

Romain Tinière

University of Grenoble, France

romain.tiniere@univ-grenoble-alpes.fr

ORCID: 0009-0002-7568-6310

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From Fundamental Rights to Values: The Story of a Return Journey¹

1. Introduction

Enshrined in Article 2 of the Treaty on European Union (TEU) since the Treaty of Lisbon, the founding values of the European Union have close material links with fundamental rights. This is clear from their wording, which reveals considerable overlap between the two concepts, the founding values, including respect for human dignity, freedom, equality “and respect for human rights, including the rights of persons belonging to minorities,” these being “common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.” Admittedly, Article 2 TEU also mentions democracy and the rule of law among these founding values, which are not strictly speaking fundamental rights. But both of these values are inseparable from fundamental rights, both in their concrete expressions, which call on some of these rights, and in their material interdependence to ensure their effectiveness. As there can be no democracy without respect for the rule of law and fundamental rights, this statement remains true for each of the three terms of this proposition. Indeed, the third paragraph of the preamble to the Statute of London establishing the Council of Europe expresses the same thing, recalling the “spiritual and moral values (...) which are at the origin of the principles of individual freedom, political liberty and the rule of law, on which all genuine democracy is founded.”

While the links between the founding values of the Union and fundamental rights are close, it has to be said that the two provisions of the Treaty on European Union devoted to them seem to ignore each other. There is no formal reference to the notion of fundamental rights in Article 2 TEU, which prefers the more international reference to human rights, and no mention of values in Article 6 TEU on the protection of fundamental rights within the Union. Despite their close material and conceptual links,

¹ This text is an extract from a talk given at the IRDEIC doctoral workshops in Toulouse in May 2024 on the founding values of the EU.

the founding values of the European Union and fundamental rights would appear to evolve in EU law in distinct spheres.

The purpose of this brief article is to show that this is not the case, through the history of the path that led from the consecration of the protection of fundamental rights to the protection of values, then the reverse path from values to rights, before trying to draw some lessons from this to-and-fro movement.

2. From fundamental rights to values

There is no need here to go into detail on the initial silence of the founding treaties on the question of fundamental rights. Initially deemed unnecessary in view of the economic purpose of European integration, and risky in view of its potential constitutional scope, it is totally absent from the Treaties of Rome, with the exception of Article 119 TCEE concerning the prohibition of discrimination in remuneration between men and women, pushed for by France to avoid German social dumping. The same applies to values, which are also absent from the Treaties on the European Communities, apart from a vague reference to safeguarding peace and freedom in the preamble.

It was through the practical application of Community law in the Member States, and particularly in Germany and Italy, that the protection of fundamental rights became an imperative for the Court of Justice of the European Communities. In order to preserve the primacy of its law, the Court recognized the existence of general principles of law protecting fundamental rights, such as the right to property,² the freedom to pursue an economic activity,³ the right to a fair hearing,⁴ and the right to protection of privacy,⁵ in a body of case law consisting mainly of rulings on preliminary questions. Fundamental rights, thus, made their entry into Community law, not through a general proclamation but through specific, concrete problems submitted to the courts.

From the late 1970s onwards, and especially in the 1980s and 1990s, the corpus of fundamental rights guaranteed as general principles of law grew with the number of cases brought before the Court of Justice. So much so, in fact, that several institutional players, including the European Parliament, envisaged the possibility of a solemn proclamation of fundamental rights at European Union level. Although attempts to provide the Communities and then the Union with a catalogue of rights failed during this period, European Treaties nevertheless progressively incorporated rather general references to these rights. The preamble to the Maastricht Treaty, for example, refers to "attachment to the principles of liberty, democracy, respect for human rights and

² ECJ, Judgment of 14 May 1974, *Nold KG v. Commission*, C-4/73.

³ ECJ, Judgment of 13 December 1979, *Hauer*, C-44/79.

⁴ ECJ, Judgment of 13 February 1979, *Hoffman La Roche*, C-85/76.

⁵ ECJ, Judgment of 21 September 1989, *Hoescht*, C-46/87 and C-227/88.

fundamental freedoms, and the rule of law.” This is also, and above all, true of the Treaty of Amsterdam, which inserts a first paragraph into Article F, now 6 TEU, stating that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” While Article 6(1) of the Amsterdam Treaty refers to principles rather than values, the Charter and then the Lisbon Treaty took this step in two stages. The preamble to the Charter refers to a Union “founded on the indivisible, universal values of human dignity, freedom, equality and solidarity” and “founded on the principle of democracy and the rule of law,” foreshadowing Article 2 TEU, the wording of which is recalled at the start of this article, and which now refers only to values.

Leaving aside political explanations such as the desire expressed by Member States since Maastricht to bring European integration closer to their citizens, by demonstrating that Europe is not only concerned with economics and trade, but also with rights and values, how can we justify this gradual evolution of primary law towards the proclamation of the Union’s founding values? Admittedly, the fact that the Member States all belong to the Council of Europe and have signed up to the European Convention on Human Rights, as well as the existence of national standards protecting fundamental rights within their respective legal systems, justifies one’s sense of the common, shared nature of these values among Member States. But what about the founding character of these values for the Union itself? Before the Charter became legally binding with the entry into force of the Lisbon Treaty, the general principles of Community law identified by the Court of Justice in its case law constituted the sole formal source of protection for fundamental rights within the Community legal order. Present in Article F(2) TEU as early as the Maastricht Treaty, and subsequently renamed 6(2) following the Amsterdam revision, the general principles of Community law, thus, constitute the only tangible legal basis for the assertion that the Union is founded on a certain number of principles (which subsequently became values) such as liberty or “respect for human rights and fundamental freedoms.”⁶

In this sense, the founding principles that have become the founding values of the Union can be seen as a form of generalization of the fundamental rights initially enshrined as general principles of law. In other words, it is because the Community and then the European Union have ensured the concrete protection of a certain number of specific fundamental rights that the Union can now claim to be founded on values such as dignity, freedom, equality, and, more generally, respect for human rights.

⁶ To complete the analysis, it is possible to link the proclamation of the value of respect for the rule of law to the concrete progress of the community and then of the union of law through the gradual reabsorption of areas excluded from the jurisdiction of the Court of Justice.

3. From values to fundamental rights

Now formally founded on values by virtue of Article 2 TEU, the European Union under the Treaty of Lisbon has embarked on a process of concretizing these values. More specifically, it is the Court of Justice which, faced with the challenge posed by certain Member States, has endeavoured to follow the path from fundamental rights to values in the opposite direction, with the aim of making them more effective. While the founding values can play an important role in the narrative of European integration, highlighting what the Member States have in common, it is not easy to ensure that they are actually respected. There are two main reasons for this. First, their symbolic significance is such that any allegation of violation against a Member State must be approached with great caution. The guarantee mechanism set out in Article 7 TEU reinforces this by requiring either “clear risks of a serious violation” or a “serious and manifest violation” of these values before it can be triggered. Not only are these values both founding and common to the Member States, but only their serious violation is likely to trigger a finding of violation. Second, the values set out in Article 2 TEU are, by definition, vaguely formulated, making it difficult to envisage a more specific, less systemic mobilization before a judge than that provided for in Article 7 TEU.

In fact, it seems that values need fundamental rights to be expressed in concrete terms. This, at any rate, is what emerges from the case law of the Court of Justice, which in recent years has endeavoured to give concrete form to some of the values enshrined in Article 2, based on the Charter of Fundamental Rights.

The first illustration is well known. It is the concretization of the value of respect for the rule of law by Article 19(1)(2), which allows the link to be made with the right to effective judicial protection recalled by Article 47 of the Charter.⁷

The value of democracy has also been given concrete expression through freedom of expression and the principles of representative democracy. In the *Spacenet* judgment, for example, the Court noted that freedom of expression is “one of the essential foundations of a democratic and pluralist society, and one of the values on which, in accordance with Article 2 TEU, the European Union is founded,”⁸ while in the *Puppinck* judgment it established a link between this value and Article 10(1) TEU, stressing that “the functioning of the Union is based on representative democracy, which gives concrete expression to the value of democracy.”⁹ Continuing this line of reasoning, the Court adds that this principle of representative democracy is itself implemented by Article 14(3) TEU, which stipulates that the members of the Union

⁷ From CJEU, Grand Chamber, Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16.

⁸ CJEU, Judgment of 20 September 2022, *Spacenet*, C-793 and C-794/19, pt 59. See also CJEU, Grand Chamber, Judgment of 4 October 2024, *Real Madrid Club de Fútbol*, C-633/22, pt 49.

⁹ CJEU, Grand Chamber, Judgment of 19 December 2019, *Puppinck*, C-418/18 P, pt 64.

institution that is the European Parliament are elected by direct universal suffrage, free and secret, for a five-year term. It is also expressed in Article 39(2) of the Charter.¹⁰

This is also the case with the value of solidarity, which for the Court is embodied in the European budget, as it points out in a judgment in which, more generally, it makes an almost exhaustive inventory of the existing links between the values and provisions of the Charter and the Treaties.¹¹ For the Court, “the preamble to the Charter recalls, in particular, that the Union is founded on the principles of democracy and the rule of law, and recognizes the rights, freedoms, and principles set out in that Charter. Articles 6, 10 to 13, 15, 16, 20, 21, and 23 of the Charter specify the scope of the values of human dignity, freedom, equality, respect for human rights, and non-discrimination and equality between men and women, as set out in Article 2 TEU. Article 47 of the Charter and Article 19 TEU guarantee in particular the right to effective remedy and the right of access to an independent and impartial tribunal established in advance by law, with regard to the protection of rights and freedoms guaranteed by Union law. Furthermore, Articles 8 and 10, Article 19(1), Article 153(1)(i), and Article 157(1) TFEU specify the scope of the values of equality, non-discrimination, and equality between women and men, and enable the Union legislator to adopt secondary legislation aimed at implementing these values.”¹²

It is clear from this enumeration of the Court’s case law that all the values set out in Article 2 TEU are likely to find “concretization,” “clarification,” or “implementation” in various provisions of the Charter and Treaties, on which the Court may have to rely to ensure compliance.

We are thus witnessing the opposite of the movement that led to the emergence of the Union’s founding values: the rise in generality of rights has been followed by a phase of concretizing values into rights. All this is a way back to the starting point, you might say?

4. Conclusions: Lessons from the trip

However, the journey from rights to values, and then from values to rights, has not been in vain, as it has at least strengthened the place and role of fundamental rights within the Union’s legal order. Two main developments can be noted.

The first is that the right to an effective remedy and the right of access to an independent and impartial tribunal established in advance by law can now transcend the boundaries set by Article 51 of the Charter, which limits its application to national situations involving the “implementation” of Union law. Indeed, it is now to the “areas

¹⁰ CJEU, Grand Chamber, Judgment of 19 December 2019, *Junqueras Vies*, C-502/19, pts 63–64 and 86.

¹¹ CJEU, Plenary Session, Judgment of 16 February 2022, *Hungary v. Parliament and Council*, C-156/21, pt 129 then 156–163.

¹² *Ibid.*, pts 157–158.

covered" by Union law that we can refer for this law by virtue of the terms retained by Article 19(1)(2) TEU. However, the difference is not merely cosmetic, since the Court can now rule on compliance with this right by national judicial systems without having to prove the existence of a link with the application of Union law. For the time being, the Court's case law has been confined to examining the judicial systems of Poland,¹³ Romania,¹⁴ and Malta,¹⁵ but in principle there is nothing to prevent it from ruling in the future on the independence and impartiality of any national court, be it supreme or constitutional.

The second evolution resulting from this back-and-forth between rights and values is the strengthening of the place and weight of fundamental rights, which is the result of the combination of these two concepts. Two examples support this analysis.

The first illustrates the spread of fundamental rights within the Union's legal order, with the addition by regulation 2021/1060 on European funds of horizontal principles (Article 9) and favourable conditions (Article 15(1)) linked to compliance with the Charter of Fundamental Rights. The fact that an area so far removed from the protection of fundamental rights incorporates this issue clearly demonstrates a phenomenon of constitutionalization, with fundamental rights spreading well beyond their usual perimeter, which can only result from the combination of the formalization of values in article 2 TEU and the incorporation of the Charter into primary law.

The second example concerns the reinforcement of the obligation to respect fundamental rights. An analysis of the Court's case law suggests that its reminder of the link between rights and values strengthens the legitimacy of its intervention in favour of better protection. This is the case when it comes to the delicate question of how personal data protection and the right to respect for private life fit in with the imperatives of public security, as expressed in the authorities' choice to retain connection data in a general and undifferentiated manner.¹⁶ The same applies to the reminder of the founding values of the Union in cases in which the Court must reconcile the effectiveness of mutual recognition mechanisms such as the European arrest warrant with the protection of fundamental rights.¹⁷ In each case, the appeal to values is intended to demonstrate the importance of effective respect for fundamental rights, given the founding and common nature of these values.

Weighed down by the weight of values, fundamental rights are thus opening up new perspectives within the Union's legal order, proof that the journey to values was certainly not in vain.

¹³ CJEU, Grand Chamber, Judgment of 24 June 2019, *Commission v. Poland (independence of the Supreme Court)*, C-619/18.

¹⁴ E.g. CJEU, Grand Chamber, Judgment of 21 December 2022, *Eurobox Promotion e.a.*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.

¹⁵ CJEU, Grand Chamber, Judgment of 20 April 2021, *Repubblika*, C-896/19.

¹⁶ *Spacenet* ruling cited above. See also CJEU, Grand Chamber, Judgment of 6 October 2020, *Quadrature du net*, C-511/18, C-512-18 and C-520/18, pt 114.

¹⁷ E.g. CJEU, Grand Chamber, Judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU and C-412/20 PPU, pt 39 or CJEU, Judgment of 22 February 2022, *Openbaar Ministerie (Court established by law in the issuing Member State)*, C-562/21 PPU, pt 45.

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Summary

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From Fundamental Rights to Values: The Story of a Return Journey

A reading of the Treaty on European Union may give the impression that the Union's founding values and fundamental rights constitute two distinct entities operating in different spheres. This short article seeks to show that this is not the case and that the interactions that may arise between these two concepts are likely to strengthen the protection of rights and freedoms within the EU.

Keywords: EU values, democracy, rule of law, fundamental rights.

Streszczenie

Romain Tinière

Od praw fundamentalnych do wartości – historia powrotnej podróży

Lektura Traktatu o Unii Europejskiej może wywołać wrażenie, że wartości założycielskie Unii i prawa podstawowe stanowią dwa odrębne byty działające w różnych sferach. Przedstawiona analiza zmierza do wykazania, że nie jest to prawdą i że interakcje, jakie mogą powstać między tymi dwoma koncepcjami, mogą wzmocnić ochronę praw i wolności w UE.

Słowa kluczowe: wartości Unii Europejskiej, demokracja, państwo prawa, prawa podstawowe.