

Supremacy of values in the European Union. The tests of the financial crisis and refugees

Fausto de Quadros
Jean Monnet Chair ad personam
Doctor iuris, Professor at the Law Faculty of the University of Lisbon

1. Values as “*acquis communautaire*”

Since the theme of this Jean Monnet Conference centres on the values of the European Union, this provides us with an opportunity to reflect, albeit briefly, on a very current issue raised by these values.

One of the greatest innovations of the Treaty of Lisbon was, without doubt, the inclusion of a reference to the Union’s values, in Article 2 of the TEU.

However, values have been referred to in the philosophical and political lexicon of European integration since the early days. Despite not containing any formal reference to values, the Schuman Declaration of 1950 suggested that peace, solidarity and economic and social progress should be the cornerstones and the ontological foundations of integration. Later, in 1966, the first President of the Commission of the European Communities, Walter Hallstein, characterised the EEC as a “Community of Law” (“*Rechtsgemeinschaft*”), with the aim of affirming the rule of Law and its values in the integration. The Court of Justice of the European Communities was quick to adopt this same construction for itself.

Following this, in 1973, at the Copenhagen Summit, the Member States felt the need to pass the *Declaration on European Identity* in order to stress that the first enlargement of the Communities, which occurred in that year, would not call into question the values which have inspired European integration.

Subsequently, the Treaty on European Union, in the wording given to it by the Treaty of Maastricht, expressly enshrined the values by which the Union’s legal and political system should be shaped. This was the interpretation that had to be given to what was then Article F, 1 and 2, of the TEU, in the wording given to it by the Treaty of Maastricht, and, above all, to Article 6 of the TEU, in the wording later given to it by the Treaty of Amsterdam. Although the first paragraph of Article 6 is predominant, the article as a whole refers to the following structural values of the European Union: liberty, democracy, respect for fundamental rights, as they result from the European Convention on Human Rights and from the constitutional traditions common to the Member States, the rule of law and preservation of national identity.

As part of the work of the Convention on the Future of Europe, the draft Constitution presented by the European Commission, known as the “Penelope” document, expressly classified the European Union as a “Community of Values” (Article 1(1)). These values were to be “spiritual and moral values” (Article 1(2)). This idea was revisited throughout the draft

document, for example on the subject of the “external relations policy”, which was aimed, among other objectives, at “safeguarding common values”.

The final text of the Constitutional Treaty did not use the term “Community of Values”. However, as can be seen from Articles I (2) and I (3) of the Treaty, it did not ignore the existence of common values of the Union itself, the pursuit of which was imposed on the Union, including in its international relations and with the cooperation of the Member States. The Treaty included a new article, Article I-2, which stated that the Union is “founded” on values and those values were the ones listed therein.

The Treaty of Lisbon maintained that Article I-2, now Article 2 of the TEU. Accordingly, this rule became the first written rule to be listed in the European Treaties in force, and in expressly written terms, mentioned the values of the Union. In addition to the listing of values in this article, the following points should be highlighted: the Union is obliged to promote these values (Article 3(1)); these values are the values of the Union but are also “common to the Member States” (Article 2, 2nd sentence); and they must also be respected by the Union in its external relations (Article 3(5)). Yet the Treaty gives even greater strength to the meaning of the values when it defines the basis of some of them. Indeed, the second recital of the TEU’s Preamble establishes that fundamental rights, freedom, democracy, equality and the rule of law are “universal values” and they draw “inspiration” from the “cultural, religious and humanist inheritance of Europe”. The notion of “Europe’s cultural heritage” is reiterated later in Article 3(3), paragraph 4.

We must, therefore, conclude that the values of Article 2 of the TEU are part of the solid core of the European Constitution and, therefore, are part of the Union’s constitutional identity. It follows that they are part of the European public order, that they are the Union’s *ius cogens*, that is, the imperative Law of the Union. As such, these values prevail over the Treaties themselves and, hence, constitute material limits to their revision.

2. Two tests for the values

Since the Treaty of Lisbon came into force there have been at least two difficult tests of the values mentioned in the Treaties. The first was within the framework of the financial crisis and the second, more recently, is in the context of the problem of the refugees fleeing Syria.

With regard to the financial crisis, there is no question that the Union acted correctly when it required defaulting Member States to comply with the Treaties and other Law by which they were bound in the field of public finances. Yet, even so, the requirement that these States comply with the rules applicable to them by reason of their joining the Union or enhanced cooperation of the EMU should have been tempered, in proportion, by respect for the values referred to in Article 2 of the TEU, that is, the values of respect for human dignity, respect for fundamental rights (meaning those set out in the Charter of Fundamental Rights), justice and solidarity. This proportionality that we require also follows from European Union Law. Today the principle of proportionality is set out in Article 5(4), paragraph 1 of the TEU. This article prohibits Union action from exceeding that which is strictly necessary to achieve the objectives

of the Treaty, at any given time. Here European Union Law absorbed from German law the “prohibition of excess” (“*Übermassverbot*”), which was widely developed in the case law of the German Constitutional Court, and later, in that of the French *Conseil d’État*, and which was adopted at an early stage in the case law of the European Court of Justice. What was not at all clear, however, was whether, as part of the need to oblige these defaulting States to once again respect their commitments in the Eurozone, these States were asked to make an extreme effort, which was excessively intense over a short period of time and, therefore, disproportionate in relation to the fundamental rights guaranteed to their citizens by the Charter of Fundamental Rights and by the respective national Constitutions, which the Charter expressly states must be taken into consideration. This is particularly true for social rights, namely salaries, pensions and other basic social provisions, where the restrictions imposed by the IMF and by the EU often caused the standard of living of the most disadvantaged citizens of those States to fall below that required for their subsistence and, therefore, below the level called for in terms of consideration for the value of human dignity, which is the first value respect for which is imposed by Article 2 of the TEU.

A similar situation is raised with regard to the more recent issue of the refugees fleeing from the war in Syria and the local conflicts in North Africa. These refugees are fleeing desperately from war and extermination in their home countries. They are men, women and children, some of a very young age. They are whole families. They arrive at the southern borders of the European Union with only the clothes on their backs. The fact that, as yet, the European Union has no common policy regarding refugees leads to the conclusion that little can be expected from the Union in terms of solving this problem, other than the provisional measures provided for emergency situations in Article 78(3) of the Treaty on Functioning of the EU. This means the Member States have competence to define what their attitude should be regarding the entry of refugees into their territory. As we have seen, some States, up until the time these lines were written (15 September 2015), have opposed or placed conditions on granting asylum to these refugees. This position, particularly in the radical way these States have presented it, offends the values of Article 2 of the TEU. As highlighted above, these values bind not only the Union but every Member State individually and all of them as a whole. This is the interpretation that should be given to Article 2 when it establishes that these values “are common to the Member States”. And the provisions of Article 3(4) of the TEU also cover the Member States. According to this rule, the values mentioned in Article 2 have to be observed and enforced by the Union and, therefore, inclusively by its Member States, also in their external relations. Moreover, Article 3(4) establishes that in its external relations the Union and its Member States shall contribute to peace, security, solidarity and mutual respect among people, eradication of poverty and the protection of human rights, in particular the rights of the child. These aims, in connection with the values of respect for human dignity, justice, tolerance, respect for minorities and protection of children, which are all mentioned in Articles 2 and 3 of the TEU, require the Member States, as far as they are able, to adopt humanitarian behaviour different to that which has been adopted by some of them.

While the current crisis affecting the Union and its Member States is simply an economic, financial and monetary crisis, the Union can, with greater or lesser difficulty, recover from this crisis if it maintains within it the cohesion given to it by its common cultural heritage, namely by its values. But if the crisis attacks these values themselves and if, in this way, it calls into

question the very roots of the Union, that is, the very ontological and political foundations which have always inspired European integration, then we should all fear for the robustness of the European project and for the real will of all to take it forward. Since, in all certainty, the Union and its Member States do not wish to put to waste all the efforts made over sixty years by several generations in order to consolidate peace and economic and social progress in the Union and to provide Europe with the capacity to successfully face the current challenge posed by globalisation, we hope that the Union and the Member States will quickly change their attitude and give the values the importance and the strength granted to them by the Treaties.

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