. 20, 2019, pp. 1199 and ff.

[89] F. DE WITTE, *op. cit.* n. 14, p. 1552–53.

questions (e.g. do Europeans share a common identity? What are the limits of that identity?) and decisive pragmatic questions, could lead to the stone-by-stone construction of some form of European identity. Such a mix of day-to-day elements with lofty ambitions on the protection of values shows that the European integration which takes place through actual movement and the law built around it are contributing to the integration of societies and perhaps ultimately the formation of a European identity through a bottom-up collective path.[90] This applies all the more when people move bringing their identities, their cultures, their conflicts with them – or bringing them back to their home States (as it happened in *Coman* and *Pancharevo*). This last point bounces back in a broader question – worth researching further – concerning the role of European citizenship in the creation of a common identity through the protection of common values in a common territory (in principle) without borders. One could thus query if free movement – due to its role in enforcing those rights and expanding the personal and legal sphere of European citizens – is in itself a value to be protected and what would be the legal consequences of this.

[90] L. AZOULAI, *op. cit.* n. 2.

ABSTRACT (ITA)

Il presente contributo analizza il rapporto tra la libera circolazione delle persone, che è l'aspetto più visibile e apprezzato della cittadinanza europea, e i valori di cui all'articolo 2 TUE, che costituiscono l'identità legale dell'Unione europea. Si esaminerà dunque in primo luogo come quei valori permeino lo sviluppo della cittadinanza europea e condizionino la possibilità di esercitare i diritti di libera circolazione. In secondo luogo, ci si concentrerà sul ruolo della libera circolazione come strumento di mediazione dei conflitti valoriali e di protezione dei valori europei nei contesti giuridici nazionali.

ABSTRACT (ENG)

This paper reflects on whether, how, and with what effects does free movement of persons, that is the most visible and cherished aspect of Union citizenship, interact with the values enshrined in Article 2 TEU, that define the normative identity of the EU. The contribution in particular examines on the one hand, how those values shape EU citizenship so that the respect for those values conditions the possibility to exercise the rights attached to EU citizenship. On the other hand, whether free movement is a tool to mediate conflicts of values in the EU and protect the common European values in domestic contexts.