

## Chapter 5

# Legal Lens



The question whether references to ethics should be understood as an unconditional reference (to one or more philosophical theories), or only as pointing towards a certain idea (question No. 3), has already been answered in the previous chapter (in terms of the second option). This question (concerning the philosophical lens) is separate from another question (now, concerning the legal lens), whether these notions shall be imported in an unaltered way (i.e. absolute approach), or whether they shall be imported by placing them in the legal context (i.e. relative approach? As mentioned above,<sup>1</sup> for the relation of law and science, a relative approach has been preferred.<sup>2</sup> I have argued elsewhere<sup>3</sup> that references in legal texts to ethics and morality have to be seen within the limitation that those philosophical concepts necessarily have to be reflected within the legal order itself.<sup>4</sup> In other words, concepts that cannot, in one way or another be traced in the legal order itself (and which therefore are alien to this legal order), consequently cannot come into consideration. The same argumentation is also upheld in this book; hence, these normative theories and other philosophical concepts have to be imported in a relative way and need to be reflected in the EU legal order. While this legal order can be seen as autonomous, it shall nevertheless respect principles of justice (relative autonomy). Thus, in the following, this legal lens will add some pieces to further enrich the lattice developed so far, and, as we will see, will confirm some of the findings of the previous chapter.

---

<sup>1</sup>*Supra* Sect. 1.4.

<sup>2</sup>Wahlberg (2010, 208, 213, 2017, p. 63), Wahlberg and Persson (2017).

<sup>3</sup>Frischhut (2015).

<sup>4</sup>This approach has previously also been adopted by the Austrian Supreme Court judgment of 18 April 2012, *Prostitution not against public morals*, 3 Ob 45/12g, para 4.6.1: “When it comes to the understanding of ‘public morals’, generally accepted moral concepts can be taken into account. This applies, however, with the limitation that moral concepts are only relevant to the extent that they have been reflected in the legal system itself” (own translation).

## 5.1 From the *Schuman Plan* to Today's Vertical Distribution of Competences

On 9 March 1950, the then French foreign minister and founding father of the EU, Robert Schuman highlighted, amongst others, the following idea in his ground-breaking declaration<sup>5</sup>: “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity”.<sup>6</sup> The same applies to the ‘ethical spirit of EU law’, which has developed since then, and which will continue to do so in the future. The background of this declaration was World War II and its atrocities. Hence, the atmosphere of this time might have been inspired by deontology, while neo-functionalism can rather be seen as consequentialist.

This integration process, started with the “pooling of coal and steel production” and has further developed according to the spill-over phenomenon, resulting in the vertical distribution of competences,<sup>7</sup> as we know it today. This distribution of competences to pass legal documents can also have an impact on the ethical spirit. For instance, ‘public health’ falls within the MS competence. As we have seen above,<sup>8</sup> in order to alleviate the fear of MS that, based on economic single market rights, patients could seek unethical treatment abroad, the relevant EU directive states as follows: “[n]o provision of this Directive should be interpreted in such a way as to undermine the fundamental ethical choices of Member States”.<sup>9</sup> This is quite remarkable as the directive, besides a clear statement in EU primary law,<sup>10</sup> emphasizes several times the competences of MS in this regard, that is to say from a legal perspective. From a strictly legal angle, this reference to ethics would not have been necessary; nevertheless, it clearly demonstrates the increasing role of ethics in EU law. Although this example, like others classified in this ‘protection shield’ category, is not very ambitious, it can be taken as a role model where the vertical distribution of legal competences can also play a role for the question at which vertical level ethical questions would be decided. These considerations can be summarised as follows: based on this vertical distribution of competences, one can, in case of doubt assume that the

---

<sup>5</sup>This plan was initiated by Jean Monnet and Paul Reuter; Simon (1998, p. 16). On Monnet, see Schwabe (2016).

<sup>6</sup>Source: [https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en).

<sup>7</sup>Art 2-6 TEU.

<sup>8</sup>*Supra* Sect. 3.3.3.3, at note 351.

<sup>9</sup>Directive patient mobility, recital 7.

<sup>10</sup>Art 168(7) TFEU: “Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them [...]”.

legal competence also includes the competence for ethical questions.<sup>11</sup> On the other hand, if EU secondary law explicitly refers to the MS for deciding issues of ethical nature, this goes in the same direction as this presumption. Likewise, as in similar cases, the EU's common values can be a limitation to this 'national competence'.

## 5.2 Preambles TEU and CFR

Based on what we have already seen in Sect. 3.1.1, the preambles of the TEU and the CFR provide important guidance with regard to the ethical spirit of EU law.

Searching for the groundwork of ethics in EU law, one comes across the preamble of the CFR, which refers to the "spiritual and moral heritage" of the Union.<sup>12</sup> It is worth mentioning that the preamble only uses the wording "conscious of", as opposed to the wording used for the common values<sup>13</sup>: "based on",<sup>14</sup> respectively "is *founded on* the indivisible, universal values of human dignity, freedom, equality and solidarity".<sup>15</sup> In terms of the already covered terminology, presumably the term of 'morality' has been chosen, in order to refer to a factual (historically developed) situation, and not to the one of 'ethics', which would be the philosophical approach to define morality. As one might already suspect, these terms ('spiritual' and 'moral' heritage) are not defined regarding their content. In terms of geography, they can be seen as to refer to Europe, presumably as composed at the time of the drafting of the Charter.<sup>16</sup> We are faced with the same challenge that we have already seen many times in this book, that is to say the reference of law to another discipline, which in this case requires primarily a historical approach.<sup>17</sup> Hence, this moral heritage does not define the 'ethical spirit', it just adds up to the lattice identified so far.

This goes hand in hand with the reference to the "cultural, religious and humanist inheritance of Europe", from which the TEU draws 'inspiration'.<sup>18</sup> While the previous reference of the CFR (i.e. the 'spiritual and moral heritage') opened the legal field for this 'ethical spirit',<sup>19</sup> this second reference can fill it regarding its content. Let us start with the reference to humanism.<sup>20</sup> Although covering a broad range, humanism

---

<sup>11</sup>I already argued this way in Frischhut (2015, p. 570).

<sup>12</sup>CFR, recital 2.

<sup>13</sup>*Infra* Sect. 5.4.

<sup>14</sup>CFR, recital 1.

<sup>15</sup>CFR, recital 2, which continues, "*based on* the principles of democracy and the rule of law"; emphases added.

<sup>16</sup>However, this cannot be taken as a reason against including future MS, given the dynamic interpretation of EU law by the CJEU.

<sup>17</sup>For a brief overview, albeit primarily from a Christian perspective, see Rauscher (2005).

<sup>18</sup>TEU, recital 2. Similar to what was mentioned before (notes 14 and 15), this is also a 'softer wording'.

<sup>19</sup>N.B. Besides all the other examples identified so far in this book.

<sup>20</sup>'Culture' can also have in impact on the ethical spirit. However, since this influence is of a rather indirect nature, it will not be pursued further.

can be understood as “any philosophical perspective that assigns preeminent value to human beings, their experiences, their interests, and their rights”,<sup>21</sup> “based on the freedom, responsibility, and rationality of human beings”.<sup>22</sup> This goes hand in hand with the recitals of the preambles of the CFR, which “places the individual at the heart of [the Union’s] activities”,<sup>23</sup> as well as of the TEU, according to which “decisions are taken as closely as possible to the citizen”.<sup>24</sup> Recently in the context of ethical challenges of robotics, the EP referred to the “intrinsically European and universal humanistic values that characterise Europe’s contribution to society”.<sup>25</sup>

The two references in the CFR (“spiritual and moral heritage”) and in the TEU (“cultural, *religious* and humanist *inheritance*”)<sup>26</sup> require a few words on the relationship between EU law and religion. When the European Convention drafted the CFR, there were ‘highly emotional disputes’<sup>27</sup> concerning a possible reference to God (*invocatio dei*), respectively a reference to (one or more) religion(s).<sup>28</sup> These have finally been solved by deviating language versions referring to the already mentioned ‘spiritual and moral heritage’, whereas only the German version refers to religion and none of them to ‘God’.<sup>29</sup> Therefore, on the one hand, the reference to the ‘spiritual and moral heritage’ can neither be seen as a commitment to a single religion (for example, Christianity), nor to several religions (such as, Christianity, Judaism, while excluding Islam); on the other hand, also atheists and agnostics should be seen as bearers of this heritage.<sup>30</sup>

‘Time is a great healer’, and this heated dispute was finally ‘resolved’ years later with the amendments brought by the Lisbon Treaty, as the second recital of the TEU refers to the inspiration, drawn “from the cultural, religious and humanist inheritance of Europe”. A similar analysis applies with regard to humanism. As mentioned above,<sup>31</sup> a reference to humanism in an earlier draft<sup>32</sup> in the end has not made it into the preamble of the CFR, and now figures in this (second) recital of the TEU.

We have already seen another similarity between religion and humanism in the Polish GMO case mentioned above, where Poland had argued with “Christian and Humanist ethical principles”, opening the door for intriguing questions of the rela-

---

<sup>21</sup>Steelwater (2012, p. 674); see also *supra* Sect. 1.5, at note 108.

<sup>22</sup>Radest (2002, p. 411).

<sup>23</sup>CFR, recital 2.

<sup>24</sup>TEU, recital 13.

<sup>25</sup>EP resolution robotics, recital U.

<sup>26</sup>Emphases added.

<sup>27</sup>Meyer (2014, p. 70).

<sup>28</sup>Schmitz (2005, 86), refers to the influence of French laicism and to the distance of many European citizens from church and religion.

<sup>29</sup>For further details, see Meyer (2014, pp. 70–73).

<sup>30</sup>Meyer (2014, p. 71).

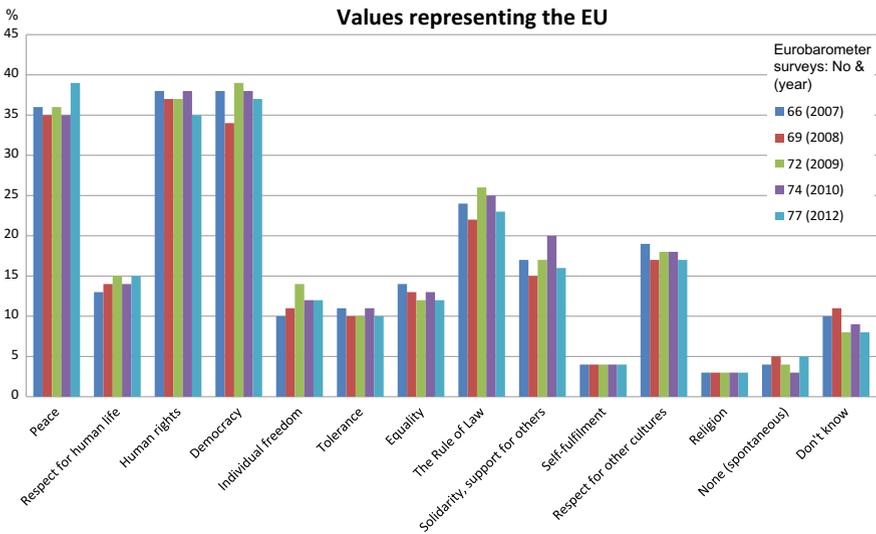
<sup>31</sup>*Supra* Sect. 1.5, at note 109.

<sup>32</sup>CONV 722/03 of 28 May 2003, p. 2.

tionship of EU law and religion, as well as humanism.<sup>33</sup> However, since Poland did not fulfil its burden of proof, there was no room for the CFEU to make any statement in this regard; however, against the background of the principle of judicial restraint, one had not much to hope for in terms of content anyway.

The reserved relationship of EU law and religion is somehow also confirmed by some Eurobarometer surveys. During the last years, peace, respect for human life and human rights have constantly been ranked top in terms of personal values of Europeans, and peace, human rights and democracy in terms of values representing the EU (see Fig. 5.1), while religion has been constantly ranked very low in both categories.<sup>34</sup>

Nonetheless, it would be wrong to state that there is no influence of religion for our quest for the ‘ethical spirit of EU law’. Moyn has convincingly argued that “religious constitutionalism” had some influence and inspired the concept of dignity.<sup>35</sup> To make a long story short, religion has had an influence on the understanding of ‘human dignity’, which plays a key role for the ‘ethical spirit of EU law’.<sup>36</sup> In summary, one can speak of an indirect influence of religion on the ethics of the EU.



**Fig. 5.1** Eurobarometer surveys on EU values [Source Eurobarometer 77 (2012), pp. 9 and 12; Eurobarometer 74 (2010), pp. 32 and 33; Eurobarometer 72 (2009), Vol. 2, pp. 148 and 152; Eurobarometer 69 (2008), 1. Values of Europeans, pp. 15 and 22; Eurobarometer 66 (2007), p. 28]

<sup>33</sup> *Supra* Sect. 3.3.1.1, at note 149.

<sup>34</sup> On the ranking of values, see Hermerén (2006).

<sup>35</sup> Moyn (2012, 2014).

<sup>36</sup> As stated already several times, and as further outlined in Sect. 5.3.

Referring to the EU integration process in its entirety, the four references to the “ever closer union”<sup>37</sup> can also be applied to the ‘ethical spirit of EU law’ in the sense of a steadily developing concept, a ‘spirit *in statu nascendi*’, so to speak.<sup>38</sup> According to Meyer, the ideal picture of a draft for the future is also associated with an ‘ethical claim’.<sup>39</sup> This evolutionary aspect goes hand in hand with the above comments on the *Schuman* declaration.

Several times throughout this book, we have seen examples of ethics comprising not only rights, but also duties.<sup>40</sup> According to Meyer, although there were concerns about ‘basic obligations’ in totalitarian regimes, the Convention did not want to completely ignore the idea of an ‘asymmetric guarantee of connection’ to fundamental rights, not least because of classical philosophical guidelines.<sup>41</sup> This finally resulted in the following recital of the CFR preamble: “Enjoyment of these rights entails *responsibilities* and duties with regard to other *persons*, to the *human community* and to *future generations*.”<sup>42</sup> The distinction between ethical and legal obligations is likely to echo in the pair of concepts of responsibilities and duties, where ethical obligations may arise both in relation to fellow human beings and to human society, and in relation to future generations.<sup>43</sup>

Values and human dignity have already been addressed several times. To finish with the guidance provided by the preambles of the TEU and the CFR with regard to the ethical spirit of EU law, the CFR addresses the “peaceful future *based on* common values” as well as “the indivisible, universal values of human dignity, freedom, equality and solidarity”, on which “the Union is *founded*”.<sup>44</sup> The TEU preamble refers to the inspiration, drawn “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”.<sup>45</sup> This leads us to human dignity in the next chapter, as well as to the other values in the subsequent one.

---

<sup>37</sup>TEU, recital 13; Art 1(2) TEU; TFEU, recital 1; CFR, recital 1. The counterpart to this is the respect of the national identities of MS; Art 4(2) TEU.

<sup>38</sup>Similar to the debates in the CFR Convention on religion, this concept of ‘ever closer union’ is also a partly controversial issue, as the EU offer (of 18 and 19 February 2016) to the UK before the Brexit referendum (of 23 June 2016) shows; ‘A New Settlement for the United Kingdom within the European Union’, OJ 2016 CI 69/1. On the concept of respect for national identities, see *infra* note 100.

<sup>39</sup>Meyer (2014, p. 49).

<sup>40</sup>*Supra* Sect. 3.2.1, note 74, (moral obligation to assist ACP countries), Sect. 4.2.2, notes 136 (with regard to EGE opinion No 24, p. 52) and 145 (for the definition of human dignity by William P. Cheshire).

<sup>41</sup>Meyer (2014, p. 88).

<sup>42</sup>CFR, recital 6; emphases added.

<sup>43</sup>Meyer (2014, p. 89).

<sup>44</sup>CFR, recitals 1 and 2; emphases added.

<sup>45</sup>TEU, recital 2.

## 5.3 Human Dignity

Regardless of whether one sees the origin of human dignity in the Christian emphasis on the image of man as God or in a mixture of ancient and humanistic traditions and the Enlightenment, it is a central theme in the European philosophy and history of law.<sup>46</sup>

All in all, human dignity has its roots deep in the origins of a conception of mankind in European culture that regards man as an entity capable of spontaneity and self-determination. Because of his ability to forge his own free will, he is a person (subject) and must not be downgraded to a thing or object.<sup>47</sup>

Despite its paramount role today, it is remarkable that human dignity<sup>48</sup> was not initially part of the ECHR, signed on 4 November 1950.<sup>49</sup> Human dignity entered the Council of Europe sphere with the Oviedo convention, and it was only in 2002 that the ECtHR held that “[t]he very essence of the Convention is respect for human dignity and human freedom”.<sup>50,51</sup> Also in France, the *Conseil Constitutionnel* first dealt with human dignity in the field of bioethics.<sup>52</sup> Likewise elsewhere in Europe, human dignity has also only slowly emerged as the supreme constitutional principle in the constitutions of the MS.<sup>53</sup> Besides the above-mentioned influence of religion,<sup>54</sup> also the German constitution as well as Roman Herzog, who chaired the European Convention elaborating the CFR (1999–2000), had some influence on our understanding of human dignity.<sup>55</sup>

Human dignity is not only the first value mentioned in Art 2 TEU, it is both the first title, as well as the first article of the CFR. According to Meyer, the CFR Convention refused to address human dignity as a value only in the preamble, thereby depriving it of the character of a fundamental right.<sup>56</sup> Consequently, human dignity can be seen as a value, as a human right,<sup>57</sup> as well as according to both the CFR explanations and the EGE,<sup>58</sup> as the basis for principles that are more specific, rights<sup>59</sup> and obligations.

---

<sup>46</sup>Meyer (2014, p. 73); translated with DeepL.

<sup>47</sup>AG Stix-Hackl *Omega*, C-36/02, para 78.

<sup>48</sup>See the various contributions in McCrudden (2014), as well as in Feuillet-Liger and Orfali (2018).

<sup>49</sup>For the UN-perspective, see e.g. AG Stix-Hackl *Omega*, C-36/02, para 82.

<sup>50</sup>ECtHR judgment of 29 April 2002, *Pretty vs. the United Kingdom*, 2346/02, para 65.

<sup>51</sup>Rensmann (2005, 58, 60).

<sup>52</sup>Rensmann (2005, 60).

<sup>53</sup>Rensmann (2005, 58).

<sup>54</sup>*Supra* note 35.

<sup>55</sup>Rensmann (2005, 58); for further details on the other MS see pp. 59–60.

<sup>56</sup>Meyer (2014, p. 53).

<sup>57</sup>As a human right, human dignity is both a ‘defensive right’ (“must be respected”) and also entails a ‘duty to protect’ (“must be [...] protected”); Streinz (2018, no. 4).

<sup>58</sup>*Supra* Sect. 4.3.

<sup>59</sup>“Human dignity, as a fundamental expression of an element of mankind founded simply on humanity, forms the underlying basis and starting point for all human rights distinguishable from it [...]”; AG Stix-Hackl *Omega*, C-36/02, para 76.

This is why human dignity has been referred to as the corner stone<sup>60</sup> of both the CFR and the values.

However, as accentuated by Di Fabio, in law, human dignity must also be respected in its non-legal meaning.<sup>61</sup> This is in line with the statement of the EGE, according to which “[t]he respect of the dignity of the human person is at the *root* of the *ethics* of science and new technologies *as well as of human rights*”.<sup>62</sup> In a resolution 1.5 years before the mandate of the GAEIB expired, the EP emphasized, “that it is essential to establish ethical standards, based on respect for human dignity”.<sup>63</sup> Human dignity as the bridge between the two disciplines of law and practical philosophy, so to speak.<sup>64</sup>

As we have already seen especially with regard to EGE opinions, human dignity predominantly has this notion of treating human beings as subjects, not merely as objects.<sup>65</sup> Also in literature, human dignity is usually explained with reference to Immanuel Kant.<sup>66</sup> As Dickson and Eleftheriadis highlighted, “in a way, Kant’s theory is a predecessor to that of Rawls and a predecessor to some relevant contemporary views of the European Union”.<sup>67</sup> This Kantian notion of human dignity can be exemplified by the following current<sup>68</sup> example. In a recent resolution on integrity in sports, the EP pointed out that “athletes, in particular minors, face increasing economic pressures, and are treated as *commodities*, and have therefore to be protected against any form of abuse, violence or discrimination that may occur in the course of their participation in sport”.<sup>69</sup> Although the Union, with its commitment to human dignity, which places the human person at the centre of its action, clearly sees itself as an anthropocentric order of values,<sup>70</sup> animals can also enjoy protection and respect due to their intrinsic value.

In summary, the legal lens confirms the importance of the corner stone of human dignity for the ‘ethical spirit of EU law’, just as we have already seen it from the philosophical lens.

---

<sup>60</sup>Frischhut (2015, p. 532).

<sup>61</sup>Di Fabio (2004, p. 5).

<sup>62</sup>European Group on Ethics in Science and New Technologies (2000, p. 11).

<sup>63</sup>EP resolution GAEIB, pt. 1.

<sup>64</sup>See also Frischhut (2015, p. 565).

<sup>65</sup>See also AG Stix-Hackl *Omega*, C-36/02, paras 77–78 and 94 on ‘dwarf-tossing’.

<sup>66</sup>Cf. for instance: Borowsky (2014, p. 96), Müller-Graff (2017, 47).

<sup>67</sup>Dickson and Eleftheriadis (2012, pp. 12–13).

<sup>68</sup>For an older example see: EP resolution on compulsory gynaecological examinations at the Dutch-German border, OJ 1991 C 106/113; N.B. on suspicion of having had an abortion in the Netherlands. On Kant, see *supra* Sect. 2.1.

<sup>69</sup>EP resolution sport and integrity; emphasis added.

<sup>70</sup>Rensmann (2005, 61).

## 5.4 EU Values (Continued) and Human Rights

Does this also hold true for the other common values of the EU and for human rights,<sup>71</sup> do they also contribute to the lattice forming the ‘ethical spirit’? The increasing role of human rights, culminating in the now legally binding CFR, corresponds to the before mentioned anthropocentric view and humanism.

As also reflected in the CJEU’s case-law, values can entail not only rights, but also obligations: They can also result in negative consequences, as in the following example. This was about a Dutch decision declaring a foreigner to be an “undesirable immigrant”, where “a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, such as human dignity and human rights”, can be qualified as being against ‘public policy’.<sup>72,73</sup>

If we turn to this concept of ‘values’, it is necessary to differentiate, as values can have an ethical, political, legal, artistic and economic connotation, though the latter two are not discussed any further.

From a social science point of view, according to Di Fabio “values are the basic attitudes of people who stand out due to their special firmness, conviction of correctness and emotional foundation”. He continues as follows: “values appear like relics from a past epoch, they have not yet taken part in the disenchantment and rationalization of the modern world, they stand between ‘is’ and ‘ought’, they act normatively, but are subject to change through social factuality”.<sup>74</sup> The latter statement corresponds with the evolutionary aspect of the ‘ethical spirit’.

Values in the sense of political science (*‘Staatswissenschaften’*) are “guiding ideas for the activities of political institutions based on political-philosophical value judgments. Every political community needs a bundle of guiding ideas, to which its basic order is oriented. Two types of guiding ideas can be distinguished, namely values (value-based guiding ideas) and other (in themselves value-neutral) guiding ideas.”<sup>75</sup>

Finally, from the legal point of view, “values describe goods that a legal system recognises as given or abandoned”.<sup>76</sup> In this context, values may serve as interpretive guidelines as well as standards of norm control, and unfold a legitimacy meaning.<sup>77</sup> The challenge is the determination of the content, as values are indeterminate, multi-layered, subjective, contextual, and culturally shaped.<sup>78</sup> As mentioned earlier,<sup>79</sup> values are more abstract than principles, as the former lack specific lim-

---

<sup>71</sup> Although officially coined ‘fundamental rights’, most of the CFR rights apply to all ‘humans’, ‘persons’, ‘everyone’, etc.

<sup>72</sup> For this notion, see *supra* Sect. 3.3.1.1, at note 146.

<sup>73</sup> CJEU judgment of 2 May 2018, *K*, joined cases C-331/16 and C-366/16, EU:C:2018:296, para 60.

<sup>74</sup> Di Fabio (2004, p. 3); translated with DeepL.

<sup>75</sup> Schmitz (2005, 80); translated with DeepL; emphases in the original.

<sup>76</sup> Reimer (2003, p. 209); translated with DeepL.

<sup>77</sup> Calliess (2004, p. 1034).

<sup>78</sup> See Footnote 77.

<sup>79</sup> *Supra* Sect. 1.5, at note 99.

itations, in particular with regard to specific legal consequences and addressees.<sup>80</sup> The lack of these limitations contrasts values from state objectives (principles) or fundamental rights (subjective rights).<sup>81</sup> With regard to the German Basic Law, the Federal Constitutional Court has stated that the Basic Law is not a value-neutral order and that its value order expresses a fundamental strengthening of the validity of fundamental rights.<sup>82</sup>

According to Walter Hallstein, certain values have been part of the integration process, even before the Lisbon Treaty has officially enshrined them in Art 2 TEU.<sup>83</sup> The EU has transformed itself from, an ‘association of functional integration’ (*‘Zweckverband funktioneller Integration’*<sup>84</sup>), as Hans Peter Ipsen coined it, into a political union (Maastricht Treaty), that also respects human rights (CFR, etc.), and finally into a ‘community of values’.<sup>85,86</sup> The key word for this metamorphosis is ‘homogeneity’. Homogeneity demands, “a supranational Union and its Member States must have the same basic political and philosophical orientation”, where this “requirement of homogeneity of value systems is already known from another federal organizational form, namely the federal state”.<sup>87</sup> However, homogeneity of value orders does not mean uniformity of value orders, “homogeneity means affinity of essence, not equality of essence, congruence in essential points, not total congruence”.<sup>88</sup> Applying this concept of homogeneity to EU integration means that the Union must also implement the common fundamental values; however, it can do so “in its own specific way”.<sup>89</sup> “This is part of the development of the Union’s own identity, which must be more than a mere mirror of the identity of the Member States”, where an important step was the development of a separate catalogue of fundamental rights.<sup>90</sup>

---

<sup>80</sup>Reimer (2003, p. 209).

<sup>81</sup>See Footnote 77.

<sup>82</sup>BVerfG judgment of 15 January 1958, *Lüth*, 1 BvR 400/51, BVerfGE 7, 198, para 25; see also Di Fabio (2004, pp. 1–2).

<sup>83</sup>Hallstein (1979, pp. 66–71): peace, uniformity, equality, freedom, solidarity, prosperity, progress and security (own translation).

<sup>84</sup>Ipsen (1972, pp. 196–200).

<sup>85</sup>On this notion, see *infra*.

<sup>86</sup>On the ‘constitutional debate’ see, for instance, Weiler (1999).

<sup>87</sup>Schmitz (2005, 81); translated with DeepL.

<sup>88</sup>Schmitz (2005, 82); and he continues: “Only the basic values that characterise the system must agree, but not the many simple values—be it in the laws or in the constitution—that go beyond them; these must only be compatible with the common basic values”, translated with DeepL.

<sup>89</sup>Schmitz (2005, 82); translated with DeepL.

<sup>90</sup>See Footnote 89.

Nowadays, the EU's values have mainly been shaped and further enriched in its practical application by the CJEU.<sup>91</sup> For the EU's common<sup>92</sup> values, we have also seen a sector-specific approach also comprising distinct values, when looking at health, non-financial reporting, sports and digitalization.<sup>93</sup> There is a resemblance to ethics, where the CJEU clearly took a sector-specific approach, if we only compare the *Brüstle* and the *Mayr* case (fertilization vs. transfer into uterus).<sup>94</sup>

As part of the Court's 'judicial self-restraint', when dealing with the notion of 'public morality', the Court referred to national values.<sup>95</sup> However, the Court's statement in *Omega*<sup>96</sup> that there is no need for a consensus amongst all MS could be answered differently today, now having legally binding *common* values.<sup>97</sup> In other words, a more uniform rather than diverse approach from a vertical (EU vs. MS) perspective.

However, the Court will always be willing to recognise certain circumstances, which have a specific importance for a country, for example because of the historical context. This was the case in the following examples. For instance, the national value of human dignity in Germany,<sup>98</sup> due to the atrocities of the Nazi regime, falling under 'public policy'. The fight against the mafia as a specifically important principle of morality in Italy, which corresponds with the EU's values (see *infra*).<sup>99</sup> Finally, the 'Law on the abolition of the nobility', an element of national identity in the context of Austrian constitutional history, falling under 'public policy' as well as under Art 4(2) TEU (respect for the national identities of MS).<sup>100</sup> In the Italian case on EU trademark law, the GC has referred to EU values in the following way:

The Court takes the view that such criminal activities breach the *very values* on which the European Union is *founded*, in particular the values of respect for *human dignity and freedom* as laid down in Article 2 TEU and Articles 2, 3 and 6 of the Charter of Fundamental Rights

<sup>91</sup>As the Court stated, "EU law is based on the fundamental premiss that each [MS] *shares* with all the other [MS], and *recognises* that they share with it, a set of common values on which the [EU] is *founded*, as stated in Article 2 TEU. That premiss implies and justifies the existence of *mutual trust* between the [MS] that those values will be recognised, and therefore that the EU law that implements them will be respected"; CJEU *LM*, C-216/18 PPU, para 35; emphases added.

<sup>92</sup>Recently it has been argued that "differentiation [in integration] should not be permissible when it comes to the respect of existing fundamental rights and values"; EP draft report of 2 August 2018 on differentiated integration (2018/2093(INI)), PE626.719v01-00, pt. 9.

<sup>93</sup>*Supra* Sect. 3.1.3.

<sup>94</sup>*Supra* Sect. 3.3.1.1, at note 128. Also Herrmann and Rowlandson have observed that "[a]t first glance it seems as if the role of ethics and morality in EU law does not hold any uniform legal significance"; Herrmann and Rowlandson (2008, p. 241).

<sup>95</sup>*Supra* Sect. 3.3.1.1, at note 101.

<sup>96</sup>*Supra* Sect. 3.3.1.1, at note 143.

<sup>97</sup>N.B. However, this would not change much for the *Omega* case as such, as we have seen that the German notion of human dignity very much corresponds with the EU counterpart.

<sup>98</sup>In Germany, human dignity is referred to as the 'fundamental constitutional principle' of human rights; AG Stix-Hackl *Omega*, C-36/02, para 76.

<sup>99</sup>GC *La Mafia Franchises*, T-1/17, para 36; see *supra* Sect. 3.3.1.2, at note 155.

<sup>100</sup>CJEU judgment of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806, paras 83, 84, 92.

of the European Union. Those values are *indivisible* and make up the *spiritual and moral heritage* of the European Union.<sup>101</sup>

We have already seen various links between the EU's values (including human dignity), the legal lens so to speak, and the philosophical<sup>102</sup> one. According to Larenz, to 'judge' ('*werten*') is an inner invitation to comment with regard to a moral value, whereby not according to one's own highly personal values, but according to the general consciousness of values of a legal community.<sup>103</sup> These values have to be *objective*, correspond with a *general* mode of action and judgement and must be an *adequate* expression of this value requirement; in other terms, bad habits cannot be such a yardstick.<sup>104</sup> While in previous times, values have also been considered as non-legal concepts, which need to be imported into the legal sphere,<sup>105</sup> nowadays we have to accept that values do not only have a legal meaning, but also a philosophical one.<sup>106</sup> In other words, values stand between law and morality,<sup>107</sup> and in this way, they fulfil a bridge function.

As mentioned above, starting with a market for coal and steel, the EU finally also turned into a 'community of values'. According to Mandry, this notion, "on the one hand, describes the supranational European collectivity founded on common value convictions and a sense of belonging together, and on the other hand, the political-ethical quality of the political organization, namely the institutions and attitudes of the European Union."<sup>108</sup> As mentioned earlier, the notion of 'ethos' refers to the attitude, convictions, customs and behaviours of a person,<sup>109</sup> or even of an institution.<sup>110</sup> From an ethical perspective, the self-image as a 'community of values' can help to describe the 'ethos' of the EU.<sup>111</sup> From a social perspective, the 'community of values' is obviously an idea that is intended to express the 'identity' of the EU.<sup>112</sup> As Calliess rightly points out, the totality of values forms the value system of a society, which, according to social science, constructs identity over it.<sup>113</sup> Besides the more institutional angle of the 'community of values', what is most important are the expectations of citizens with regard to legitimate and 'good' political action.<sup>114</sup>

---

<sup>101</sup>GC *La Mafia Franchises*, T-1/17, para 36.

<sup>102</sup>On the notion of 'philosophy of values', see Berthold and Hügli (2004, pp. 611–614).

<sup>103</sup>Larenz (1960, p. 216).

<sup>104</sup>Larenz (1960, p. 219).

<sup>105</sup>Di Fabio (2004, p. 4), referring to older German case-law.

<sup>106</sup>Cf. e.g. Scheler (1916).

<sup>107</sup>Calliess (2004, p. 1034), with reference also to Di Fabio (2004, p. 3).

<sup>108</sup>Mandry (2009, p. 17); translated with DeepL.

<sup>109</sup>*Supra* Sect. 1.5, at note 89.

<sup>110</sup>*Supra* Sect. 1.5, at note 90.

<sup>111</sup>Mandry (2009, p. 99).

<sup>112</sup>See Footnote 111.

<sup>113</sup>Calliess (2004, p. 1034).

<sup>114</sup>See Footnote 111.

As we know, the ‘community of values’ has a threefold impact: on the EU, on the Member States and on citizens.<sup>115</sup> Focussing on the citizens, as the EP has recently emphasized, “European democracy needs a European identity, a genuinely European demos”.<sup>116</sup> The question of whether and how a ‘European identity’ is further developed and strengthened, has to be differentiated from the question of how the ‘community of values’ affects the citizens, keeping in mind that they are closely connected. As mentioned earlier,<sup>117</sup> the first sentence of Art 2 TEU mentions the values the EU is founded on. This sentence affects all three ‘stakeholders’, the EU, the MS and the citizens. The second sentence mentions values that “are common to the Member States in a society”, which is then further described by means of these values. These values are societal values, which also concern the relationship of private persons.<sup>118</sup> Already thirteen years ago, Rensmann argued that the metamorphosis of the EU into a ‘community of values’, which has been legally implemented for a long time, must still be understood by the citizens in order to become the basis for the development of a European consciousness, respectively EU identity.<sup>119</sup> To close the circle with the homogeneity mentioned above, “despite their feedback to national values, European values have their own independent content, which must be worked out.”<sup>120</sup> Citizen participation will be of utmost importance for both the ‘community of values’, as well as for the ‘ethical spirit’.

## References

- Berthold, J., & Hügli, A. (2004). Wertphilosophie. In J. Ritter, K. Gründer, & G. Gabriel (Eds.), *Historisches Wörterbuch der Philosophie: Band 12: W-Z* (pp. 611–614). Basel: Schwabe AG.
- Borowsky, M. (2014). Titel I Würde des Menschen. In J. Meyer (Ed.), *Charta der Grundrechte der Europäischen Union* (4th ed., pp. 94–106). Baden-Baden: Nomos.
- Calliess, C. (2004). Europa als Wertegemeinschaft: Integration und Identität durch europäisches Verfassungsrecht? *Juristenzeitung (JZ)*, 59, 1033–1084.
- Di Fabio, U. (2004). *Grundrechte als Werteordnung. Juristenzeitung (JZ)*, 59, 1–8.
- Dickson, J., & Eleftheriadis, P. (2012). Introduction: The puzzles of European Union law. In J. Dickson & P. Eleftheriadis (Eds.), *Philosophical foundations of law. Philosophical foundations of EU law* (pp. 1–22). Oxford: Oxford University Press.
- European Commission. (2007). Public Opinion in the European Union. Eurobarometer 66.
- European Commission. (2008). Values of Europeans. Eurobarometer 69.
- European Commission. (2009). Public Opinion in the European Union. Vol. 2. Eurobarometer 72.
- European Commission. (2010). Public Opinion in the European Union. Eurobarometer 74.
- European Commission. (2012). The Values of Europeans. Eurobarometer 77.

---

<sup>115</sup>Calliess (2004, p. 1038).

<sup>116</sup>EP draft report of 19 July 2018 on State of the debate on the Future of Europe (2018/2094(INI)), PE625.528v01-00, pt. 21.

<sup>117</sup>*Supra* Sect. 3.1.3.

<sup>118</sup>Streinz et al. (2010, pp. 79–80).

<sup>119</sup>Rensmann (2005, 54).

<sup>120</sup>Calliess (2004, p. 1042).

- European Group on Ethics in Science and New Technologies. (2000). Citizens rights and new technologies: A European challenge. Report of the European Group on Ethics in Science and New Technologies on the Charter on Fundamental Rights related to technological innovation as requested by President Prodi on February 3, 2000: CHARTE 4370/00 CONTRIB 233.
- Feuillet-Liger, B., & Orfali, K. (Eds.). (2018). *The reality of human dignity in law and bioethics*. Cham: Springer.
- Frischhut, M. (2015). "EU": Short for "Ethical" Union?: The role of ethics in European Union law. *Heidelberg Journal of International Law (HJIL)*, 75, 531–577.
- Hallstein, W. (1979). *Die Europäische Gemeinschaft* (5th ed.). Düsseldorf, Wien: Econ.
- Hermerén, G. (2006). European values, ethics and law: Present policies and future challenges. *Jahrbuch Für Wissenschaft Und Ethik*, 11, 5–40.
- Herrmann, J. R., & Rowlandson, M. (2008). The role of ethics and morality in EU law. *Journal of International Biotechnology Law*, 5, 241–251. <https://doi.org/10.1515/JIBL.2008.39>.
- Ipsen, H. P. (1972). *Europäisches Gemeinschaftsrecht*. Tübingen: Mohr.
- Larenz, K. (1960). *Methodenlehre der Rechtswissenschaft*. Berlin, Göttingen, Heidelberg: Springer.
- Mandry, C. (2009). *Europa als Wertegemeinschaft: Eine theologisch-ethische Studie zum politischen Selbstverständnis der Europäischen Union. Denkart Europa: Vol. 9*. Baden-Baden: Nomos.
- McCrudden, C. (Ed.). (2014). *Understanding human dignity*. Oxford: Oxford University Press.
- Meyer, J. (2014). Präambel. In J. Meyer (Ed.), *Charta der Grundrechte der Europäischen Union* (4th ed., pp. 43–93). Baden-Baden: Nomos.
- Moyn, S. (2012). The secret history of constitutional dignity. Retrieved from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2159248](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159248).
- Moyn, S. (2014). The secret history of constitutional dignity. In C. McCrudden (Ed.), *Understanding Human Dignity* (pp. 95–111). Oxford: Oxford University Press.
- Müller-Graff, P.-C. (2017). A. Verfassungsordnung der Europäischen Union: I. Verfassungsziele der Europäischen Union. In M. A. Dausas & M. Ludwigs (Eds.), *Handbuch des EU-Wirtschaftsrechts: Band 1* (pp. 1–76). München: C.H. Beck.
- Radest, H. B. (2002). Humanism. In J. K. Roth (Ed.), *International encyclopedia of ethics* (pp. 411–412). London, Chicago, Illinois: Fitzroy Dearborn.
- Rauscher, A. (2005). Die christlichen Wurzeln der Europäischen Einigung. In D. Blumenwitz, G.-H. Gornig, & D. Murswiek (Eds.), *Die Europäische Union als Wertegemeinschaft* (pp. 19–27). Berlin: Duncker & Humblot.
- Reimer, F. (2003). Wertegemeinschaft durch Wertennormierung?: Die Grundwerteklausel im europäischen Verfassungsvertrag. *Zeitschrift Für Gesetzgebung*, 208–217.
- Rensmann, T. (2005). Grundwerte im Prozeß der europäischen Konstitutionalisierung: Anmerkung zur Europäischen Union als Wertegemeinschaft aus juristischer Perspektive. In D. Blumenwitz, G.-H. Gornig, & D. Murswiek (Eds.), *Die Europäische Union als Wertegemeinschaft* (pp. 49–72). Berlin: Duncker & Humblot.
- Scheler, M. (1916). *Der Formalismus in der Ethik und die materiale Wertethik: Neuer Versuch der Grundlegung eines ethischen Personalismus*. Sonderdruck aus: „Jahrbuch für Philosophie und phänomenologische Forschung“, Bd. I und II, herausgegeben von EDMUND HUSSERL, Freiburg i. Br. Halle a. d. Saale: Verlag von Max Niemeyer.
- Schmitz, T. (2005). Die Charta der Grundrechte der Europäischen Union als Konkretisierung der gemeinsamen europäischen Werte. In D. Blumenwitz, G.-H. Gornig, & D. Murswiek (Eds.), *Die Europäische Union als Wertegemeinschaft* (pp. 73–97). Berlin: Duncker & Humblot.
- Schwabe, K. (2016). *Jean Monnet: Frankreich, die Deutschen und die Einigung Europas*. Baden-Baden: Nomos.
- Simon, D. (1998). *Le système juridique communautaire* (2<sup>e</sup> édition mise à jour). *Droit politique et théorique*. Paris: Presses universitaires de France.
- Steelwater, E. (2012). Humanism. In R. F. Chadwick (Ed.), *Encyclopedia of applied ethics* (2nd ed., pp. 674–682). London: Academic Press.

- Streinz, R. (2018). Art. 1 EU-Grundrechte-Charta Würde des Menschen. In *EUV/AEUV: Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union* (3rd ed.). München: C.H. Beck.
- Streinz, R., Ohler, C., & Herrmann, C. (2010). *Der Vertrag von Lissabon zur Reform der EU: Einführung mit Synopse; [mit Lissabon-Entscheidung und Begleitgesetz]* (3. aktualisierte und erw. Aufl.). *Aktuelles Recht für die Praxis*. München: Beck.
- Wahlberg, L. (2010). *Legal questions and scientific answers: Ontological differences and epistemic gaps in the assessment of causal relations*. Lund: Media-Tryck.
- Wahlberg, L. (2017). Legal ontology, scientific expertise and the factual world. *Journal of Social Ontology*, 3, 49–65. <https://doi.org/10.1515/jso-2015-0022>.
- Wahlberg, L., & Persson, J. (2017). Importing notions in health law: Science and proven experience. *European Journal of Health Law*, 24, 565–590. <https://doi.org/10.1163/15718093-12453308>.
- Weiler, J. H. H. (1999). *The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration*. Cambridge: University Press.

**Open Access** This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

