Chapter 6
Conclusion and Suggestions for Improvement

> *For decades, the Union's techno- and bureaucrats have successfully worked on a process of economic integration between countries, but in their paper mills they have overlooked the fact that unions between countries must also have a soul, an idea or an ideal that is above individual interests and in which everyone feels united.*
>
> Leon de Winter, *Wo steckt Europas Seele*? (de Winter 2004, p. 158; translated with DeepL.).

While so far, this book was clearly about the legal situation as it stands, I now want to conclude with some own suggestions for improvement. Much has already been written about the multiple crisis of the EU. However, even if these crises did not exist, it would be high time to further develop a new Union, which is 'inspired by an ethical spirit'. Without going into details, such a development has the advantage that it does not necessarily require an amendment of primary law,[1] which was the 'mission impossible' in all the crises the EU had to deal with recently.[2] There are good philosophical and legal arguments supporting this idea, but the pragmatic reasons might even prevail. Why should the European Union (EU) act and be perceived as an 'Ethical Union'?[3]

We can observe various gaps between the EU and the citizens, a geographic one (Brussels is further away than your municipality or your capital city), an emotional one (to some extent also due to the first point), and a content-related one (EU law often is very sophisticated, especially for citizens). That is why trust is of utmost importance

[1] Art 48 TEU.

[2] One idea which would not be a 'mission impossible' from a formal perspective (as there would be no necessity to change EU primary law), but in terms of the likelihood of its implementation, would be an 'ethical impact assessment'. Without going into details, combining the current role of the EGE and the impact assessment, as we know it today, this could be an EGE 2.0.

[3] This was the title of my paper (Frischhut 2015), which can be seen as the starting point of this bigger research project, which is part of this Jean Monnet Chair, entitled 'European integration & ethics'.

M. Frischhut, *The Ethical Spirit of EU Law*,
https://doi.org/10.1007/978-3-030-10582-2_6

even more important than at a nation state level. As the Court has recently held in a case on access to EU documents, "by increasing the legitimacy of the Commission's decision-making process, transparency ensures the credibility of that institution's action in the minds of citizens",[4] a statement, which holds true for to the EU as a whole. This quotation also corresponds with the moral entitlement of citizens as argued by Waldron.[5] However, this procedural component has to be accompanied by a substantive one, where the 'ethical spirit' of EU law plays a role for either perspective. While the author strongly rejects populism, the EU has to focus more on citizens and their concerns.[6] Otherwise, it risks failing, if it is perceived as the supporter of big companies, which can 'buy justice' or 'buy legislation'. Without going into details and, in a very simplified way, if we add the two perspectives of content and the way how it was perceived by the general public, the EU has clearly done a better job on 'roaming' and 'passenger's rights', than providing transparency in case of CETA,[7] or handling the issue of glyphosate. In the already mentioned report on the CFR,[8] the EGE has referred to the 'precautionary principle' as "the expression of prudence as a genuine ethical virtue".[9] To make a long story short, a true application of this principle[10] could also lead to a different outcome. Acting in the citizens' interest and not being open to unethical lobbying is one element of this 'ethical spirit', where the EU can demonstrate the added value of acting at EU level, for a single state realistically has no chance of overcoming these challenges. However, these statements should be seen as encouragement, knowing that much improvement has already happened and also having in mind the important work of the European Ombuds(wo)man.

Hence, the question is, what should this 'ethical spirit' look like? Well, for a big part, it already exists; in terms of all the opening clauses we have seen in EU law, through the EU's values, including human dignity, the EU's human rights, as well as the 'spiritual and moral heritage'. Tallacchini has argued that from the beginning, "ethics never embodied or related to any existing specific morality or moral philosophy".[11] This statement has been confirmed in the various analyses throughout this book. Although we have seen that from the three normative theories deontology

[4]CJEU judgment of 4 September 2018, *ClientEarth vs. Commission*, C-57/16 P, EU:C:2018:660, para 104.

[5]*Supra* Sect. 4.2.2, at note 157.

[6]In an open letter in the '*Frankfurter Allgemeine Zeitung*', Supiot et al. (2018) argue that "the EU can still be resuscitated by giving clear priority and safeguarding the ideals it proclaims over the economic and financial postulates that lead to its loss"; translated with DeepL. They refer to the three options (exit, voice or loyalty) available in times of a crises, as developed by Hirschman (1970).

[7]It seems that the Commission has clearly learned its lessons, if we nowadays look at the Brexit negotiations.

[8]*Supra* Sect. 4.2.1, note 112.

[9]European Group on Ethics in Science and New Technologies (2000, p. 10).

[10]Apart from the above-mentioned disclaimer (Sect. 1.5 note 92), one has to acknowledge the difficulties in establishing a common understanding in this regard; see e.g. Dratwa (2002).

[11]Tallacchini (2015, p. 157).

prevails, it would be wrong to attribute the EU's 'ethical spirit' exclusively to this one. Rather should we see this 'ethical spirit' as a lattice, not only linking various provisions of EU law that address ethics and morality in different ways, but also as a lattice of different input.[12]

In *Van Gend en Loos*, the Court has not only referred to the 'spirit' of (EU) law, it has also coined the term of the 'new legal order'.[13] In line with this ground-breaking statement, the 'ethical spirit' of EU law cannot be attributed to a certain pre-existing and worldwide uniform philosophical approach. Some might argue that it would be desirable if one could define the 'stone of the philosophers' (*lapis philosophorum*) in the sense of such a uniform normative theory.[14] However, one has to be so realistic that a theory of ethics is always relative to the current challenges of the time and the community we are living in.[15] This corresponds to the step-by-step approach inherent to the *Schuman* declaration.[16]

As mentioned above,[17] according to a particularistic moral understanding, the claim of morality can also be limited to the members of a certain group. This 'communitarianism' has been developed against the background of multiple crises,[18] emphasizing rights and responsibilities,[19] stressing the importance of shared common values and the 'common good', which requires that "we have to reason together about the meaning of the good life".[20] This idea goes hand in hand with the analysis of human dignity in the CFR, which according to Rensmann "does not only embrace man as a being isolated in his freedom, but also in his social integration".[21] Therefore, I argue that the 'ethical spirit of EU law' should also be seen from such a communitarian perspective. The limitation to the EU should not be understood in a way excluding others. Rather should it be seen as a rejection of a 'colonialist approach' and a rejection of the wish to develop a universally applicable system,

[12] On Montesquieu see *supra* Sect. 4.1 at note 5, and on CJEU *Achmea*, C-284/16, paras 33–34 (same chapter) at note 13.

[13] CJEU *Van Gend en Loos*, 26/62, p. 12; see also *supra* Sect. 1.2, notes 37–39 and 45.

[14] On Parfit (2011) see *supra* Chap. 2, note 1.

[15] As Sangiovanni (2008, p. 164) points out, "principles of justice therefore vary, at a fundamental level, with respect to the institutional context they are meant to regulate".

[16] Without the atrocities of World War II, human dignity would most likely not play the same role as it does today.

[17] Section 2.4.3.

[18] Hence, it seems perfectly suitable for the EU.

[19] Briefly to mention, that also CJEU *Van Gend en Loos*, 26/62, p. 12, addressed rights and obligations, the citizens as key stakeholders, as well as the 'legal heritage'.

[20] Sandel (2010, p. 261).

[21] Rensmann (2005, 61); translated with DeepL.

which would fit every community and culture,[22] worldwide and at any time.[23] This communitarian perspective entails the idea that we reason together about the 'good life', hence involving citizens. This comprises not only rights, but also obligations,[24] not only freedom, but also engaging in and for society.

Also the analysis of the preambles of the EU treaties point to a specific EU approach, as they do not refer to one of these three normative theories, but to the EU's 'spiritual and moral heritage'. Within this Jean Monnet chair, not only was the research on this book conducted, but it also included a course,[25] in which an exchange student from Asia provided the following valuable external perspective. This statement may sound banal, but it shows exactly what it is all about. Asked to write down what *should be* a value of the EU, he wrote, 'community'. While since the entry into force of the Lisbon Treaty, for reasons of linguistic accuracy EU lawyers tend only to refer to the Union, not to the Community any more,[26] this notion of 'community' better reflects how the EU, its members and its citizens should see themselves in it.

The 'ethical spirit' of EU law should not only be seen from and benefit from the idea of 'communitarianism'. In addition, 'principlism' ought to be embraced as well. Making this 'ethical spirit' more easily applicable to different challenges in different sectors,[27] we might need an approach as we have seen it in the context of lobbying. These principles (sometimes also virtues[28]) can translate abstract values into principles that are able to guide the individual to the 'right solution'. In a similar way as we have seen the general common values of the EU (Art 2 TEU) also specified to different fields,[29] we could think about both specific values for other fields, as well as developing further principles, linked to these general or specific values. Hence, values could be general (Art 2 TEU) or specific (e.g. sports), while these principles would mainly be specific. This does of course not mean that a principle like 'integrity'

[22] This does not mean that the author is not of the opinion that also other cultures could benefit from (parts of) this 'ethical spirit' and adopt it, as for instance other elements of the EU integration process have been adopted in other parts of the world. On the example of the CJEU and the Andean Community, see Frischhut (2003, pp. 209–301).

[23] Although it might be still relevant today, also the social contract theory was developed against the background of the emerging role of the state, and although it was highly developed, ancient Greek philosophy had no problem with slavery.

[24] In CJEU judgment of 7 February 1973, *Commission vs. Italy*, EU:C:1973:13, paras 24–25, the Court has emphasized "the equilibrium between advantages and obligations", which is an essential part of solidarity (now: one of the common values), where a failure in the duty of solidarity "strikes at the fundamental basis of the [EU] legal order".

[25] Available at: https://jeanmonnet.mci.edu/jean_monnet_mooc.

[26] See also the disclaimer in this book, *supra* Sect. 1.1, note 15.

[27] Besides this differentiation in different (horizontal) sectors, principles can also be differentiated from a vertical perspective in those mainly governing the relationship between the EU and the MS, and those mainly concerning the individuals (in relation to the EU, respectively the MS when applying, etc. EU law); for a similar approach, see Dickson and Eleftheriadis (2012, p. 14).

[28] As mentioned above (Sect. 1.5 note 107), principles and virtues can sometimes be difficult to define and overlap.

[29] *Supra* Sect. 3.1.3.

would not make sense in various sectors. This approach goes into a similar direction as a position called 'moral disunitarianism', "according to which moral generalities, to the extent that they exist, are at best domain-specific".[30]

While sometimes terminology might differ, this approach can go into a similar direction as primary and secondary principles, or in other terms: more abstract primary principles, and below that, more detailed secondary principles.[31] We have also seen that virtues might require principles,[32] and that the 2006 Council conclusions might serve as a role model, where "[b]eneath these overarching values, there is also a set of operating principles".[33]

Finally, the 'ethical spirit of EU law', which, as we have seen, is constantly developing, can also embrace some ideas of 'minimal ethics'. We have seen this approach in Art 6 Directive Biotech. Although it can be desirable to have a uniform approach, the step-by-step shift from diversity to more uniformity can simply require a pragmatic minimal approach (i.e. only to define the core, but not the periphery), which, in the future, might become more 'united'.

These ideas for an 'ethical spirit of EU law' can contribute to the statement that "unions between countries must also have a soul", as mentioned in the quote at the beginning of this chapter. It is important to emphasize that other approaches, for instance Williams arguing for a "new philosophy of EU law based on a theory of justice that is constitutionally enshrined" and "an institutional ethos that prioritizes fundamental values" can be complementary to this book.[34] Not only is justice a value of the EU, also citizens would highly value a more just EU.

As this book has summarized the research conducted with this Jean Monnet Chair 'European integration & ethics', kindly supported by the European Commission under Erasmus+, one funding requirement was to publish this book 'open access'. The author is thankful for this stimulus, as this 'ethical spirit' cannot be covered by one single book. In addition, every day, new documents can add up to this 'lattice'. That is why this open access book and hopefully other research will contribute to this "research agenda where I hope that others will contribute to this process".[35]

Finally, and for the sake of this debate, the book is summarized in the following 28[36] theses. This will include both the summary of the status quo identified so far, as well as the author's suggestions for improvement (high lightened by "I argue").

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[30] Brännmark (2016, p. 481); see also Brännmark and Sahlin (2010), and the following quotation on medical ethics, which can be applied analogously to our topic: "what disunitarianism points to is a conception of medical ethics where morality, politics, and law are more strongly integrated"; Brännmark (2018, p. 10).

[31] *Supra* Sect. 2.2, at note 34.

[32] *Supra* Sect. 2.3, at note 57.

[33] *Supra* Sect. 3.1.3, at note 28.

[34] Williams (2009, p. 577).

[35] Taken from my paper "'EU': Short for 'Ethical Union'", Frischhut (2015, p. 577).

[36] 28, because the author believes in #StrongerTogether.

1. Striving to identify the 'ethical spirit' of EU law, the notion of spirit, I argue, shall be understood as "the intention of the authors of a legal system, which is reflected in a lattice of various different provisions".
2. We can observe an increasing role of ethics in EU law since the 1990s.
3. Not surprisingly, ethics in EU law plays a role above all, but not only, in sensitive areas.
4. In EU law, we can find both implicit (e.g. in case of rules on lobbying) as well as explicit references to ethics (and morality).
5. There are various categories for the question, how the content of ethics (in case EU law refers to this non-legal concept) is determined. [1.] Ethics serving as a mere 'protection shield' (not a very ambitious approach, indeed), [2.] ethics as a supportive argument, or a [3.] parallel ethical and legal assessment. Often ethics is determined by [4.] an ethics committee or via [5.] a code of conduct, in either category either at EU and/or at national level, via [6.] references to other (international) documents (e.g. Helsinki declaration or Oviedo convention), or [7.] further information provided in the relevant EU document itself. Finally, there is also one category [8.], where ethics remains undetermined.[37]
6. In case of implementation of EU directives, which refer to ethics and morality, in the MS, we cannot observe a uniform 'ethicalization' in the nine countries covered, rather can we observe countries with comparable legal traditions displaying similar results.
7. The CJEU applies a judicial self-restraint when being confronted with cases involving ethical implications, thus leaving more discretion to the MS.[38]
8. The limitations to this national discretion are the prohibition of double morality and the requirements of coherence and legislative transparency, or in others terms, a reduced (or 'procedural') proportionality review.
9. Based on the vertical distribution of competences in the EU, one can assume in case of doubt that the legal competence also includes the competence for ethical questions. The just mentioned limitations also apply here.
10. The corner stone of human dignity and the other values, I argue, can be seen as a bridge between the legal and the philosophical 'world'.
11. For various reasons, it cannot be argued that religion should play a direct role in determining the content especially of ethics and human dignity, but it clearly has had an indirect impact in shaping our understanding of human dignity.
12. References to all three normative theories, I argue, also support the claim for a distinct 'ethical spirit of EU law'.
13. These references to ethics and morality cannot only be attributed to one, but to all three normative theories (deontology, consequentialism, virtue ethics),

[37] The author agrees to the feedback of Karl Harald Søvig (University of Bergen | Faculty of Law) that law should be more concrete (the argument of legal certainty), when referring to ethics.

[38] While harmonisation in some areas might be desirable, it can be difficult to achieve, especially because of different historical, political, religious traditions, different economical and/or technical development. The author would like to thank Göran Hermerén for valuable feedback in this regard.

where deontology clearly prevailed. However, this does not mean that the other two do (and shall) not play an important role.

14. The references to these normative theories do not follow a common horizontal, but rather a sector-specific approach.
15. These references from the legal sphere to non-legal concepts, I argue, should only be understood as pointing towards certain philosophical theories, not as unconditional reference.
16. A distinct question addresses the way, how these normative theories and other philosophical concepts (as non-legal concepts) shall be imported in the legal sphere. Here I argue that they have to be imported in a relative way, as they need to be reflected in EU law itself (i.e. a relative approach), and not be imported in an unaltered way (i.e. absolute approach); hence, the same approach as it has been argued for references of law to natural science.
17. The references to the "cultural, religious and humanist inheritance of Europe", human dignity and human rights clearly point to an anthropocentric view, while we can also find examples for a bio-centric attitude, emphasizing the intrinsic value of animals.
18. The 'ethical spirit' of EU law identified in this book is '*in statu nascendi*', following a step-by-step approach comparable to the *Schuman* declaration, where future developments will also contribute to the lattice of this spirit, hopefully rendering it more uniform than diverse.
19. This 'ethical spirit', which hopefully contributes to adding a 'soul' to the EU, is important for various reasons, nowadays, however, most important to increase citizens' trust in the EU.[39] In the external field, the EU could thus serve as a 'shining torch' for other countries or organisations.[40]
20. In this context, I argue, it is also important to involve citizens and other stakeholders. However, if citizens are engaged (i.e. citizen participation) and 'have a talk', then this input should be taken into account as far as possible ('walk the talk').[41]
21. This 'ethical spirit' as well as the 'community of values' hopefully contribute to the emergence of an EU identity.
22. The gap that still exists in between this lattice, but equally other references to ethics and morality, I argue, have to be filled by the EU's common values and the corner stone of human dignity, which play a predominant role.
23. The 'ethical spirit of EU law', I argue, should also be seen from a communitarian perspective, where communitarianism has been developed against the background of multiple crises, emphasizing rights and responsibilities, stressing the importance of shared common values and the 'common good', which requires to reason together about the meaning of the good life.
24. Likewise, being a community could also be seen as a value, as long as it is not used simply to exclude others.

[39] It is a different question, but such an ethical spirit will hopefully also lead to ethical laws.

[40] The author would like to thank Dean Harris for valuable feedback in this regard.

[41] See Frischhut (2015, p. 574).

25. The 'ethical spirit of EU law', I argue, should also embrace principlism, as different principles might render abstract values more easily applicable to different challenges in different sectors.[42]
26. The 'ethical spirit of EU law', I argue, should also encompass ideas of minimal ethics, especially if this is the only possible way of moving step-by-step from a temporarily diverse, to a more uniform approach in the future.
27. Other approaches, for instance arguing for a "new philosophy of EU law based on a theory of justice that is constitutionally enshrined" and "an institutional ethos that prioritizes fundamental values" (Williams), can be seen to be complementary to this book.
28. Finally, I argue that this 'ethical spirit' should equally apply if there are no references in EU law to ethics or morality.

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[42] The author would like to thank Winfried Löffler (University of Innsbruck | Department of Christian Philosophy) for pointing out the following. While the three normative theories mentioned so far are intended to answer the general question of the nature of good actions, principlism and minimal ethics are attempts to offer an ethical tool that can also be applied to 'mere practitioners' beyond difficult fundamental debates. In addition, for various reasons, it can be challenging to apply the concept of principlism beyond medical ethics. There will clearly be a need for further debate here.

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