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Protecting fundamental EU values: In search of a balanced approach

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Abstract

This article reflects on the increasingly contentious nature of EU fundamental values under Article 2 of the Treaty on European Union. It argues that a 'double encroachment' is taking place in this field. Under the convenient veneer of defending 'conservative' values, the governments of some EU member states have taken measures that undermine basic rights, checks and balances. But at the same time, EU institutions have increasingly embraced an expansive and progressive interpretation of EU fundamental values that restricts member states' ability to pursue conservative policies on such matters as family, gender and education. A restrained approach is advocated to strike the correct balance between the EU's necessary responsibility to protect the core dimensions of the rule of law and fundamental rights across the member states and those states' legitimate desires to filter their interpretations through the specific lenses of their societies' histories, values and democratic preferences. Some recommendations to that effect are put forward.

Keywords

EU fundamental values, Rule of law, Article 2 Treaty on European Union, EU subsidiarity, Federalism, National identities, Moral disagreements, Depoliticisation

Introduction

The EU's fundamental values, as defined in Article 2 of the Treaty on European Union (TEU), have been part of the official discourse and legal system of European integration for some time. But until recently they have not represented a significant bone of contention, either among the member states or between them and the supranational institutions.

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For various reasons, that is no longer the case. The last decade has witnessed a growing number of disputes about the correct interpretation and most effective enforcement of EU values, such as fundamental human rights and the rule of law.

In the second half of 2020, for example, a Polish and Hungarian veto over a proposed mechanism to suspend the disbursement of EU funds in cases of generalised rule of law deficiencies in any member state temporarily stalled negotiations on the next EU Multiannual Financial Framework and the attendant NextGenerationEU funding. Commotions about this matter have continued, including both a legal action against the mechanism and constant frictions between the EU institutions and affected governments (Makszimov 2021). More recently, a Hungarian law banning, among other things, any portrayal to minors of homosexuality or gender reassignment (Kovács 2022) caused uproar across the EU, including a letter of condemnation signed by 16 governments (Bayer 2023) and a damning European Parliament resolution (Rankin 2021). In short, the EU is increasingly being marred by what we might call an identity politics of fundamental rights.

This article is not concerned with existing or potential new mechanisms for protecting fundamental EU values. It only offers some thoughts on the historic–political background to the current disputes and puts forward some general recommendations that should be considered when implementing existing mechanisms or designing new ones.

From limited objectives to a Union of values

While European integration has had clearly political goals from the start, in its first decades the European (Economic) Community was only active in very precise fields for the pursuit of very specific goals, and ‘values’ did not play much of a role. There were two main drivers on the path from a community of interests to a community of law, and finally to one of values. The first was the growing strength and scope of European law. The supremacy of European law over national constitutional law, established by the European Court of Justice (ECJ) in the 1960s, coupled with the gradual expansion of EU competences to new fields, created a fear that the basic values protected in member states’ constitutions could be flouted by the European institutions. In other words, the discourse on ‘values’ first entered European law to make sure that the basic principles protected in national constitutions—the common constitutional heritage of the member states—would not be undermined by European initiatives, rather than to empower the EU to guard individual rights from the actions of member states. The second driver was the enlargement to the younger democracies of Southern, Central and Eastern Europe, which made it necessary to define more precisely the basic values that all candidate countries and member states had to respect. This is how, after complex development, the fundamental values of the EU, as defined in Article 2 TEU, emerged. For our purposes, they can be summarised simply as democracy, fundamental rights and the rule of law.

By placing EU values (art. 2) before EU goals (art. 3), the Lisbon Treaty emphasised the former’s precedence over the latter and accelerated the EU’s transition from a Union

of limited objectives to one of general values. The Treaty also encouraged EU institutions to interpretatively broaden the scope of fundamental EU values and incorporate their defence and promotion in EU policies (Amato and Verola 2018, 57–88). This trend was strengthened by the attribution of 'the same legal value as the treaties' to the EU Charter of Fundamental Rights, as well as by the legal obligation—as yet unfulfilled—for the EU to accede to the European Convention on Fundamental Rights (Schütze 2021, Chapter 12). All this justified a much more activist posture from EU institutions in the (mine)field of fundamental values and rights.

Fundamental values in today's EU: a double encroachment?

Aside from the constitutional transformation of the EU after the entering into force of the Lisbon Treaty, another crucial change—this one more cultural and political—must be kept in mind when studying the multiplication of clashes over fundamental EU values: the rise of identity politics. Traditional politics in Western democracies was animated by a universal notion of human dignity and the desire to protect a sphere of individual autonomy from arbitrary government interference. Contemporary politics, by contrast, is increasingly hijacked by loud and resentful demands for the recognition of one's identity, variously defined based on nation, religion, sect, race, ethnicity or gender. This includes both phenomena that are usually considered progressive and left-wing—such as 'political correctness', radical feminism or the various 'pride' movements of sexual minorities—and trends more typically treated as regressive and right-wing—such as the populist nationalism that has arisen in many Western countries since the Great Recession (Fukuyama 2018). As in the US, where this destructive ideological polarisation first took hold, in the EU culture wars are increasingly extending beyond the borders of single states, spilling over into the shared space guaranteed by the Union. These wars not only divide national societies, but reach directly into EU politics, pitting country against country and emboldening EU institutions to take a stance on explosive identity issues never previously considered to have been within their purview.

Over the last decade, EU identity politics has also become entangled with the rise of 'illiberal democracy' in several member states. EU institutions seem to have partly compensated for their inability to act directly against these authoritarian tendencies by adopting an increasingly militant progressive identity politics that delegitimises conservative interpretations of EU fundamental values. European Parliament initiatives championing the most progressive understanding of EU values have multiplied. The 2021 Matic report, for example, clearly aimed to include an unqualified right to 'services providing safe and legal abortions' under Article 2 TEU's definition of EU fundamental rights, despite the EU having no competence on such matters (European Parliament 2021). Moreover, in its reports and resolutions, genuine rule of law issues—such as the independence of the judiciary, civil society organisations and the media—are routinely conflated with more controversial matters, such as those affecting gender relations or LGBTQI+ people.[1]

Nor has the European Commission shown much restraint when it comes to embracing progressive identity politics, which underpin many of its measures adopted or planned

for a 'Union of equality'. For example, when the Commission champions 'the mutual recognition of parenthood' for 'rainbow families' across the Union, it prepares the ground for restricting or voiding member states' rights to adopt more conservative definitions of the family, again despite the EU having no direct competence on such matters (European Commission 2020). This increasingly associates EU policies with progressive ideological causes, unnecessarily discrediting the Union in the eyes of conservatives.

In today's EU, therefore, there is a risk of double encroachment: on the one hand, some member states are encroaching upon basic rights, such as those ensuring an independent judiciary and free media. On the other, EU institutions are increasingly embracing a progressive interpretation of EU fundamental values that de-legitimises, when not outlawing, the possibility of more conservative approaches in some member states. These twin manifestations of identity politics feed upon each other, creating a climate of ideological civil war within and, increasingly, between states.

In search of balance: some recommendations

If a double encroachment is occurring in today's EU, or at least if there are risks of it, the EU institutions must become aware of the problem and take countermeasures to establish a more restrained and balanced enforcement of fundamental values. This need not mean weaker enforcement, but rather the opposite. By adopting a more ideologically neutral approach and standing above the demands of both progressive and conservative identity politics, EU institutions would be more credibly able to enforce the essential core of fundamental values, which also happens to include those which are the least ideologically charged. This essential core primarily refers to what classical liberals have long called 'negative rights', that is, the necessary legal infrastructure of all free societies: civil and political rights such as freedom of speech, life, private property and religion; as well as fair trial provisions; free and fair elections; and basic checks and balances. There is no doubt that fundamental values, if defined in this narrow and prudent manner, are a necessary prerequisite for a decentralised federal union, such as the EU, to survive and thrive, if only because its good functioning and single market rest on national administrations and judicial bodies loyally implementing its rules. If given a more ambitious and intrusive definition, however, fundamental values can become a cause of division.

> Recommendation 1: moral disagreements cannot always be resolved in federal unions. Keep the EU out of 'morality policy' as much as possible.

Europeans disagree profoundly on questions of moral principle and their legal consequences. Naturally, then, issues such as family structure, gender relations, LGBTQI+ rights, social rights, the relationship between the state and church(es), and the role of religious symbols in public life are still highly sensitive and divisive, both between and within EU countries. Such radical moral disagreements are far from unusual in big and diverse federal unions, which have often foundered on their inability to manage them.

The desire to protect the free expression of local moral preferences from the risk of encroachment by central government is, after all, the most salient basis for federal and decentralised, as opposed to unitary, institutions. American federalism, for example, is largely a product of the individual states' desires to protect and maintain their profound differences in morals, values and cultures, while enjoying the benefits of a large economic and military union. In the last century, the moral disagreements accommodated by American federalism have included such explosive issues as capital punishment, abortion, racial segregation, alcohol prohibition, pornography, gambling, sex education, same-sex marriage and the right to die (Calabresi and Fish 2016). The much-discussed 2022 *Dobbs* v. *Jackson Women's Health Organization* decision of the US Supreme Court, which overruled the 1973 *Roe* v. *Wade* decision and reassigned to the individual states the right to regulate access to abortion, is essentially a return to this more traditional and decentralised approach to handling moral disagreements.

In federal unions, morality policy is best dealt with by agreeing to disagree, by accepting decentralised policymaking and policy heterogeneity under a rigorous principle of subsidiarity. When the federal level usurps state authority on morality policy in pursuit of a more uniform protection of 'fundamental values', it encourages unnecessary polarisation and risks jeopardising its own legitimacy (Mooney 2000). The federal spirit is demanding: its essence lies in the ability of all actors to exercise self-restraint and to tolerate, within the same compound polity, values that they might find abhorrent and contrary to their first principles.

Recommendation 2: supranational institutions should behave as impartial guardians of rules interpreted as consensually as possible.

In a complex and highly integrated federal union, however, there are bound to be instances when supranational institutions cannot remain completely aloof from morally contentious values. In such cases, it is essential that they behave as impartial guardians of rules interpreted as consensually as possible, not as promoters of a progressive agenda. This applies first and foremost to the two supranational courts of Europe—the ECJ and the European Court of Human Rights (ECHR)—which both perform essential constitutional roles but obviously have no political mandate.

The ECHR famously treats the Convention for the Protection of Human Rights and Fundamental Freedoms as a 'living instrument', seeing human rights as ever-expanding and gradually being locked into ever stronger supranational safeguards (Pin 2019). This was not always so and need not always be so. In tune with its forgotten conservative origins (Duranti 2017), for many years the Strasbourg court ensured the protection of core human rights while granting states the latitude necessary to interpret them in light of their differing preferences and traditions. This attitude has recently been shed in favour of a doctrine that more aggressively advances the prevailing progressive values, restricting the freedom of more conservative states (Clarke 2017). The same can be said of the ECJ (Grimm 2016, 295–312). Over the last 20 years, both courts have adopted ambitious

and progressive definitions of democracy, the rule of law and human rights. For example, under their rulings the principle of equality has been transformed from a limited one focused on the neutral arbitration of conflicts among market operators to a much more intrusive concept of equality as non-discrimination (Pin 2019, 237–40). The same can be said, as explained above, of the two supranational political institutions of the EU, the Commission and the Parliament. The 'progress-bound' judicial doctrines of the ECJ and ECHR and political agendas of the Parliament and Commission have certainly been contributing factors to the rise of Eurosceptic populism that purports to protect threatened traditions and cultural identities. Abandoning these doctrines and agendas in favour of, respectively, judicial and political restraint would therefore seem wise.

The position taken by centre–right forces in European Parliament votes on morally contentious issues also deserves to be mentioned here. Based on the current political composition of the Parliament, centre–right support is indispensable to approve any of the legislative proposals and resolutions that promote divisive interpretations of fundamental rights. Centre–right forces could therefore act more resolutely as the guardians of a robust notion of subsidiarity in the field of fundamental rights. They should reject initiatives that promote expansive and divisive interpretations of Article 2 TEU on strictly constitutional grounds, as opposed to being dragged into a discussion of the substantive issues involved, on which positions can, and do, differ. This would likely widen the legitimacy of the European project by showing that a united Europe is not necessarily inimical to conservative values, and that conservatism and Europeanism can be perfectly compatible. It would also take away any residual justification from governments pursuing an authoritarian agenda under the convenient veneer of defending 'conservative' values against the 'progressive' agenda of the EU.

Recommendation 3: fundamental values should always be interpreted in light of a concern for subsidiarity and national identities.

Rights never exist in a historical, political and cultural vacuum. And yet the very mechanisms that normally trigger the proceedings of the ECHR and ECJ—the 'pilot judgement' and 'preliminary ruling' respectively—'always posit . . . an individual vindicating a personal, private interest' against the public good as perceived in the community to which he belongs, thus ultimately placing him 'at odds with his or her thicker national political space' (Joseph Weiler, in Pin 2019, 241). This is less destabilising for national cultures and democracies when it is rights of access to the market that are at stake. However, when supranational institutions act to enforce 'progressive' values on issues characterised by fundamental moral disagreements, the risk increases that this both encourages polarisation and restricts the scope for national democratic deliberations, thereby fomenting Euroscepticism.

Partial remedies to counterbalance such tendencies have been made available and gradually strengthened since the Maastricht Treaty, chief among them the protection of national cultural and constitutional identities and the principle of subsidiarity, currently provided for in Articles 4(2) and 5 TEU respectively. In some cases, the invocation of national identity by some member states has appeared to mask the desire to pursue

undisturbed an authoritarian transformation of national legal and political systems. Against that, it has been rightly observed that the treaties should be read as a whole: the constitutional identities of the member states are to be respected only as long as they are compatible with the founding values of the Union listed in Article 2 TEU and the commitment to guaranteeing fundamental rights (Faraguna 2017). However, the injunction to read the treaties as a whole is not only valid for member states which hide their authoritarianism behind the concept of constitutional identity. It is equally valid for supranational institutions which promote the most progressive interpretation of fundamental EU values based on a reading of Article 2 that neglects the need to respect cultural diversity and subsidiarity. After all, as the noted jurist Joseph Weiler argues, the 'political and cultural specificity of one's own unique national identity' is an extension of one's dignity as a unique and irreplaceable human being. By undermining it, we risk compromising, at least to an extent, this very dignity (Weiler 2020, 98).

> Recommendation 4: resist the 'culture of rights', which undermines subsidiarity and democracy.

More generally, when dealing with the defence of fundamental values, policymakers—especially those with conservative and Christian Democratic leanings—should resist the abstract conception of rights that often seems to underpin them in EU discourse.[2] Such a conception seems particularly ill-suited to a supranational federal union based on subsidiarity, such as the EU. By mandating the organic construction of political order from the bottom up and demanding that higher and bigger entities be at the service of the lower and smaller ones, the philosophy underpinning the principle of subsidiarity is incompatible both with any notion of abstract rights and with the progressive fiction of totally free and self-determining individuals. On the contrary, its starting point is the natural embeddedness of responsible persons in multiple concentric communities from the family up to the EU. Therefore, 'subsidiarity implies a relativisation of rights: a permanent questioning, not of their necessity, but of their content.' Subsidiarity is incompatible 'with petrified and sacralised rights' (Million-Delsol 1993, 76–9; author's translation). And how can one define the rights constantly brandished in the political discourse of today's EU, if not as 'petrified' and 'sacralised'?

Relatedly, constitutionalising at the supranational level an ever-expanding list of rights whose exact content is still contested in many member states also means reducing the scope for legitimate democratic debate and disagreement at the national level. This 'depoliticisation' of debates that go straight to the heart of national cultures and identities encourages the rise of right-wing Eurosceptic populism (Pin 2019, 241–2). A flawed and ultimately anti-pluralist conception of European integration is to blame for this, as are the equally flawed and anti-pluralist notions of 'illiberal democracy'.

Conclusion

The interpretation and enforcement of fundamental values in the EU are becoming increasingly contentious. This is not surprising. The experience of other federal unions in history,

from the US to Switzerland, confirms that such matters are among the most intractable and disruptive challenges these kinds of polities are confronted with. Wisdom and restraint are needed from all sides to strike the correct balance between the EU's necessary responsibility to protect the core dimensions of the rule of law across the member states and those states' legitimate desires to at least partly filter their interpretations through the specific lenses of their societies' histories, values and democratic preferences.

It is essential to avoid the polarisation of the EU into two opposing camps separated by an unbridgeable distrust. In one camp there is concern that in some member states a systematic and conscious attempt to subvert basic checks and balances is ongoing, and that respect for the EU principle of loyal cooperation can no longer be assumed. In the other there is fear that the EU institutions have come to embrace and promote an expansive and progressive definition of fundamental values that could restrict the member states' ability to pursue conservative policies on such matters as family, gender and education.

For the long-term sustainability of the European project, all sides must accept that the Union ought to be able to protect the rule of law and basic freedoms if there is clear and indisputable evidence that they have become imperilled in some member states. However, it must also be understood that the Union's definition of rule of law and fundamental rights ought to be broad and flexible enough to allow a degree of internal constitutional differentiation that reflects the specificities of the 27 different member states. Only this approach has any chance of restoring trust, which is the most invaluable commodity for the survival of a supranational union such as the EU.

Notes

1. See, for example, European Parliament (2018). Breaches listed in the report include failing to adapt working conditions for pregnant or breastfeeding workers, discriminating against the LGBTQI+ community and gender stereotypes in new school textbooks.
2. For a general discussion of the problem, see Biggar (2022).

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