

CIFE Policy Paper N° 62

Gabriel N. Toggenburg*, November 6th, 2017

EU values: a fragile and outdated foundation for EU-ropean unity?

“What happens if, at some moment in time, for whatever reason, a member State (government) cannot, say, respect minority rights like marriage equality for sexual minorities? Or can't, for whatever reason, share responsibility for, say, unplanned, large migrations of refugees and their need for re-settlement? The foundational directives that they must do so or face not belonging to the Union invites inevitable crises. This is a fragile foundation upon which to build further European unity.” This is what Steve Lee concludes in *“A purpose for further European unity?”*¹ The EU should, in his eyes, focus on ensuring trade success and thereby improve standards of living: trade, economic growth and human development is a better *“purpose for further European integration”* than EU values. In fact, not only does he claim that the normative postulation for the EU Member States to share EU values is doomed to fail, he also states that, in contrast to the situation amongst African societies or the States in Latin America, there is simply no common set of values within the EU: *“the diversity is extreme”*. The following thoughts aim to provide some alternative perspectives.

1. Is it indeed the EU's “main goal” to defend its values as opposed to trade, economic growth and human development?

It is true that the EU Treaty (Treaty on European Union, TEU) has a rather solemn opening, starting off by 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”*.² Secondly, the EU Treaty defines in Article 2 these values as foundational values of the EU as well as values that are *“common to the Member States”*. It establishes six major components of values, namely *“respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”*. And, thirdly, the treaty defines in its Article 3 the promotion of these values as one of the main aims of the European Union.

However, this is only half the story. The aim of the Union to promote shared values stands alongside two more operational aims: the promotion of peace

and the *“well-being of its peoples”*. Moreover, the so called ‘EU values’ are not left in the abstract: the explicitly defined EU objectives in Article 3 of the EU treaty give them clear direction and application. The EU's objectives are, according to the lengthy Article 3, to *“offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”* The EU is also to *“establish an internal market”* which should work for the *“sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advances.”* The EU *“shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.”* just as it is an objective of the EU to *“promote economic, social and territorial cohesion, and solidarity among Member States.”*

The EU's Charter of Fundamental Rights is the EU's most prominent document when it comes to the promotion of ‘EU values’. Its preamble recalls that the individual (and that is every single person, not only those belonging to some sort of ‘minorities’) stands at the centre of European integration, as the EU *“places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice”*. In fact, the fundamental rights, as enshrined in the Charter on the one hand, promote economic activities³ and on the other, contain many social rights in its title on *“solidarity”*.

To conclude: The promotion of *“shared values”* is not the only EU ambition, nor can it be seen as an alternative to the promotion of trade, economic growth and human development. These objectives are already very prominently laid down in the EU treaties as concrete EU objectives. It does not seem appropriate to think of EU values and human development as a binary and mutually exclusive set of

ambitions. They are intertwined and it would thus be to the detriment of both if one were to be considered in isolation from the other. As EU Commissioner Jourova has recently stressed “*There will be no well-functioning single market without the rule of law, because if companies don’t believe they have legal certainty, they will not invest and innovate.*”⁴ The European pillar of social rights, as proclaimed jointly by the European Parliament, the Council and the Commission at the end of November 2017 in Gothenburg may serve as another illustration of how EU values and EU trade are two sides of the same coin - the medal of European integration.⁵

2. Do the EU values really aim at furthering European integration and unity?

The objectives of the EU, as outlined in the EU treaty, come with a caveat. Article 3 underlines that the EU “*shall pursue its objectives [only] by appropriate means commensurate with the competences which are conferred upon it in the Treaties*”. But are the EU values, as outlined in Article 2 TEU, part of an integrationist agenda that would, by its very nature, push Europe towards a future dominated by ‘more EU’? Or are EU values rather a means to prevent the achieved degree of unity being put at risk? The treaty appears to be clear on this: Article 2 TEU does not establish a new competence base allowing the EU to legislate on the basis of the six value-elements listed therein. The EU can only act where it has an explicit mandate to do so, as, for instance, in the areas of fighting discrimination or asylum law. But even in such fields, the EU values as such do not imply that there would be a primary law obligation for the EU and its Member States to adopt, for instance, the “*Council Directive on implementing the principle of equal treatment between persons, irrespective of religion or belief, disability, age or sexual orientation.*” This was proposed by the European Commission back in 2008 and is since being negotiated in the Council – so far, without any agreement being reached. Neither was there an obligation for the Council to agree on the contested Council decisions on the relocation of refugees from Greece and Italy to the other EU Member States. These decisions – later brought before the Court of Justice of the European Union by Hungary and the Slovak Republic⁶ – were taken in the EU legislative process in the same way as any other EU act. The EU values are therefore not a means to circumvent the ordinary legislative processes involving the European Commission, the European Parliament and the Council of the European Union.

It is true that the mothers and fathers of the EU treaties (the Heads of State and governments who agreed on the various treaty amendments) made the values they considered as shared between the EU and its Member States very explicit. Legally speaking, however, this does not have any implications on how much EU we should see in the future but rather what sort of EU we should witness. The value clauses in the EU treaties are hence rather defensive than offensive and have the following implications:

- All EU action, be it legislation or policies, has to conform with the basic values as defined in Article 2 TEU, though this provision would not, in itself, entitle the EU to any new policy or law making;
- Where a Member State is at “*a clear risk of a serious breach*” of the shared values, the various procedures in Article 7 TEU could be activated: This set of procedures (so far never activated) allow for the determination of such a clear risk⁷; the determination of “*the existence of a serious and persistent breach*”⁸ or, finally, the suspension of “*certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council*”⁹;
- The EU is open for applications for new members. However, according to Article 49 TEU this standing invitation applies only to any “*European State which respects the values referred to in Article 2 and is committed to promoting them*”. Moreover, in its external relations the EU has to use its policies and actions in order to “*safeguard and consolidate its values*” and “*support democracy, the rule of law, human rights and the principles of international law*”.¹⁰

It is helpful here to recall how a prominent part of the EU values, namely fundamental rights, entered the EU system. As early as the 60s the Court of Justice of the European Union established a prominent line of case law that stressed that fundamental rights – even if at that time not mentioned in the Treaties – were part of EU law. The reason for this was to prevent national Constitutional Courts from checking EU legislation against national fundamental rights, which would have seriously undermined the supremacy, effectivity and unity of EU law. In that sense EU level fundamental rights were introduced not to create more EU intervention, but to prevent existing EU intervention being undermined through the invocation of national values.

The Charter of Fundamental Rights can be characterised as the fruit reaped from unpacking and detailing the Article 2 values from a fundamental rights perspective.¹¹ It has the same legal value as the EU

Treaties and its rather defensive¹² wording confirms the submission that EU values are not a means of ‘integration by stealth’. The Charter underlines that the promotion of shared values is set against the background of the EU obligation to respect the national identities of the Member States. It states in its preamble that the EU “*contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels*”.

To conclude: the EU’s focus on values is not a perfidious weapon to boost supranational intervention, but is rather a safeguard to ensure that the current value consensus amongst states does not erode and that the EU itself stays true to its value commitments in its policies. It is not that ‘EU values’ are designed to force the EU legislator to create EU laws on how to deal with ethnic, religious or sexual minorities or EU laws on ‘refugee quotas’. Once the EU legislator (meaning not only the European Commission but also the ministers of the Member States as represented in the Council of the European Union, as well as the members of the European Parliament, directly elected by the EU citizens) has decided on a piece of EU legislation, the Member States have to implement it. One might disagree with a piece of EU legislation, but it would be ill-founded to argue against the EU treaty values because of a disagreement with one piece of legislation.

3. Are the EU values a tool to impose values held by elites against the will of EU populations? Or are they about something else?

Steve Lee refers to the results of the European Values Study in order to claim that there is “*simply no common set of European values*”. The diversity of values across the EU is described as “*extreme*” and the potential for conflicts over values in Europe “*most acute in the global landscape*”. He speaks of “*traditional values*” that emphasise the “*importance of religion, parent-child ties, deference to authority and traditional family values*”. People who embrace these values also reject “*divorce, abortion, same sex relations, euthanasia and suicide*”. To the contrary, “*secular-rational values*” place less emphasis on religion, traditional family values and authority. For persons believing in such values, divorce, abortion, same sex relations, euthanasia and suicide appear as relatively acceptable. Whereas elites across Europe may hold a common set of such secular-rational values, this is not the

case across EU populations. To assume that such a set of beliefs exist is-, in the eyes of Steve Lee, “*inaccurate at best*” – the value study showed that such a claim was “*a measurable fantasy*”.

Whereas, this is not the place to discuss the European Value Study and whether it is appropriately reflected in the above, one question does arise: are the results of the European Value Study an argument against the EU to acknowledge, protect and promote the values as laid down in Article 2 TEU? Three important points have to be clarified upfront.

Firstly, there is a huge difference between the beliefs of people and the values of a legal system like a state or an organisation. The beliefs of people and the values of a legal system might coincide but they do not necessarily have to. In many societies majorities might describe abortion as something very negative and still the law of the country might allow abortion under certain circumstances. Similarly, divorce will often be perceived as something negative and still there will be rules in place as to how to get divorced. Moreover, there will be dramatic differences of “*beliefs*” within national societies, depending on geographical areas, social status and the like. And many of the “*beliefs*” that were studied by the European Value Study (Is bad luck a reason for poverty?) are not of any relevance to EU values.

Secondly, it is a misunderstanding to perceive ‘EU values’ as something entirely distinct from national constitutional values. The EU values were not created by the EU. Rather the EU has reproduced at EU level what already pre-existed within the EU Member States. In fact, the Charter of Fundamental Rights puts it very accurately when stressing that it “*reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States*”. The three foundational stones of the EU values, as outlined in Article 2 TEU are democracy, rule of law and human rights. This trilogity stands at the very core of the constitutions in each and every EU Member State.

Thirdly, EU values do not predetermine every value-relevant policy decision. Just as at national level, these values provide merely guardrails for policy decisions. Neither democracy, nor human rights, nor the rule of law point to the one and only legally ‘acceptable’ solution when it comes to the beliefs the European Value Study has dealt with concerning

issues such as divorce, abortion, same sex relations, euthanasia, suicide, religion, traditional family values or authority. More importantly, the EU lacks the competence to deal with most of these topics.

Finally, the EU does not have a fixed idea of man that it would impose on the societies of its Member States.¹³

Already these preliminary points should show that EU values are not a tool to impose policy decisions on States against the will of people. Admittedly, there have occasionally been fears that the EU system might indirectly interfere in national moral decisions. This is exemplified by Declaration number 16, submitted by Poland, regarding the Charter of Fundamental Rights attached to the treaties.¹⁴ In fact, the common market and transborder movement may occasionally lead to indirect spill-over effects in areas that are ethically loaded. But as the case Grogan showed (a case where the Irish prohibition of abortion risked being assessed against the common market principles)¹⁵, the Court tends to take a balanced approach respecting the Member States “umbrella philosophy” which aims at shielding off unwanted ethical influences.¹⁶ It is even more important to note that morality was never an issue when in recent years possible violations of EU values were so prominently discussed. The value discussion arose when in Italy a prime minister maintained as private entrepreneur a stronghold over the medialandscape; when in Romania a fight between the Prime Minister and the President threatened to block the entire political system; when in Hungary independent institutions, including the judiciary, the Central Bank or the Data Protection Authority faced threats by the government and when the Hungarian Prime Minister announced a possible reintroduction of the death penalty; or when in Poland the Constitutional Court was disempowered by the government (a threat that was then extended to the overall judiciary).¹⁷

In fact, Article 2 TEU was introduced to guarantee a minimum of homogeneity within the constitutional construction built by the EU treaties. Since 1999, as a result of the Amsterdam treaty, this provision is also accompanied by a procedural clause in Article 7 TEU. This procedure can be activated even when Member States are acting autonomously, that is, when acting outside the areas where the EU has a competence to legislate.¹⁸ The logic for allowing the EU to intervene politically in instances where it is not entitled to intervene legally can be quickly explained: the Member States have built a Union of such density and interdependence that major changes in one national political/legal system will also have repercussions in the

other systems. For instance, in the Area of Freedom Security and Justice, judgements and decisions deriving from one judiciary have to be automatically implemented by the authorities of other Member States. This mechanism of “mutual recognition” can only function if built on “mutual trust” between the systems.

To conclude: The debate surrounding EU values has not become so prominent because the EU has developed an interest in telling States how to best deal with issues like abortion, divorce or assisted suicide. It is so topical because at least two Member States have, for a number of years now, been on a path towards leaving the shared constitutional ground, as defined by Article 2 TEU. These developments at national level create risks to the political system of the EU and the daily functioning of the Area of Freedom Security and Justice as provided by the EU treaties to all persons living within the EU. If one national legal system suffers systemic flaws, also the EU system is affected. Or as it was eloquently put: “*The judicial system in the EU is like a chain of Christmas lights. When one light goes off, others don’t light up and the chain is dark*”.⁴ It does not appear, therefore, to be an appropriate time (should such a time ever exist) to be arguing that the EU’s quest for unity should be moved from values to trade, unless the ambition is to deconstruct the EU as it currently exists. Rather the challenge today is how best to ensure that EU values remain in place – as postulated by the treaties – “shared” by all the Member States.

4. Instead of conclusions: so what is indeed wrong with the EU values?

Whereas there is nothing wrong with the EU values as such, the system to protect these values suffers from a series of discrepancies.

Firstly, there is a discrepancy between assumptions of the legal theory and experiences in practice. The EU builds on the assumption that all EU Member States are by definition upholding, in abstract terms and implementing in concrete terms, the values as outlined in Article 2 TEU. For instance, EU law establishes that, given “*the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters*”.¹⁹ In the daily operation of the area of freedom, security and justice, “*each of those States, save in exceptional circumstances, [have] to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law*”.²⁰ However, both the case law of the Court of Justice of the

European Union, together with political developments, lead us to recognise that these assumptions are ideal simplifications that may require further scrutiny in the face of reality on a case-by-case basis.

Secondly, in terms of substance, there is a discrepancy between the ambition of EU values to separate the wheat from the chaff and the concrete guidance they offer when trying to assess whether a certain behaviour falls within or outside the EU's 'Verfassungsbogen' or 'arco costituzionale',²¹ that is to say, what is (or is not) acceptable within the EU family. When the wording of Article 2 TEU was first discussed and decided upon, the drafters advocated a rather short value provision representing "a hard core of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society practicing tolerance, justice and solidarity; on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are subject to sanction".²² Taken in isolation – that is without extensive and regular data collection and comparative analysis – the Article 2 values are not so crystal-clear that Member States can discern the obligations resulting from them.

Thirdly, in terms of procedures, there is a discrepancy between the procedural armoury the EU has at its disposal in order to defend the EU's down to earth 'acquis' (EU legislation) and the procedures it is equipped with to defend the constitutional values it shares with its Member States. Whereas the former procedures (first and foremost the infringement procedure) have a low threshold, are legal in nature, efficient and part of day-to-day EU practice, the latter procedures (Article 7, Paras 1, 2, and 3 TEU) have very high thresholds (a "serious and persistent breach" can only be established by the "European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament"), do not involve substantial supervision by the Court of Justice and have so far never been applied, as they are perceived as a 'nuclear option'. The reason for this discrepancy is somewhat understandable: Member States want to avoid the EU using the exceptional procedure in Article 7 TEU to silently conquer areas falling exclusively within the competence of EU Member States by introducing a permanent monitoring exercise for the purpose of Article 2 TEU.

So what must be done to improve the current system protecting EU values? In 2016, the European Parliament

proposed the establishment of an "EU mechanism on democracy, the rule of law and fundamental rights" which, amongst other things would regularly assess the state of democracy, rule of law and fundamental rights in the Member States and develop country-specific recommendations through "a representative panel of independent experts (DFR Expert Panel) on the basis of a quantitative and qualitative review of the data and information available".²³ The mechanism should be established via an interinstitutional agreement between the European Parliament, the Council of the European Union and the European Commission. The Commission, which already in 2014 presented its new "EU Framework to strengthen the Rule of Law"²⁴ as currently applied with limited success vis-à-vis Poland, showed only a limited degree of enthusiasm for the Parliament's proposal.²⁵ Moreover, the Council (which is only slowly succeeding in transforming its "Annual Rule of Dialogue" launched at the end of the same year,²⁶ from a series of monologues into a proper exchange) is likely to be less interested in the EP's proposal. Nevertheless there are indeed avenues available to improve already existing mechanisms and procedure to better protect and promote EU values. For instance, the infringement procedure could be better used for also protecting EU values and the Charter of Fundamental Rights. More use could also be made of the EU's Fundamental Rights Agency, and existing data and analysis could be made more accessible and relevant for any debates on EU values including in the Council and the European Parliament).²⁷ There are avenues to ensure that Member States remain true to current obligations under Article 2 TEU whilst at the same time avoiding normative overstretch or a competence creep leading to a federal leap. To say that all the related discussions²⁸ are far from easy is not a valid argument for backtracking on EU-ropé's commitment to shared values and a solid set of house rules in that regard.

To conclude: Shortly before World War II Joseph Roth, the Austrian novelist, described the pre-World War I Austrian Empire as "a big house with many doors and rooms, for different kinds of people". The EU is also a big complex house for many different kinds of people. That there are some house rules determining a set of common values is not the expression of an imperial Brussels-driven presumption, nor a hidden agenda for 'more EU', but a straightforward, simple necessity to allow the big house to continue being a shared house and not a collection of rooms that risk losing their connection – when they belong together. When and where commonalities are tested, throwing house rules out of the window will not be the best recipe.

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