

Markus Frischhut

# The Ethical Spirit of EU Values

Status Quo of the Union of Values and Future Direction of Travel



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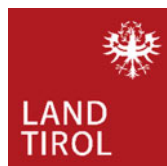
 Springer

# The Ethical Spirit of EU Values

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Status Quo of the Union of Values and Future  
Direction of Travel



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Jean Monnet Chair 'EU Values & DIGitalization  
for our CommuNITY' (DIGNITY)  
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*The book is dedicated to all those who supported and inspired me, especially during the last year and the rest of the drafting process.*

# Preface

In September 2019, the Jean Monnet Chair on “EU Values & DIGitalisation for our CommuNITY (DIGNITY)”, kindly supported by the European Commission under Erasmus+, was launched, comprising teaching, research, and related activities in this field (all information available under <https://jeanmonnet.mci.edu>). The research necessary for this book has been conducted within the comprehensive activities of this Chair.

This Chair and this book are consecutively based on the previous Jean Monnet Chair on “European integration & ethics”, equally kindly supported by the European Commission under Erasmus+, which started in September 2016. The research outcome of this 2016–2019 Chair resulted in the open access book entitled “The Ethical Spirit of EU law”. Depicting the status quo of ethics in EU law, I have argued to fill these concepts, which are often not sufficiently determined in terms of content, with reference to the EU’s common values, as well as the fundamental rights, especially of the EU Charter of Fundamental Rights.

As a well-known funding requirement, also this book is published open access. Even if this requirement would not exist, it makes a lot of sense for the content presented here, as I will argue that public debate in this field is of utmost importance and must be based on active citizen participation.

This book will analyse the EU’s common values, as well as those in specific fields, such as digitalisation. By relating more abstract values to legal and ethical principles, this book will elaborate the “ethical spirit of EU values”, focussing both on the status quo of the “Union of values” and on the future direction of travel.

This book was mainly written during (summer) 2021, where the author wants to thank his home institution (MCI | The Entrepreneurial School<sup>®</sup>), the department to which he is affiliated (Management & Law), and especially its head Ralf Geymayer and department colleagues, for making this possible.

The author wants to thank the following colleagues (in alphabetical order) for valuable feedback and discussions during the drafting process of this book: François Biltgen (Court of Justice of the European Union, Judge); Doris Dialer (Permanent

Representation of Austria to the EU, Attachée); André den Exter (Erasmus University Rotterdam, Erasmus School of Law); Christian Felber (Institute for Advanced Sustainability Studies [IASS], Affiliate Scholar; Initiator of the Economy for the Common Good); Matthias Fuchs (Mid-Sweden University, Östersund, Professor of Tourism Management & Economics); Brad Glosserman (Pacific Forum, Senior Advisor); Göran Hermerén (Lund University; 2002–2011 president/chairperson of the “European Group on Ethics in Science and New Technologies” [EGE]); Tamara K Hervey (City University London, Jean Monnet Professor of European Union Law); Eva Lichtenberger (former Member of the European Parliament); Andreas Th. Müller (University of Innsbruck, Department of European Law and Public International Law); Matthias Pirs (MCI alumnus; Executive Assistant to COO AT&S); Barbara Prainsack (University of Vienna, Department of Political Science; EGE member; Member of the Austrian Bioethics Commission); Andreas Semrajc (voestalpine High Performance Metals); Philipp Weinkogl (MCI, Management & Law). However, the usual disclaimer applies.

Forming the Advisory Board of this Jean Monnet Chair on teaching and research in this field, the author wants to thank the members (Biltgen; Dialer; den Exter; Hermerén; Hervey; Lichtenberger) for valuable support, exchange of thoughts, guest-lectures at MCI, as well as mentoring.

The author also thanks the participants of the following events (in reverse chronological order) for valuable discussions and suggestions: The 8th European Conference on Health Law at the University of Ghent (21 April 2022); “EU law higher seminar” at Uppsala University (17 February 2022); International Conference “COVID-19 Pandemic: Medical, Legal and Ethical Issues” at the Aristotle University of Thessaloniki (11 November 2021); the “Health in Europe” seminar series at Lancaster University (3 November 2021); the 14th EHFCN International Conference “How to enhance integrity in the health sector in changing societies” (20 October 2021); “EUPHA Law and Public Health Section” launch event (20 May 2021); presentation of my study “Strengthening transparency and integrity via the new ‘Independent Ethics Body’ (IEB)” for the European Parliament (19 November 2020); International Conference “New technologies in health: medical, legal and ethical issues”, Aristotle University of Thessaloniki (21 November 2019). The author would also like to thank his students at MCI and at the University of Bologna for valuable discussions.

The author would also like to thank his colleagues Susanne Kirchmair and Christof Köstl from MCI Library Services for their continuous support in accessing books and articles, as well as all technical questions (Citavi). The author would also like to thank Janine Kiechl (MCI) for the visualisation of Fig. 1.1.

The author is also thankful for “[www.DeepL.com/Translator](http://www.DeepL.com/Translator)”, which was a useful support in translating certain terms and (parts of) sentences, as well as for Trinka proofreading.

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Innsbruck, Austria  
May 2022

Markus Frischhut



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# Abbreviations

AETR	<i>Accord Européen sur les Transports Routiers</i> (= European Agreement concerning the work of crews of vehicles engaged in international road transport)
AFCO	European Parliament Committee on Constitutional Affairs
AFSJ	Area of freedom, security and justice
AI	Artificial Intelligence
Art	Article(s)
BSE	Bovine spongiform encephalopathy
BVerfG	<i>Bundesverfassungsgericht</i> (= German Constitutional Court)
CETA	Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CIEC	Conflict of Interest and Ethics Commissioner (Canada)
CJEU	Court of Justice of the EU
CONV	European Convention document
CoR	Committee of the Regions
COREPER	<i>Comité des représentants permanents des gouvernements des États membres</i> (= Committee of Permanent Representatives of the Governments of the Member States)
CSR	Corporate social responsibility
Dec	Declaration
DMA	Digital Markets Act
DSA	Digital Services Act
e.g.	<i>Exempli gratia</i> (= for example)
EC	European Commission, respectively, European Community
ECB	European Central Bank
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECI	EU citizens' initiative

ECJ	Court of Justice (part of CJEU)
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
Ed.	Editor, respectively, edition
Eds.	Editors
EEA	European Economic Area
EEC	European Economic Community
EESC	European Economic and Social Committee
EFTA	European Free Trade Area
EGE	European Group on Ethics in Science and New Technologies
ENP	European Neighbourhood Policy
EP	European Parliament
et al.	<i>Et alii</i> (= and others)
etc.	<i>Et cetera</i> (= and so forth)
ETS	European Treaty Series
EU	European Union
FR	French language
GC	General Court (part of CJEU)
GDPR	General Data Protection Regulation
GMOs	Genetically modified organisms
HATVP	<i>Haute Autorité pour la transparence de la vie publique</i> (French High Authority for the transparency of public life)
IASS	Institute for Advanced Sustainability Studies
i.c.w.	In conjunction with
i.e.	<i>Id est</i> (= that is)
ibid	<i>Ibidem</i> (= in the same place)
IEB	Independent Ethics Body (proposal for the EU)
IGC	Inter-Governmental Conference
lit	<i>Litera</i>
MCI	Management Center Innsbruck   The Entrepreneurial School <sup>®</sup>
MOOC	Massive open online course
MS	Member State(s)
N.B.	<i>Nota bene</i> (= note well)
NATO	North Atlantic Treaty Organization
NL	Netherlands, respectively, Dutch language
No	Number
OJ	Official Journal (of the EU)
OMT	Outright Monetary Transactions
p.	Page
para	Paragraph
paras	Paragraphs
pp.	Pages
Prot	Protocol
pt.	Point

pts.	Points
SDG(s)	Social Development Goal(s)
SMEs	Small and medium-sized enterprises
TCA	Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part
TCN	Third-country national(s)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
VfGH	<i>Verfassungsgerichtshof</i> (= Austrian Constitutional Court)
Vol.	Volume
vs.	Versus (against)

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# Chapter 1

## Setting the Agenda



*These **essential characteristics** of EU law have given rise to a structured network of principles, rules and mutually **interdependent legal relations** linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an **ever closer union** among the peoples of Europe’.*

*This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, 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 Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.—Court of Justice (2014)<sup>1</sup>*

### 1.1 Point of Departure (and ‘Ethical Spirit of EU Law’)

There are various approaches of determining the right behaviour via normative standards. These normative standards can be found both within and outside the ‘legal turf’. Especially if law lags behind certain technical developments, we can often observe a tendency<sup>2</sup> in law of increasing references to non-legal concepts such as ‘ethics’ and ‘morality’. For the sake of completeness, it should be mentioned that these concepts could of course also be assigned to the legal sphere as in the case of

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<sup>1</sup>ECJ opinion of 18 December 2014, *Adhésion de l’Union à la CEDH*, Avis 2/13, EU:C:2014:2454, paras 167–168 (emphases added).

<sup>2</sup>Especially since the 1990s; Frischhut (2019), pp. 3, 144.

‘public morality’,<sup>3</sup> which is a concept of EU law. The intention of referring to non-legal concepts is presumably mainly to have a more flexible set of instruments at hand, which is also not subject to the sometimes time-consuming adjustment procedure of a legislative process. We have seen this phenomenon in the fields of biotechnology,<sup>4</sup> patient mobility,<sup>5</sup> and in the field of digitalisation.<sup>6</sup>

In enacting legal provision, the EU is bound to the ‘rule of law’<sup>7</sup> (Art 2 TEU<sup>8</sup>).<sup>9</sup> According to the European Commission (EC)’s communication,<sup>10</sup> one element of the rule of law is legal certainty, which, according to the Court of Justice of the EU (CJEU<sup>11</sup>), requires amongst other things that “legislation must be clear and predictable for those who are subject to it”<sup>12</sup>.<sup>13</sup> Therefore, a missing determination of legal, but especially also non-legal concepts, can be a challenge,<sup>14</sup> especially if triggering legal consequences.<sup>15</sup> The research conducted within the first Jean Monnet Chair (2016–2019) was published in the book entitled the ‘Ethical Spirit of EU law’.<sup>16</sup> Although the book is available ‘open access’ and was summarised in 28 theses,<sup>17</sup> this concept shall be briefly recapitulated as follows.

<sup>3</sup> Art 36 Treaty on the Functioning of the European Union (TFEU), consolidated version: OJ 2016 C 202/47.

<sup>4</sup> Tallacchini (2015).

<sup>5</sup> Frischhut (2015).

<sup>6</sup> See *infra*, Sect. 2.3.3.

<sup>7</sup> See also *infra*, Sect. 3.2.1.3.

<sup>8</sup> Treaty on European Union, consolidated version: OJ 2016 C 202/13.

<sup>9</sup> See also Frischhut (2019), p. 2.

<sup>10</sup> EC communication ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 4 and Annex I.

<sup>11</sup> This abbreviation refers to the Court of Justice of the EU in the sense of Art 19(1) TEU, which comprises not only the Court of Justice (ECJ), but also the General Court (GC). When in the following reference is made to the GC, this should be understood as also comprising the formerly Court of First Instance.

<sup>12</sup> ECJ judgement of 12 November 1981, *Meridionale Industria Salumi and Others*, joined cases C-212 to C-217/80, EU:C:1981:270, para 10. See also ECJ judgement of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335, para 51 (“[...] that principle requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular, where they may have adverse consequences for individuals and undertakings. Specifically, to meet the requirements of that principle, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly”).

<sup>13</sup> However, as the Austrian Constitutional Court has emphasised, the constitutional requirement of certainty (“*Bestimmtheitsgebot*”) does not mean that the legislature may not also use indeterminate legal terms; VfGH judgement of 11.12.2020, *Prohibiting any form of assisted suicide without exception is unconstitutional*, G 139/2019, para 111.

<sup>14</sup> With regard to the rule of law, cf. Schroeder (2016), pp. 19–21.

<sup>15</sup> Again, with regard to the rule of law, cf. Schroeder (2016), p. 25.

<sup>16</sup> Frischhut (2019).

<sup>17</sup> Frischhut (2019), pp. 144–146.

The concept of the ‘**ethical spirit of EU law**’ concerns the EU’s approach towards ethics. It refers to the entire EU legal system, not only to single legal provisions. Every legal provision has a literal meaning and an intention. The notion of ‘spirit’ is more than just the mere intention. It is the holistic coming together of different elements, or as Montesquieu called it, the “relations [which] together constitute what I call the Spirit of Laws”.<sup>18</sup> Dratwa has referred to a ‘lattice’ as “set of bodies and texts, of products and processes”.<sup>19</sup> The concept of the ‘ethical spirit of EU law’ is based on the following understanding of ‘spirit’, namely “the intention of the authors of a legal system, which is reflected in a lattice of various different provisions”.<sup>20</sup>

One could argue, in a metaphorical sense, this ‘spirit’ can be described as a ghost that maybe cannot be seen, but which is nevertheless present in terms of this lattice; or the discovery of a common approach which can serve as a basis of understanding of the underlying philosophy of EU law (towards ethics). This ‘ethical spirit of EU law’ requires some **clarification**. First, having analysed the relationship of EU law to ethics, references<sup>21</sup> to all three normative theories (deontology, consequentialism, virtue ethics) support the claim for a **distinct** ‘ethical spirit of EU law’. It would not be sufficient to merely refer to one of these normative theories here. Second, such a spirit of a legal system obviously can change over time, for instance when in 2009 the EU became a Community or Union of values. Hence, it can be qualified as ‘**in statu nascendi**’, following a step-by-step approach. Finally, there is a need to fill this ‘ethical lattice’, both in case of **gaps** that still exist within this lattice, but equally in case of other references to ethics and morality. My key argument in this book was to fill this ‘ethical spirit’ with life **via the EU’s common values**, their corner stone of human dignity and fundamental rights. Both this corner stone of human dignity, the other values of Art 2 TEU and fundamental rights can be seen as a bridge between the legal and the philosophical ‘world’.

## 1.2 Objective and Limitations of This Book

Various books have been written on single values, often focussing on the rule of law. The **objective** of this book is to provide an overview on all general (Art 2 TEU), and some selected specific values. In doing so, the **holistic** concept of the above-mentioned ‘ethical spirit of EU law’ shall be complemented with this focus on EU

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<sup>18</sup>This quotation has been retrieved from “The Complete Works of M. de Montesquieu (London: T. Evans, 1777), 4 vols. Vol. 1. 27.8.2018”, [http://oll.libertyfund.org/titles/837#Montesquieu\\_0171-01\\_115](http://oll.libertyfund.org/titles/837#Montesquieu_0171-01_115); book I, ‘chapter III, of positive laws’.

<sup>19</sup>Dratwa (2014), p. 113 et passim.

<sup>20</sup>Frischhut (2019), p. 90.

<sup>21</sup>If EU law refers to non-legal concepts, the latter need 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); see also infra, Fig. 1.1.

values. As mentioned above, a ‘spirit’ is more than just the mere intention, but the holistic coming together of different elements, hence “the intention of the authors of a legal system, which is reflected in a lattice of various different provisions”.<sup>22</sup> By covering all EU values, the **underlying philosophy** of EU values shall be identified by applying, amongst others, the perspective traditionally used in EU law for the economic fundamental freedoms, i.e. the scope *ratione temporis, materiae, personae* and *limitis*. This book also strives for a holistic view in the sense of shedding more light on the **relationship** of the Art 2 TEU values to each other, but also in relation to other provisions of EU law. The spirit of values clearly surpasses the information comprised in two sentences of Art 2 TEU and has to be linked to the other relevant provisions of EU law. Likewise, based on the identified status quo, it is also the aim of this book to suggest how the values of the EU should be further developed for all the current and possible future crises (i.e., the ‘future direction of travel’).

Against this background, the following questions need to be answered, to depict the ‘ethical spirit of EU values’:

- Which values affect which **levels**, namely, from a vertical perspective, the EU, the Member States and finally the individuals (objective 1)? Especially the importance of values for individuals is key if searching for a ‘soul’ for the EU integration process.<sup>23</sup>
- Which general values (Art 2 TEU, but also beyond this legal basis) and which **specific** values, respectively, application of these general values to specific fields can we identify?<sup>24</sup> What is the **content** of the different values (i.e., scope *ratione materiae*, objective 2.1) and who is entitled (only EU citizens or humans?), respectively, obliged (only Member States or also individuals?) by these values (i.e., scope *ratione personae*, objective 2.2)?
- References to ‘common values’ in the recent **Brexit** deal<sup>25</sup> raise the question of the scope *ratione limitis*, i.e., the internal and external perspective (objective 2.3). The ‘ethical spirit’ of EU law identified in the first book has been qualified as ‘*in statu nascendi*’, following a step-by-step approach, comparable to the Schuman declaration.<sup>26</sup> The same question must be addressed regarding these values and the fundamental rights. This latter scope *ratione temporis* will have to answer the question to what extent the values and the fundamental rights can be seen as a ‘living instrument’, the **evolutionary** perspective so to say (objective 2.4).

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<sup>22</sup>Frischhut (2019), p. 90.

<sup>23</sup>Cf. Frischhut (2019), p. 139, referring to de Winter (2004), p. 158.

<sup>24</sup>While one could reflect on specific values in various fields, Sect. 2.3 will focus on a selection of these examples, where relevant EU documents exist.

<sup>25</sup>Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA), OJ 2020 L 444/14 (Art COMPROV.4); see now: OJ 2021 L 149 (and L 150).

<sup>26</sup>Frischhut (2019), p. 145, in thesis No 18.

- What are the legal effects of these values and under which circumstances can these values be restricted (objective 2.5)?
- While so far, the focus of these questions was on (general and specific) values, I have also argued that the ‘ethical spirit’ requires further input from both values and fundamental rights, as well as corresponding principles. The ‘ethical spirit of EU law’, as I have argued, should also embrace ‘principlism’, as different principles might render abstract<sup>27</sup> values more easily applicable to different challenges in different sectors.<sup>28</sup> Hence this book will also have to address the **relationship** (objective 3) not only of these values to each other (i.e., the ranking of values), but also the relationship between values and fundamental rights (especially of the CFR),<sup>29</sup> as well as legal and or ethical principles. Talking about connections, likewise the relationship between values on the one side and economic or political objectives on the other will have to be envisaged.
- Finally, integrating this evolutionary perspective, the question of a possible ‘**future direction of travel**’ as the **overreaching objective** must be addressed (*de lege ferenda*), based on the identified status quo (*de lege lata*) of this Union of values<sup>30</sup> (objective 4).

Besides these questions to be answered by the end of this book, certain **limitations** must be emphasised.

Covering both the general and some specific values, this contribution cannot cover all possible details concerning each single value, as single books have been written, for instance, on one value only.<sup>31</sup>

While this book also focuses on human rights and (ethical and legal) principles, they will only be covered insofar as they matter in their relationship with the EU’s values, respectively, being mentioned as one of the EU’s values.

## 1.3 Methodology

The book on the ‘ethical spirit’ was located at the **interface** of law and ethics, where the latter is a branch of practical philosophy.<sup>32</sup> Therefore, this book was about an ‘import’ from one discipline into another. The present book is primarily located

<sup>27</sup> Cf. also Lenaerts (2017b), p. 640 “*notwendigerweise abstrakt und unbestimmt*” (necessarily abstract and undetermined).

<sup>28</sup> Frischhut (2019), p. 146, in thesis No 25.

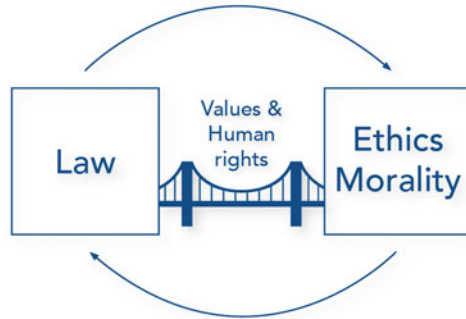
<sup>29</sup> Charter of Fundamental Rights of the European Union, consolidated version: OJ 2016 C 202/389. It has to be mentioned that most of these CFR articles entitle not only EU citizens (even within title V ‘citizens’ rights’), but all human beings. Therefore, in the following this book will also refer to ‘human rights’.

<sup>30</sup> Cf. Lenaerts (2017b), p. 640.

<sup>31</sup> On solidarity, see, for instance, Prainsack and Buyx (2017).

<sup>32</sup> Cf. Fig. 1.4 in Frischhut (2019), p. 9.

**Fig. 1.1** Relationship law and ethics, focussing on values and human rights [Further developed from Frischhut (2019), p. 3. The author wants to thank his colleague Janine Kiechl for the graphic realisation of this illustration.]



within the legal field. Even if values and human rights are displayed in Fig. 1.1 between the two disciplines, they also pertain to the legal field. As mentioned earlier, values can be seen as a **bridge**<sup>33</sup> between the legal and the philosophical ‘world’,<sup>34</sup> where human rights also play an important field in both disciplines. Hence, this book will mainly take a **legal perspective**, while also integrating some philosophical literature.<sup>35</sup>

For the relationship between **law and morality**, Habermas has emphasised, “at the post-metaphysical level of reasoning, legal and moral rules *simultaneously* differentiate from traditional morals [*Sittlichkeit*] and appear *side by side* as two different but complementary varieties of norms of action”.<sup>36</sup> As he continues, “[d]espite the common point of reference, morality and law *prima facie* differ in that post-traditional morality is only a form of cultural knowledge, while law simultaneously acquires binding force at the institutional level. Law is not only a system of symbols, but also a system of action.”<sup>37</sup>

Within this primarily **legal perspective**, this book will cover both legal literature and the law, as it stands today (*de lege lata*). This inductive approach evaluates the current situation of EU law regarding values (general and specific ones), as well as related human rights and principles. EU law considered will cover both primary EU

<sup>33</sup> AG Tanchev opinion of 6 May 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:366, para 69, has referred to a “constitutional passerelle”, in the context of Art 19(1) TEU and Art 47 CFR; see, *infra*, Sect. 4.2.1. Based on Böckenförde (2004), p. 1225, Sommermann (2020), pp. 265–266 has referred to values as “*Schleusenbegriffe*”; see also Sect. 3.5.1.

<sup>34</sup> Frischhut (2019), p. 144, in thesis No 10.

<sup>35</sup> While the author has tried to include the most relevant literature, this selection of course always remains subjective to a certain extent.

<sup>36</sup> Habermas (1992), p. 135; translated with DeepL, no emphases added. “*Ich gehe davon aus, daß sich auf dem nachmetaphysischen Begründungsniveau rechtliche und moralische Regeln gleichzeitig aus traditioneller Sittlichkeit ausdifferenzieren und als zwei verschiedene, aber einander ergänzende Sorten von Handlungsnormen nebeneinander treten.*”

<sup>37</sup> Habermas (1992), p. 137; translated with DeepL.

law (e.g., Art 2 TEU, CFR), and secondary EU law, covering both hard-law as well as soft-law, e.g., political resolutions of the European Parliament (EP). From the perspective of Montesquieu's<sup>38</sup> 'separation of powers',<sup>39</sup> this book will cover mainly legislation<sup>40</sup> (EP and Council of the EU) as well as CJEU case-law. The relevant documents have been identified by means of the open access databases of EUR-Lex and Curia (for CJEU case-law).

These various sources of law will contribute to the above-mentioned objectives in the following way:

- Objective 1 (various levels) will be answered based on an interpretation of various legal bases (e.g., Art 2 TEU), covering both hard- and soft-law, and case-law insofar relevant.
- Objective 2.1 (scope *ratione materiae*) will also be answered based on an interpretation of various legal documents (Art 2 TEU, soft-law) and the relevant case-law. If necessary, these legal documents also comprise the ECHR,<sup>41</sup> which is also mentioned in Art 6(3) TEU.
- Objective 2.2 (scope *ratione personae*) will also be answered based on an interpretation of various legal documents (Art 2 TEU, soft-law) and the relevant case-law.
- Objective 2.3 (scope *ratione limitis*) will be answered both on the internal (do values require a cross-border requirement as in the case of the economic<sup>42</sup> fundamental freedoms of the EU's single market) and the external (e.g., Brexit TCA) legal documents.
- Objective 2.4 (scope *ratione temporis*) will mainly be covered based on literature (for the historic view) concerning the pre-Amsterdam Treaty<sup>43</sup> timeframe, and documents of the European Convention concerning the Constitutional Treaty,

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<sup>38</sup>Montesquieu (1927), pp. 152–162.

<sup>39</sup>While the EU is clearly not a nation state and accepting that there are certain differences when applying this state-related concept, we can still use it to differentiate the legislative from the administrative and the judiciary branch; cf. Frischhut (2019), p. 7. On the separation of powers at national level, see ECJ judgement of 19 November 2019, *A. K.*, joined cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, para 124, "in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive"; see also ECJ judgement of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, para 54; ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 96.

<sup>40</sup>Besides secondary EU law, primary EU law will also be covered, as mentioned above.

<sup>41</sup>Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (signed 4 November 1950, entered into force 3 September 1953), ETS No 5.

<sup>42</sup>It is important to emphasise the attribute 'economic' (i.e., activities in return for remuneration), as the Court also refers to Art 21(1) TFEU (EU citizens' right to move and reside freely within the territory of the Member States) as a 'fundamental freedom'; ECJ judgement of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, para 84.

<sup>43</sup>The Amsterdam Treaty has referred to certain principles, which have been enshrined as values by the Lisbon Treaty; cf. *infra*, at note 98.



leading to the Lisbon Treaty. The ‘living instrument’ character will be mainly answered based on case-law.

- Objective 2.5, i.e., the possibility of restrictions of these values will mainly be addressed based on CJEU case-law on the ‘essence’ of fundamental rights, etc. The justiciability of these values will be answered based on EU law, including case-law.
- Objective 3 (relationship of values) will be based both on the status quo of EU law as well as legal and philosophical literature.

By putting all these findings together, this inductive research will try to identify a general proposition, which can be derived from these specific examples. While objectives 1–2.5 represent the status quo of the ‘Union of values’ (*de lege lata*), the future direction of travel (objective 4) will be based on this status quo and include my arguments *de lege ferenda*. Objective 3 (relationship) is located at the interface of *de lege lata* and *de lege ferenda*.

## 1.4 Structure

After a definition of some key terms (Sect. 1.5), the book will start with a brief introduction (Chap. 2) of what will be depicted in further details in the following chapters. The four above-mentioned scopes are part of Chap. 3, starting with the historic development so far and the evolutionary character of these values (scope *ratione temporis*) in Sect. 3.1, followed by the scope *ratione materiae* (content) in Sect. 3.2. The scope *ratione personae* (Sect. 3.3) addresses both those entitled, and obliged by the different values. Sect. 3.4 takes a closer look both inside and outside the EU27 (scope *ratione limitis*). Finally, Sect. 3.5 focuses on the possible impact of values, that is to say justiciability and restrictions. Chapter 4 addresses the relationship of values to each other, but also the relationship between values and other goals of European integration (economic and political dimension), and the relationship between the more abstract values and more concrete principles or certain human rights. These chapters depict EU law as it stands today (*de lege lata*). In order to clarify the red thread of this book, Chaps. 2, 3 and 4<sup>44</sup> are each summarised with the essential facts.

This evolutionary character leads to Chap. 5 and the future direction of travel (*de lege ferenda*), addressing the question of an additional narrative (Sect. 5.1), new values (Sect. 5.2), respectively, a stronger emphasis on existing concepts (Sect. 5.3). The debates about the ‘soul’ of the EU integration process, an evolving ‘EU identity’ and the objective of closing the gap between the EU and individuals will also have to address to question of values of EU individuals (Sect. 5.4).

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<sup>44</sup>See Sects. 2.5, 3.6 and 4.4.

## 1.5 Introduction to Key Terminology

### 1.5.1 *Ethics (Normative Theories) and Morality*

As mentioned above, values can be seen as bridge between the two disciplines of law and philosophy, as they pertain to both of them. While ethics, morality and values might all strive to determine right and wrong behaviour, they nevertheless need to be differentiated.

‘**Ethics**’ is a branch of practical (as opposed to theoretical) philosophy, which deals with what is morally right or wrong.<sup>45</sup> According to the **Oxford Dictionary**, ethics is “the branch of knowledge that deals with moral principles”, respectively, “moral principles that govern a person’s behaviour of the conducting of an activity”.<sup>46</sup> This includes normative ethics (as opposed to meta-ethics), which can be sub-divided in applied ethics and normative theories. The latter comprise deontology, consequentialism, and virtue ethics.<sup>47</sup> In a simplified way, one could say that deontology focuses on the act itself, consequentialism on the outcomes of this act, and virtue ethics on the agent of this act. **Deontology**, from the “Greek *deon*, that which is binding”, has been defined as a “type of moral theory that asserts that certain acts or types of act exhibit intrinsically [!] right-making features in themselves, regardless of the consequences that may come after them”.<sup>48</sup> In contrast, **consequentialism** is described as “[a]ny ethical theory that argues fundamentally that right action is an action that produces good results [!] or avoids bad results” and is a teleological type of theory, which refers to a *telos*<sup>49</sup> (goal, purpose).<sup>50</sup> The most prominent example is ‘utilitarianism’, an “altruistic variety of consequentialism that holds that good results are results that maximize benefits and minimize harms, even if this entails self-sacrifice”.<sup>51</sup> Finally, **virtue ethics** is defined as “[a]n ethical theory that says that the central concept for ethical theory is that of a virtue, a disposition

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<sup>45</sup> Alternatively, as O’Neil (2002), p. 281 defines it, “the philosophical science that deals with the rightness and wrongness of human actions”.

<sup>46</sup> Stevenson (2010), pp. 600–601.

<sup>47</sup> See Fig. 1.4 in Frischhut (2019), p. 9.

<sup>48</sup> Louden (2012), p. 503.

<sup>49</sup> Cf. Aristotle’s example of the lyre-player: “for the characteristic activity of the lyre-player is to play the lyre, that of the good lyre-player to play it well”; Aristotle (2000), p. 12, 1098a. N.B. In the following, besides the page, also the “numbers followed by letters (e.g., 1094a)” are indicated, which “are those of the pages and columns of Immanuel Bekker’s Greek text of 1831”; Aristotle (2000), p. xli.

<sup>50</sup> Hallgarth (2012), p. 602.

<sup>51</sup> Hallgarth (2012), p. 602, where “[u]sually, ‘benefits’ is translated as ‘pleasure,’ and ‘harm’ is translated as ‘pain’”. On the other hand, as Chappell (2012), p. 343 defined it: “An ethical theory, the central conclusion of which is that agents should always act in a way calculated to bring about the best possible outcomes overall, where the goodness of any outcome depends on the amount of happiness realized in that outcome”.

needed for human excellence or flourishing”.<sup>52</sup> In a negative way it has been defined as “any approach to ethics that puts the virtues first, before analyses of acts or their consequences”, where virtues are to be understood as “traits of character that are judged to be morally admirable or valuable”.<sup>53</sup> In defining virtues<sup>54</sup> it is essential to emphasise “rightness in character and [!] conduct”,<sup>55</sup> as these character traits need to be exercised in constant behaviour. A virtuous person does “not simply do the right thing by accident, begrudgingly, or because they will get something out of it”.<sup>56</sup> According to Aristotle, “we become just by doing just actions, temperate by temperate actions, and courageous by courageous actions”.<sup>57</sup> As Zhang argues, “the cultivation of personal virtues through common moral practice seems to be necessary for holding a society together and bringing about social harmony and cooperative actions”.<sup>58</sup> Although these normative theories are tied to different criteria, it cannot be ruled out that they all come to the same conclusion.<sup>59</sup>

Ethics must be differentiated from **morality**, which reflects the attitudes of what is right or wrong, relative to culture, region and time. According to the **Oxford Dictionary**, morality is about “principles concerning the distinction between right or wrong or good and bad behaviour”, respectively, “a particular system of values and principles of conduct”.<sup>60</sup> As Beauchamp & Childress define in their seminal book, morality “refers to norms about right and wrong human conduct that are widely shared and for a stable societal [!] compact”, it “encompasses many standards of conduct, including moral principles, rules, ideals, rights, and virtues”, where “[w]e learn about morality as we grow up”.<sup>61</sup> Hence, morality refers to factual rules (*mores*) and codes of conduct in a specific (cultural, territorial and temporal) social system.<sup>62</sup> This is also reflected in the concept of ‘public morality’, which is one of

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<sup>52</sup>Chappell (2012), p. 343.

<sup>53</sup>Louden (2012), p. 503. See also Ferkany (2021), p. 59: “Virtues are character traits belonging to morally and intellectually good persons”.

<sup>54</sup>Aristotle (2000), p. 23, 1103b distinguishes two kinds of virtues, “that of the intellect and that of character. Intellectual virtue owes its origin and development mainly to teaching, for which reason its attainment requires experience and time; virtue of character (*ēthos*) is a result of habituation (*ethos*), for which reason it has acquired its name through a small variation on ‘*ethos*’” (no emphases added). For virtues, feelings and empathy are also essential.

<sup>55</sup>The full definition of Chara (2002), p. 912 reads as follows: “Principles of goodness and rightness in character and conduct that lead a person towards moral excellence and away from moral depravity”.

<sup>56</sup>Ferkany (2021), p. 59.

<sup>57</sup>Aristotle (2000), p. 23, 1103b.

<sup>58</sup>Zhang (2016), p. 9.

<sup>59</sup>An interesting example in this regard is the African approach of ‘Ubuntu’, which was explained by Cordeiro-Rodrigues and Metz (2021), pp. 61–62 from the perspectives of all three normative theories.

<sup>60</sup>Stevenson (2010), p. 1150.

<sup>61</sup>Beauchamp and Childress (2019), p. 3.

<sup>62</sup>Cf. Frischhut (2015), pp. 536–537, with further references.

the reasons of justification that can limit the economic fundamental freedoms, as enshrined in Art 36 TFEU (for the free movement of goods). As the Court has held, “in principle it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory”.<sup>63</sup> Hence, we can identify this regional and cultural element (territory of each Member State), where attitudes can change over time and are based on values (“with its own scale of values”). This leads us to the next concept, the one of ‘values’.

### 1.5.2 Values (and Foundations)

**Values** cannot only be seen as a bridge between law and philosophy,<sup>64</sup> they can be found in various disciplines.<sup>65</sup> Values can have a social, political, legal, artistic and economic connotation, though the latter two will not be addressed any further.<sup>66</sup>

In **social science**, “values are the basic attitudes of people who stand out due to their special firmness, conviction of correctness and emotional foundation”.<sup>67</sup> They are described as some sort of ‘civil religion’, as anyone who in a discussion “goes further enters a taboo area, leaves the secure basic consensus of society”.<sup>68</sup> The totality of values forms the “value system of a society, which constructs identity over it”.<sup>69</sup> As Di Fabio stresses, “in a best-case scenario, values have an integrative function by bringing human behaviour and social requirements into harmony”, they have “an ideal meaning, they create sense, they set a fixed point for a logical system of social relations, for moral orientation, for meaningful life”.<sup>70</sup>

Values in the sense of **political science**<sup>71</sup> are “guiding ideas for the activities of political institutions based on political-philosophical value judgements. Every political community needs a bundle of guiding ideas, to which its basic order is orientated. Two types of guiding ideas can be distinguished, namely, values (value-based guiding ideas) and other (in themselves value-neutral) guiding ideas.”<sup>72</sup> Schmitz mentions human dignity, democracy, and the rule of law, amongst others, as values,

<sup>63</sup> ECJ judgement of 11 March 1986, *Conegate*, C-121/85, EU:C:1986:114, para 14.

<sup>64</sup> Values have also been described as being located between law and morality; Calliess (2004), p. 1034.

<sup>65</sup> Already the ‘Declaration on European Identity’, Bulletin of the European Communities, December 1973, No 12, pp. 118–122 (119) referred to values of “legal, political and moral order”.

<sup>66</sup> The following is essentially based on Frischhut (2019), pp. 131–135.

<sup>67</sup> Di Fabio (2004), p. 3; translated with DeepL.

<sup>68</sup> Di Fabio (2004), p. 3; translated with DeepL.

<sup>69</sup> Calliess (2004), p. 1034; translated with DeepL.

<sup>70</sup> Di Fabio (2004), p. 4; translated with DeepL.

<sup>71</sup> ‘*Staatswissenschaften*’.

<sup>72</sup> Schmitz (2005), p. 80; translated with DeepL (N.B. Italic emphases in original German text).

and the federal principle or subsidiarity as more or less value-neutral guiding ideas.<sup>73</sup> As Schroeder mentioned, if a norm “is referred to as a value, this means to elevate it on the political or ethical level”.<sup>74</sup> This shows the connectedness of these various levels or disciplines. At the same time, this quotation makes clear that these various levels are not mutually exclusive, which is particularly true for political and legal science.

In **legal science**, values or basic values (*valeurs fondamentales*) are described as “assets that a legal system recognizes as predetermined and imposed”.<sup>75</sup> They can serve as both guidelines for interpretation and standard of judicial review, and they can “develop a legitimizing meaning”.<sup>76</sup> Concerning 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>77</sup> With regard to Art 2 TEU, Hilf and Schorkopf have defined values as “recognised rules that guide a subject in decision-making situations”.<sup>78</sup>

Calliess distinguishes between guiding values (“*Leitwerte*”), basic values (“*Grundwerte*”) and individual values (“*Einzelwerte*”).<sup>79</sup> ‘Guiding values’ have been (at least implicitly) at the basis of EU integration process right from the beginning. They comprise peace, integration, and market freedom,<sup>80</sup> as well as solidarity and subsidiarity.<sup>81</sup> These guiding values can be seen as specific to the supra-national<sup>82</sup> integration process of the EU, as started in 1950 with the Schuman declaration. The ‘basic values’, on the other hand, are not so much EU specific, but have developed from the constitutional traditions common to the Member States,<sup>83</sup> and have then become structural features of the EU. They comprise democracy, the rule of law, freedom, and fundamental rights (see now Art 2 TEU). These ‘basic

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<sup>73</sup> Schmitz (2005), p. 80.

<sup>74</sup> Schroeder (2016), p. 14.

<sup>75</sup> Reimer (2003), p. 209; translated with DeepL. See also Calliess (2016), p. 40.

<sup>76</sup> Calliess (2004), p. 1034; translated with DeepL.

<sup>77</sup> BVerfG judgement of 15 January 1958, *Lüth*, 1 BvR 400/51, BVerfGE 7, 198, para 25; see also Di Fabio (2004), pp. 1–2.

<sup>78</sup> Hilf and Schorkopf (2021), para 19; translated with DeepL.

<sup>79</sup> Calliess (2004), pp. 1038–1039.

<sup>80</sup> Calliess (2016), p. 37 refers to the magic triangle of values consisting of peace, economic freedom and integration.

<sup>81</sup> This ‘guiding value’ of subsidiarity has been referred to by Schmitz (*supra*, note 65) as a ‘value-neutral guiding idea’.

<sup>82</sup> Cf. Pescatore (1974), p. 50: “I should like to summarize its [i.e., the principle of supranationality] essence in the form of three propositions: the recognition by a group of states of a complex of common interests or, more broadly, a complex of common values; the creation of an effective power placed at the service of these interests or values; finally, the autonomy of this power”. For further details on supranationality, see also Frischhut (2003), pp. 34–36.

<sup>83</sup> On the general principles of EU law (cf. Art 6[3] TEU), see *infra*, Sect. 1.5.3.

values’ are not specific to the EU integration process, but relate to the similarities of asserting public authority, whether at supra-national or national level.<sup>84</sup>

In terms of their **function**, values have a “normative orientation function” in that they distinguish good from bad and right from wrong.<sup>85</sup> According to Schroeder, values are “ethical, supra-positive norms[, which] have an orientation and ordering function”.<sup>86</sup> Like morality, also values develop over time and adapt to societal circumstances, as they must be seen against the background of their historic development.<sup>87</sup> Human dignity is a good example in that regard, as it has been a reaction to the atrocities of the Second World War.<sup>88</sup> According to Hermerén, common values are “one of several ways of keeping the member states of the European Union together by referring to values they have in common and by pointing out differences between these values and others”.<sup>89</sup>

Before Art 2 TEU, the CJEU had referred to the ‘(very) **foundations**’ of the Community, which nowadays is the EU.

In the seminal *Kadi* judgement of 2008,<sup>90</sup> in the context of the “allocation of powers fixed by the Treaties or, consequently, the autonomy of the [EU] legal system”, the ECJ had referred to its “exclusive jurisdiction”,<sup>91</sup> which forms “part of the very [!] foundations of the Community”,<sup>92</sup> as “such review is a constitutional [!] guarantee forming part of the very foundations of the Community”.<sup>93</sup>

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<sup>84</sup> Finally, ‘individual values’ (on values affecting individuals, see *infra*, Sects. 3.3.2, 5.3, and 5.4) in this classification of Calliess refer to what in this book is referred to as ‘specific values’, where he mentions ‘services of general economic interest’ (Art 14 TFEU) as an explicit example, as well as implicitly, general interests via the *Cassis*-reasons, as well as via the sectoral policies of environmental, health and consumer protection. See ECJ judgement of 20 February 1979, *Reve vs. Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42, para 8 (“mandatory requirements” in the general interest, as case-law developed reasons of justification for restrictions to the economic fundamental freedoms, besides the Treaty based reasons, e.g., Art 36 TFEU).

<sup>85</sup> Di Fabio (2004), p. 3, translation; Calliess (2004), p. 1034.

<sup>86</sup> Schroeder (2016), p. 16.

<sup>87</sup> Calliess (2004), p. 1034.

<sup>88</sup> See *infra*, Sect. 3.2.1.1.

<sup>89</sup> Hermerén (2008), p. 375.

<sup>90</sup> A similar statement can already be found in: ECJ opinion of 14 December 1991, *Accord EEE - I*, Avis 1/91, EU:C:1991:490, para 71 (“However, Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community”).

<sup>91</sup> Art 220 EC, according to the ‘Tables of Equivalence’ (OJ 2016 C 202/361 [382]) is “replaced, in substance, by Article 19 TEU”.

<sup>92</sup> ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 282.

<sup>93</sup> ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 290.

Besides the Court's judicial review, in *Kadi* the Court had also referred to "the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union"<sup>94</sup>.<sup>95</sup> Principles, which "form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights".<sup>96</sup>

First, this pre-Lisbon article can basically now be found in Art 2 TEU,<sup>97</sup> and second, what was referred to as 'principles' is now coined as 'values'.<sup>98</sup> Hence, one can legitimately argue that the 'foundations' are now part of the concept of 'values', on which the "Union is founded" (Art 2 TEU). While also a principle could be referred to as a foundation, the picture of a foundation and the reference to the 'constitutional guarantee' help to better understand the concept and meaning of EU values. The notion of 'foundation' can also be found in Strasbourg case-law, where the ECtHR has referred to "tolerance and respect for the equal dignity of all human beings [as] the foundation of a democratic and pluralistic society".<sup>99</sup> Tolerance, human dignity, equality, democracy and pluralism are all values that now figure in Art 2 TEU.

Values have been described as "undetermined, they are multi-layered, subjective and contextual".<sup>100</sup> Values are clearly quite **abstract**. However, this should not be seen as criticism, as values are abstract by nature. This is not only true for values at EU level, as "shared commitment to abstract ideals is a feature of all constitutions".<sup>101</sup> Besides their abstractness, values do not have any specific limitations,

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<sup>94</sup>ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 303. N.B. the fundamental freedoms mentioned here shall not be confused with the economic fundamental freedoms of the internal market.

<sup>95</sup>Likewise, the 'Declaration on European Identity', Bulletin of the European Communities, December 1973, No 12, pp. 118–122 (119) referred to "the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights".

<sup>96</sup>ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 304.

<sup>97</sup>Cf. Streinz et al. (2010), p. 173.

<sup>98</sup>See *supra*, at note 43.

<sup>99</sup>ECtHR judgement of 16 July 2009, *Feret vs. Belgium*, 15615/07, para 64 ("La tolérance et le respect de l'égalité de tous les êtres humains constituent le fondement [!] d'une société démocratique et pluraliste. Il en résulte qu'en principe on peut juger nécessaire, dans les sociétés démocratiques, de sanctionner, voire de prévenir, toutes les formes d'expression qui propagent, encouragent, promeuvent ou justifient la haine fondée sur l'intolérance (y compris l'intolérance religieuse)"); translated with DeepL.

<sup>100</sup>Calliess (2004), p. 1034; translated with DeepL. N.B. Values do not necessarily have to be subjective only.

<sup>101</sup>Tridimas (2006), p. 16.

“since they are not restricted to certain legal consequences or addressees”.<sup>102</sup> This distinguishes them from principles.

### 1.5.3 Values and (General) Principles

*Valid norms oblige their addressees, without exception and equally, to behave in a way that fulfils generalised behavioural expectations, whereas values are to be understood as intersubjectively shared preferences. Values express the preferability of goods that are considered desirable in certain collectives and can be acquired and realised through purposeful action.*—Streinz (2018, p. 10)

Like values, also **principles**, as a concept, can be found in various disciplines. Generally, principles refer to “basic truth”, or “general law of cause and effect”.<sup>103</sup> In the following, the focus will be on legal and **ethical or moral** principles.

According to the **Oxford Dictionary**, values are defined as “principles or standards of behaviour”, respectively, “one’s judgment of what is important in life”.<sup>104</sup>

In their seminal book ‘Principles of biomedical ethics’, Beauchamp & Childress have defined the following “four clusters of moral principles”: respect for autonomy, non-maleficence, beneficence, and justice. Autonomy is described as “a norm of respecting and supporting autonomous decisions”, non-maleficence as “a norm of avoiding the causation of harm”, beneficence as “a group of norms pertaining to relieving, lessening, or preventing harm and providing benefits and balancing benefits against risks and costs”, and finally justice as “a cluster of norms for fairly distributing benefits, risks, and costs”.<sup>105</sup> This approach referred to as ‘principlism’ has the advantage of being more determined (i.e., less abstract) and ‘user-friendly’, as being better applicable to different challenges in different fields.

In **legal science**, principles have been referred to as “legal norms laying down essential elements of a legal order”,<sup>106</sup> or as “a basic, fundamental rule, which is – albeit broad – binding”.<sup>107</sup> Yet another definition describes a principle as “a general proposition of law of some importance from which concrete rules derive”.<sup>108</sup> According to Schroeder, principles “are understood as legal norms which do not state specific rights or duties, but which are of a general nature and need being

<sup>102</sup>Reimer (2003), p. 209, translated with DeepL; Calliess (2004), p. 1034.

<sup>103</sup>Streinz (2018), p. 10.

<sup>104</sup>Stevenson (2010), p. 1963.

<sup>105</sup>Beauchamp and Childress (2019), p. 13.

<sup>106</sup>von Bogdandy (2003), p. 10; see also Williams (2009), p. 559.

<sup>107</sup>Streinz (2018), p. 10.

<sup>108</sup>Tridimas (2006), p. 1; see also Williams (2009), p. 559: “general propositions from which rules might derive [and] relate to certain standards that might be based in law or practice, which contribute to forming a framework for decision-making and action”.



concretised by the legislative, the executive and the judiciary”.<sup>109</sup> Likewise, legal principles are also less abstract<sup>110</sup> and more determined. However, comparing principles<sup>111</sup> to statutory provisions, principles are naturally more abstract.<sup>112</sup>

Contrasting principles from the afore-mentioned values, they have **legal consequences and addressees**, as also addressed by Habermas’ opening quotation. For instance, the principle of proportionality is, amongst others, addressed at the Member States, which must respect it when limiting the EU’s fundamental freedoms. A breach of this principle can have the legal consequence of rendering a national measure inapplicable according to the primacy<sup>113</sup> of EU law. The relationship between more abstract values and more concrete principles can be found in the 2006 health values, where “[b]eneath [!] these overarching values, there is also a set of operating principles”.<sup>114</sup> According to Sommermann, shared values of a community aim semantically deeper than the statement of principles.<sup>115</sup>

While it is important to distinguish the concept of values from legal principles,<sup>116</sup> we must acknowledge that constitutional law can define one concept as “value, objective, fundamental right, principle or otherwise”,<sup>117</sup> hence they are **not mutually exclusive**. Solidarity is a good example, which can be found in Art 2 TEU as one of the EU’s common values, and a legal principle.<sup>118</sup> Comparing the four ‘principles of biomedical ethics’ of Beauchamp & Childress to Art 2 TEU reveals that the same word (‘justice’) can be qualified as different concepts, once as a value (Art 2 TEU), in the other case as a principle.

Having so far concentrated on the EU, let us now briefly turn to the European Economic Area (EEA),<sup>119</sup> linking Norway, Iceland, and Liechtenstein to the EU. Former EFTA Court President Carl Baudenbacher has edited a book comprising

<sup>109</sup>Schroeder (2016), p. 13.

<sup>110</sup>However, also legal principles can sometimes be more abstract; cf. AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU: C:2021:218, para 111, “the principle of energy solidarity entails some measure of abstraction making it difficult to apply”.

<sup>111</sup>Klamert mentions **three functions** of ‘structural principles’: The ‘rule function’, according to which structural principles “can be applied according to clearly defined rules in specific cases”, the ‘guiding function’, according to which they “serve to further develop the law of the Union”, as well as the ‘standard function’, as “a standard of legality and interpretation”. Klamert (2015), p. 279, translated with DeepL.

<sup>112</sup>Schroeder (2016), pp. 12–13 has also emphasised the relationship between values, (legal) principles, and more specific legal rules. On rules and principles, see in particular Dworkin (1984), pp. 54–68.

<sup>113</sup>Cf. Skouris (2021).

<sup>114</sup>Council conclusions on Common values and principles in European Union Health Systems, OJ 2006 C 146/1; see *infra*, Sect. 2.3.1.

<sup>115</sup>Sommermann (2020), p. 263.

<sup>116</sup>On various types of principles, see also von Bogdandy (2009).

<sup>117</sup>Reimer (2003), p. 210; translated with DeepL.

<sup>118</sup>See *infra*, Sect. 3.2.1.6.

<sup>119</sup>Agreement on the European Economic Area, OJ 1994 L1/3, as amended.

the following ‘fundamental principles of EEA law’:<sup>120</sup> legislative homogeneity,<sup>121</sup> judicial homogeneity,<sup>122</sup> (no) reciprocity,<sup>123</sup> sincere cooperation,<sup>124</sup> sovereignty,<sup>125</sup> prosperity in the EEA,<sup>126</sup> priority,<sup>127</sup> authority of the EFTA Court,<sup>128</sup> proportionality,<sup>129</sup> equality<sup>130</sup> and state liability.<sup>131</sup> As we can see, some principles are very specific to the EEA in terms of linking these three countries to the EU: legislative and judicial homogeneity and the “twin maxim”,<sup>132</sup> of reciprocity, and priority setting of EEA/EFTA states in secondary legislation.<sup>133</sup> Other principles can also be found in the EU: sincere cooperation (Art 4[3] TEU), institutional balance (instead of reciprocity<sup>134</sup>), authority of the CJEU (Art 19 TEU), equality (as a value, Art 2 TEU), as well as proportionality and state liability (as two general principles of EU law). Prosperity, which should be measured “not only in purely financial terms, but also in the social welfare of its citizens, including the protection of its workers and the environment”<sup>135</sup> might rather be an objective (cf. Art 3[1] TEU “well-being of its peoples”) than a principle. Besides principles, the EEA agreement (recital 2) also refers to a “privileged relationship” between (what is now) the EU and its Member States on the one side, and the EFTA States on the other, “which is based on proximity, long-standing common values [!] and European identity”.<sup>136</sup>

Besides ‘principles’ (“a general proposition of law of some importance from which concrete rules derive”<sup>137</sup>), ‘**general principles**’<sup>138</sup> have been defined as “fundamental [!] propositions of law which underlie a legal system and from which concrete rules or outcomes may be derived”.<sup>139</sup> In this regard, ‘general’ refers to a certain “level of abstraction that distinguishes it from a specific rule”.<sup>140</sup> Hence,

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<sup>120</sup>Baudenbacher (2017a).

<sup>121</sup>Holter (2017).

<sup>122</sup>Speitler (2017).

<sup>123</sup>Baudenbacher (2017b).

<sup>124</sup>Temple Lang (2017).

<sup>125</sup>Andenas (2017).

<sup>126</sup>Svedman (2017).

<sup>127</sup>Zatschler (2017).

<sup>128</sup>Magnússon (2017).

<sup>129</sup>Baudenbacher and Haas (2017).

<sup>130</sup>Schmauch (2017).

<sup>131</sup>Waibel and Petersen (2017).

<sup>132</sup>Baudenbacher (2017b), p. 35.

<sup>133</sup>Zatschler (2017), p. 123.

<sup>134</sup>Andenas (2017), p. 91.

<sup>135</sup>Svedman (2017), p. 109.

<sup>136</sup>Agreement on the European Economic Area, OJ 1994 L 1/3, as amended.

<sup>137</sup>Tridimas (2006), p. 1.

<sup>138</sup>See also the contributions in Pineschi (2015) and Vogenauer and Weatherill (2017).

<sup>139</sup>Tridimas (2006), p. 1.

<sup>140</sup>Tridimas (2006), p. 1.

as mentioned above, a principle is less abstract than a value, but more abstract compared to a statutory provision. In other words, a principle “states a reason which gives argument in one direction but does not necessitate a particular result”, as “principles incorporate a minimum substantive content and guide the judicial enquiry on that basis”.<sup>141</sup> While this level of abstraction might be true for both principles and general principles of law, in case of ‘general principles of (EU) law’ the notion of ‘general’ can “refer to principles which transcend specific areas of law and underlie the legal system as a whole”.<sup>142</sup> In the same way, the element of ‘general’ in case of a ‘general principles of law’ “may also refer to the degree of recognition or acceptance”.<sup>143</sup> General principles of law have a twofold impact, as they can be “sources of rights and obligations”.<sup>144</sup>

‘General principles of EU law’ are developed by the CJEU<sup>145</sup> via a ‘comparative evaluation’ (“*wertende Rechtsvergleichung*”), as Advocate General (AG) Roemer coined it in the first ECJ case recognising fundamental rights at EU (or more precisely, at the time: Community) level.<sup>146</sup> In other words, the CJEU does “not look for a common denominator”.<sup>147</sup> In its selective and creative method of developing new ‘general principles of EU law’, a principle is only derived from specific rules of EU law “if it is in accordance with the objectives of the Treaty”.<sup>148</sup> Nowadays, this brings Art 3 TEU (EU objectives) into the game, which in its first paragraph emphasises the promotion of peace, the EU’s values and the well-being of its peoples as the EU’s aim. This shows the close relationship between values, (general) principles, and other concepts.

Although some might argue that principles cannot be sharply distinguished from general principles of law (and there might be some overlapping), the qualification as a ‘**general principle of EU law**’ matters, as they enjoy “constitutional status”<sup>149</sup> and “have equivalent status with the founding Treaties”,<sup>150</sup> hence they can be qualified as EU primary law. This qualification of ‘general principles of EU law’ as EU

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<sup>141</sup> Tridimas (2006), p. 2.

<sup>142</sup> Tridimas (2006), p. 1.

<sup>143</sup> Tridimas (2006), p. 1.

<sup>144</sup> Tridimas (2006), p. 548.

<sup>145</sup> On the wide case-law of the ECJ and GC (including the former Court of First Instance), see Tridimas (2006).

<sup>146</sup> Cf. AG Roemer opinion of 29 October 1969, *Stauder vs. Stadt Ulm*, C-29/69, EU:C:1969:52, p. 428 (“general qualitative concepts of national constitutional law, in particular fundamental rights recognized by national law, must be ascertained by means of a comparative evaluation [!] of laws, and that such concepts, which form an unwritten constituent part of Community law”).

<sup>147</sup> Tridimas (2006), p. 26.

<sup>148</sup> Tridimas (2006), p. 26. Hence, the CJEU would be reluctant to “derive a principle from a provision derogating [!] from fundamental rules even if such derogations are contained in many provisions”.

<sup>149</sup> Tridimas (2006), p. 6.

<sup>150</sup> Tridimas (2006), p. 51.

primary law is noteworthy as usually (cf. Art 48 TEU) it is up to the Member States to make new or amend existing EU primary law.

### 1.5.4 (*Mutual*) Trust

According to the **Oxford Dictionary**, trust is defined as the “firm belief in the reliability, truth, or ability of someone or something”.<sup>151</sup> As Onora O’Neill has stated, “trust is needed precisely when and because we lack certainty about others’ future action: it is redundant when action or outcomes are guaranteed”.<sup>152</sup> Hence, “in judging that someone is reliable we look to their past performance”<sup>153</sup> in order to overcome this uncertainty.<sup>154</sup> Considering experience can lead to the willingness of one entity to have confidence in the behaviour of another entity concerning future actions (**‘trust’**). Often trust will be related to a particular topic.<sup>155</sup> One entity might trust another entity regarding a certain topic (citizens might trust that the EU can guarantee peace), but not another one (citizens might not trust the EU when it comes to GMOs). One entity can trust another entity (one-way), or they can trust each other (in either direction). If trust is not a one-way street, it is further strengthened overall. As Hardin emphasised, “[a] reciprocal trusting relationship is mutually reinforcing for each trustor, because each person then has built-in incentive to be trustworthy”.<sup>156</sup>

This leads us to the notion of **‘mutual trust’**, which requires some interaction (e.g., dialogue) as an action item, and a temporal component. Turning again to Hardin, “[t]he prototypical case of mutual trust at the individual level involves an interaction that is part of a long sequence of exchanges between the same parties”.<sup>157</sup> Besides this temporal and action component, there is also a level of proximity, which tends to increase trust, as we “commonly trust our parents, siblings, close friends, spouses, and others who are close to us in this way within varying limits”.<sup>158</sup>

Let us now turn to the **EU**. In the context of **fundamental rights** (and the ‘Common European Asylum System’) the question has been addressed, whether “major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State,

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<sup>151</sup>Stevenson (2010), p. 1908.

<sup>152</sup>O’Neill (2002), p. 13.

<sup>153</sup>O’Neill (2002), p. 14.

<sup>154</sup>Uncertainty is an essential characteristic, which this concept of trust shares with the precautionary principle (see *infra*, Sect. 4.3.2.3).

<sup>155</sup>Cf. Hardin (2002), p. 7 “trust is generally a three-part relation that restricts any claim of trust to particular parties and to particular matters”.

<sup>156</sup>Hardin (2002), p. 17.

<sup>157</sup>Hardin (2002), p. 17.

<sup>158</sup>Hardin (2002), p. 24.

be treated in a manner incompatible with their fundamental rights”<sup>159</sup> can destroy mutual trust between Member States.<sup>160</sup> As the Court has stated in the seminal *N. S.* case: “At issue here is the *raison d’être* [!] of the European Union and the creation of an area of freedom, security and justice [AFSJ] and, in particular, the Common European Asylum System, based on mutual confidence [!] and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.”<sup>161</sup> Three comments: First, although the ECJ referred to mutual confidence, this can be equated with mutual trust. Second, the Court referred to human rights, not values, and, finally, the Court’s statement involves a certain threshold (“major operational problems”, “substantial risk”). This presumption has been linked by the Court to the “duty of the Member States to interpret and apply [EU secondary law] in a manner consistent with fundamental rights”.<sup>162</sup>

The concept of mutual trust also<sup>163</sup> applies to the EU’s **common values**, as clarified in *Achmea*:<sup>164</sup>

EU law is thus based on the **fundamental premiss** that each Member State shares with all the other Member States, 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 Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason *inter alia* of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU [...].

The extension of this case-law to values is not surprising and at the same time convincing, as the fundamental rights are part of Art 2 TEU. Likewise, the “principle of mutual trust is a constitutional principle”.<sup>165</sup> The duty to interpret and apply EU secondary law in the light of the fundamental freedoms can be extended to a value-conform interpretation of EU law.<sup>166</sup> The above-mentioned level of proximity leading to increased trust can be seen in the opposite situation of third countries.

<sup>159</sup>ECJ judgement of 21 December 2011, *N. S. and Others*, joined cases C-411/10 and C-493/10, EU:C:2011:865, para 81.

<sup>160</sup>See also, from earlier of the same year, ECtHR judgement of 21 January 2011, *M.S.S. v. Belgium and Greece*, 30696/09, paras 356–361.

<sup>161</sup>ECJ judgement of 21 December 2011, *N. S. and Others*, joined cases C-411/10 and C-493/10, EU:C:2011:865, para 83.

<sup>162</sup>ECJ judgement of 21 December 2011, *N. S. and Others*, joined cases C-411/10 and C-493/10, EU:C:2011:865, para 99.

<sup>163</sup>For the concept of mutual trust in the field of Schengen (with no reference to values), see ECJ judgement of 12 May 2021, *Bundesrepublik Deutschland (Notice rouge d’Interpol)*, C-505/19, EU:C:2021:376, para 80.

<sup>164</sup>ECJ judgement of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, para 34, emphases added.

<sup>165</sup>Lenaerts (2017a), p. 838. See also Ladenburger (2020), p. 379, also covering mutual trust in the EEA (p. 388).

<sup>166</sup>Cf. Potacs (2016) and von Bogdandy and Spieker (2019, 2020).

As the Court had held regarding the CETA<sup>167</sup> agreement with Canada, “that principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State”.<sup>168</sup>

However, this “fundamental premiss” can be rebutted. ‘Mutual trust’, as emphasised by ECJ president Lenaerts, should **not** be confused with ‘**blind trust**’.<sup>169</sup> Hence, “[t]rust must be ‘earned’ by the Member State of origin through effective compliance with EU fundamental rights standards”.<sup>170</sup>

To sum up, trust is based on experience, orientated towards the future<sup>171</sup> and (ideally) not a one-way street. Mutual trust is related to proximity (e.g., EU membership<sup>172</sup>), based on interaction (e.g., dialogue) and has a temporal component. The well-known approach in EU law to refer to a high level of protection<sup>173</sup> can also contribute to enhancing trust, as recently addressed by the ECJ in the specific context of animal welfare.<sup>174</sup> As ECJ President Koen Lenaerts has aptly expressed, “[i]t is said that ‘[t]rust takes years to build, seconds to destroy and forever to repair’”.<sup>175</sup> This mutual trust is based on the EU’s common values (including fundamental rights), and while emphasised for the relationship “between the Member States”, it

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<sup>167</sup>Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part.

<sup>168</sup>ECJ opinion of 30 April 2019, *Accord ECG UE-Canada [CETA]*, Avis 1/17, EU:C:2019:341, para 129.

<sup>169</sup>Lenaerts (2017a), p. 806. O’Neill (2002), p. 18 mentions “children who initially must trust their parents blindly”.

<sup>170</sup>Lenaerts (2017a), p. 840 “But, where EU legislation complies with the Charter, limitations on the principle of mutual trust must remain exceptional and should operate in such a way as to restore mutual trust, thus solidifying all at once the protection of fundamental rights and mutual trust as the cornerstone of the AFSJ.”

<sup>171</sup>Emphasising this future component: AG Tanchev opinion of 6 May 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:366, para 84 (“The mere possibility that disciplinary proceedings or measures could be taken against judges on account of the content of their judicial decisions undoubtedly creates a ‘chilling effect’ not only on those judges, but also on other judges in the future [!], which is incompatible with judicial independence”).

<sup>172</sup>On EU membership, see Craig (2020).

<sup>173</sup>This approach can, amongst others, be found in public health protection (Art 168[1] TFEU), consumer protection (Art 169[1] TFEU), environmental protection (Art 191[2] TFEU; cf. also Art 3 [3] TEU); see also Art 114(3) TFEU (“concerning health, safety, environmental protection and consumer protection”).

<sup>174</sup>ECJ judgement of 26 February 2019, *Oeuvre d’assistance aux bêtes d’abattoirs*, C-497/17, EU:C:2019:137, para 51 (in the context of consumer confidence and “observance of the highest standards” in the field of animal welfare).

<sup>175</sup>Lenaerts (2017a), p. 838.

is also crucial for the relation with EU citizens,<sup>176</sup> as will be shown in the remaining chapters.<sup>177</sup>

### 1.5.5 *Soft-Law*

Besides the concepts covered so far, the distinction of hard-law and soft-law will also play a role in this book. Therefore, the last concept to be dealt with in this chapter is that of ‘soft law’. In the context of ethics and values in the field of digitalisation<sup>178</sup> we can find both the idea that “ethical principles are only efficient where they are also enshrined in law”, and the statement that “where it would be premature to adopt legal acts, a soft law framework should be used”.<sup>179</sup>

Jabloner has **defined** soft-law as “a generic term for social controls that are related to law but do not share its binding force”.<sup>180</sup> Hence, the decisive difference between hard- and soft-law is the lack of its legally binding nature. A narrower definition of soft-law refers only to documents enacted by authorities, which theoretically could enact hard-law, but—for legal or political reasons<sup>181</sup>—opt for “softer forms of social controls”.<sup>182</sup> According to the broader definition, also NGOs, associations, etc. could enact soft-law, according to the narrower definition this would only be possible in case of authorities like the European Parliament, etc.

“As a line from Game of Thrones has it, ‘what is dead may never die’”.<sup>183</sup> With these words, AG Bobek has started his opinion on the legally binding nature of certain documents and the resulting consequences for **Art 263 TFEU** (action for annulment) and **Art 267 TFEU** (preliminary ruling). This quotation refers to the question of whether it is possible to annul (kill) a document, which is not legally binding (i.e., already dead). Under Art 263 TFEU, the Court can review “all

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<sup>176</sup> Emphasising the importance of the rule of law for “public confidence in the courts”, AG Tanchev opinion of 6 May 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:366, para 6.

<sup>177</sup> Especially Sect. 5.3.

<sup>178</sup> See, *infra*, Sect. 2.3.3.

<sup>179</sup> EP resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies (2020/2012(INL)), OJ 2021 C 404/63, recital Y and pt. 8.

<sup>180</sup> Jabloner (2019), p. 251; translated with DeepL.

<sup>181</sup> Cf. ECJ judgement of 13 December 1989, *Grimaldi vs. Fonds des maladies professionnelles*, C-322/88, EU:C:1989:646, para 13: “Recommendations, which [...] are not binding, are generally adopted by the institutions of the [EU] when they do not have the power under the Treaty [i.e., legal reason] to adopt binding measures or when they consider that it is not appropriate [i.e., political reason] to adopt more mandatory rules”.

<sup>182</sup> Jabloner (2019), p. 251; translated with DeepL.

<sup>183</sup> AG Bobek opinion of 15 April 2021, *FBF*, C-911/19, EU:C:2021:294, para 1.

measures adopted by the institutions which are intended to have legal force”.<sup>184</sup> Hence, “[a]n action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects”.<sup>185</sup> In order to determine, whether a certain document “produces binding legal effects, it is necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, where appropriate, the context in which it was adopted and the powers of the institution which adopted the act”.<sup>186</sup>

Art 263 TFEU (action for annulment) and Art 267 TFEU (preliminary ruling)<sup>187</sup> are just two **procedures at EU level** that prove the practical consequence of this classification of hard- or soft-law.<sup>188</sup> More generally, individuals should be able to know whether a certain document is binding for them and therefore can result in rights or obligations. This issue addresses a similar underlying problem as identified earlier in case of binding (EU) law referring to non-legal concepts, which in the end are not sufficiently determined in terms of content.<sup>189</sup> This can be a problem regarding legal certainty, which requires amongst other things that “legislation must be clear and predictable for those who are subject to it”.<sup>190</sup> In the case, where the Game of Thrones quotation of AG Bobek was taken from, the Court has in the end decided that these guidelines had no binding force and consequently could not be subject to an action for annulment (Art 263 TFEU).<sup>191</sup> However, the Court can assess the validity of such acts in a preliminary ruling proceeding (Art 267 TFEU).<sup>192</sup>

<sup>184</sup> ECJ judgement of 31 March 1971, *Commission vs. Council [AETR]*, C-22/70, EU:C:1971:32, para 39.

<sup>185</sup> ECJ judgement of 31 March 1971, *Commission vs. Council [AETR]*, C-22/70, EU:C:1971:32, para 42. See also ECJ judgement of 25 October 2017, *Romania vs. Commission*, C-599/15 P, EU:C:2017:801, para 47, as well as ECJ judgement of 20 February 2018, *Belgium vs. Commission [gambling]*, C-16/16 P, EU:C:2018:79, para 31, both only referring to “whatever their form”. See also ECJ judgement of 15 July 2021, *FBF*, C-911/19, EU:C:2021:599, para 36.

<sup>186</sup> AG Bobek opinion of 15 April 2021, *FBF*, C-911/19, EU:C:2021:294, para 41. See also ECJ judgement of 25 October 2017, *Romania vs. Commission*, C-599/15 P, EU:C:2017:801, para 48; ECJ judgement of 20 February 2018, *Belgium vs. Commission [gambling]*, C-16/16 P, EU:C:2018:79, para 32; ECJ judgement of 3 June 2021, *Hungary vs. Parliament [votes cast]*, C-650/18, EU:C:2021:426, para 38; ECJ judgement of 15 July 2021, *FBF*, C-911/19, EU:C:2021:599, para 38.

<sup>187</sup> EC Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ 2003 L 124/36, has been subject to interpretation in a preliminary ruling proceeding: ECJ judgement of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114.

<sup>188</sup> On the two different functions of these two proceedings and their complementarity, see AG Bobek opinion of 15 April 2021, *FBF*, C-911/19, EU:C:2021:294, paras 136–138. See also, in the end, ECJ judgement of 15 July 2021, *FBF*, C-911/19, EU:C:2021:599.

<sup>189</sup> See *supra*, at note 12.

<sup>190</sup> ECJ judgement of 12 November 1981, *Meridionale Industria Salumi and Others*, joined cases C-212 to C-217/80, EU:C:1981:270, para 10.

<sup>191</sup> ECJ judgement of 15 July 2021, *FBF*, C-911/19, EU:C:2021:599, paras 49–50.

<sup>192</sup> ECJ judgement of 15 July 2021, *FBF*, C-911/19, EU:C:2021:599, paras 52–57.



One challenge in this regard is the difficulty in distinguishing soft- from hard-law. At a **procedural** level, soft-law can become binding indirectly via courts, which must take soft-law into account in their interpretation. According to Art 288 (5) TFEU, “[r]ecommendations and opinions shall have no binding force”. As the Court has stated in *Grimaldi*, “true recommendations” are documents that “are not intended to produce binding effects” on the persons to whom they are addressed, hence “cannot create rights upon which individuals may rely before a national court”.<sup>193</sup> A distinction has to be drawn between individuals and national courts, as the latter are nonetheless “bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or [Union] law”.<sup>194</sup> One could conclude that via the *Grimaldi* case-law, the initiative is not upon the individual, but upon the court, but the latter’s decision can in the end affect individuals.

Soft-law can also become binding in another indirect but more **substantive** way. A second document of hard-law referring to a former soft-law document can make the latter binding in an indirect way. For instance, for the definition of ‘small and medium-sized enterprises’ (SMEs), the EU regulation establishing the InvestEU Programme from 2021<sup>195</sup> refers to an EC recommendation from 2003.<sup>196</sup> This **horizontal** situation at EU level is less problematic, compared to a vertical situation, where one or more (up to 27) Member States might decide to make an EU soft-law document legally binding indirectly, for instance, if a national authority “declare [s] that it complies”<sup>197</sup> with this EU soft-law document.<sup>198</sup> This **vertical** situation is not only more challenging concerning legal certainty (at the interface of two legal systems), but also more problematic with regard to the principle of uniformity.<sup>199</sup>

Besides the above-mentioned problems for individuals, EU bodies issuing soft-law could “create parallel sets of rules which bypass the legislative process and which might have an impact on institutional balance”.<sup>200</sup> As Jacqué has aptly

<sup>193</sup> ECJ judgement of 13 December 1989, *Grimaldi vs. Fonds des maladies professionnelles*, C-322/88, EU:C:1989:646, para 16.

<sup>194</sup> ECJ judgement of 13 December 1989, *Grimaldi vs. Fonds des maladies professionnelles*, C-322/88, EU:C:1989:646, para 19.

<sup>195</sup> Regulation (EU) 2021/523 of 24 March 2021 establishing the InvestEU Programme [...], OJ 2021 L 107/30 (Art 2[21]).

<sup>196</sup> EC Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ 2003 L 124/36.

<sup>197</sup> Cf. AG Bobek opinion of 15 April 2021, *FBF*, C-911/19, EU:C:2021:294, para 20.

<sup>198</sup> Cf. AG Bobek opinion of 15 April 2021, *FBF*, C-911/19, EU:C:2021:294, para 54, concerning guidelines on product oversight and governance arrangements for retail banking products issued by the European Banking Authority.

<sup>199</sup> See, for instance, ECJ judgement of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, para 177, referring to “the uniform application of EU law”.

<sup>200</sup> AG Bobek opinion of 15 April 2021, *FBF*, C-911/19, EU:C:2021:294, para 85.

emphasised, for the Court the **institutional balance** “is a substitute for the principle of the separation of powers that, in Montesquieu’s original exposition of his philosophy, aimed to protect individuals against the abuse of power”.<sup>201</sup> Hence, this represents a possible double problem not only for the EU institutions but also for individuals.

## 1.6 Practical Information for the Reader

Finally, this introduction shall end with some practical information for the reader. While literature can be found under ‘references’ at the end of each section, the following **documents** are listed at the end of this book. The case-law (clustered according to relevant court etc., then in chronological order), EU primary law etc. (in chronological order), EU directives and regulations (in alphabetical order), Eurobarometer surveys (on EU values), other (EU, Council of Europe, and United Nations) legal documents (in alphabetical order), as well as other national legal documents (according to country). Please note, if reference is made to the **EU treaties**, this refers to the latest consolidated version (OJ 2016 C 202). This document as well as all other EU legal documents can be found on EUR-Lex, the EU’s legal database (<https://eur-lex.europa.eu/>), respectively at the CJEU’s website (<https://curia.europa.eu>). Finally, in order to make the text more digestible for the reader, certain **key words** are highlighted in bold. In a similar way, **emphases**, but also omissions and notes in quotations have been marked by square brackets ([!], [. . .], etc.). This book has been finished in December 2021, some updates have been integrated as of April 2022.

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<sup>201</sup> Jacqué (2004), p. 384. See also Lenaerts and Verhoeven (2002). On the institutional balance and the *Meroni*-doctrine, see Frischhut (2020), pp. 102–107.

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# Chapter 2

## General Introduction (De Lege Lata)



This chapter shall provide a short overview covering the legal bases of values in the EU (Sect. 2.1), addressing the different levels (EU, Member States, and individuals) affected (Sect. 2.2), and besides the general values (Art 2 TEU) address (a selection<sup>1</sup> of) specific values, respectively, these general values in specific fields (Sect. 2.3). Hence, setting the agenda in terms of both providing a general overview, and addressing some questions (cf. Sect. 2.4), to be answered in the rest of this book. The lessons learned are then summarised in Sect. 2.5.

### 2.1 Legal Bases: The Hub of Art 2 TEU, and Its Spokes

Introduced by the Lisbon Treaty, Art 2 TEU is the key legal basis for the EU’s common values, which has been referred to as the “‘untouchable core’ of the EU legal order”.<sup>2</sup> However, Art 2 TEU (cf. also Sect. 3.2) in itself is not enough, as the values mentioned therein refer to various other provisions of EU law.

One prominent example is the **CFR**, as Art 2 TEU refers to “human rights, including the rights of persons belonging to minorities”. ‘Human rights’ (“moral rights possessed by all human beings simply in virtue of their humanity”<sup>3</sup>) must be differentiated from ‘fundamental rights’ (“fundamental rights form spheres of natural freedom of the individual which, as negative norms of competence, oppose state intervention and secure the exercise of individual freedom”<sup>4</sup>), as well as ‘citizens’

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<sup>1</sup>I.e. a selection of those fields, where relevant EU documents exist (Sects. 2.3.1–2.3.4), respectively, one *in statu nascendi* (Sect. 2.3.5). See also Sect. 3.2.3 for further details.

<sup>2</sup>Klamert and Kochenov (2019), p. 23.

<sup>3</sup>Tasioulas (2015), p. 70.

<sup>4</sup>Pache (2020), p. 129; translated with DeepL.

rights’.<sup>5</sup> However, it is worth mentioning that most of the articles of the CFR refer to humans and not only to EU citizens, such as Art 2 CFR (right to life: “everyone”), or Art 4 TEU (right not to be tortured: “no one”), to name but a few. Additionally, the corner-stone of the EU’s common values, human dignity, figures prominently as the title of the first chapter, as the first article, as well as the “the real basis of fundamental rights”.<sup>6</sup>

Just to name another example, **non-discrimination** (and equality) can be found in various provisions of EU law (not to mention the vast CJEU case-law).<sup>7</sup> Non-discrimination based on citizenship, or the origin of the product is a key principle of the EU’s economic<sup>8</sup> fundamental freedoms. Non-discrimination based on other criteria (ethnic minorities, religion or belief, disability, age, sexual orientation, and gender) in the fields of employment & vocational training, education, access to goods and services, as well as social protection can be found in various EU directives (cf. also Art 19[1] TFEU).<sup>9</sup>

Finally, Art 21(1) CFR extends this list by referring to “on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”.

Besides individual values, a general reference to the values of this hub (Art 2 TEU) can also be found **elsewhere** in the EU treaties.

- From an **internal** perspective, the values of Art 2 TEU figure prominently in Art 3 (1) TEU on the EU’s objectives, according to which the “Union’s aim is to promote peace, its values and the well-being of its peoples”. For countries striving to join the EU, Art 49 TEU requires both respect for “the values referred to in Article 2” as well as the commitment to promote them. In recent case-law, the ECJ has referred to Art 49 TEU emphasising that by joining the EU via this procedure, the states have “freely and voluntarily committed themselves to the common values referred to in Article 2 TEU”.<sup>10</sup> It seems that by referring to Art 49 TEU, the ECJ wants to emphasise the binding nature of Art 2 TEU, the importance of these values, and the non-negotiable compliance.<sup>11</sup> Regarding the

<sup>5</sup>“While human rights are the rights of all individuals regardless of their nationality, citizenship rights are fundamental rights that only belong to nationals of a particular country”, Benedek (2017), p. 44; translated with DeepL.

<sup>6</sup>Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17.

<sup>7</sup>Cf., for instance, Ellis and Watson (2015), Khaitan (2015) and Zaccaroni (2021).

<sup>8</sup>It is important to emphasise the attribute ‘economic’ (i.e., activities in return for remuneration), as the Court also refers to Art 21(1) TFEU (EU citizens’ right to move and reside freely within the territory of the Member States) as a ‘fundamental freedom’; ECJ judgement of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, para 84.

<sup>9</sup>For further information, see Sect. 3.2.1.10.

<sup>10</sup>ECJ judgement of 20 April 2021, *Repubblica*, C-896/19, EU:C:2021:311, para 61.

<sup>11</sup>See also ECJ judgement of 20 April 2021, *Repubblica*, C-896/19, EU:C:2021:311, para 63: “It follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to



rule of law, the ECJ has proclaimed what has been called a ‘non-regression’<sup>12</sup> principle.<sup>13</sup> Mader has argued that beyond the rule of law, this ‘non-regression’ principle is basically also applicable to other EU values.<sup>14</sup> For Member States, Art 7 TEU would provide a sanction procedure in case of breach of these values,<sup>15</sup> which so far has proven rather useless due to the high requirements.<sup>16</sup> Hence, sometimes it was referred to as the ‘nuclear option’.<sup>17</sup> For the EU’s institutions, Art 13(1) TEU refers to the Union’s ‘institutional framework’, “which shall aim to promote its values”.<sup>18</sup>

- Art 14 TFEU refers to “the place occupied by services of general economic interest in the shared values of the Union”.<sup>19</sup> As mentioned by Calliess, these “horizontal clauses thus highlight certain values of the EU and help them to prevail in individual cases”.<sup>20</sup>
- From an **external** perspective, the above-mentioned Art 3(5) TEU (objectives), tasks the EU to “uphold and promote its values and interests” in “its relations with the wider world”. This includes the EU’s neighbourhood policy (Art 8 TEU; “founded on the values of the Union”), external action (Art 21[2] [a] TEU; “safeguard its values, fundamental interests”, etc.), foreign and security policy (Art 32 TEU; “assert its interests and values on the international scene”), as well as common security and defence policy (Art 42[5] TEU; “protect the Union’s values and serve its interests”).

Hence, we can refer to Art 2 TEU as a hub, which via its spokes is linked to various provisions of EU law, both EU primary and EU secondary law, both hard- and soft-law (remains to be shown), both legislative and executive documents, and case-law.

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that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU [...].”

<sup>12</sup>Council of Europe (1998), pt. 1.1; EFTA Surveillance Authority (2019), p. 9; Kochenov and Dimitrovs (2021).

<sup>13</sup>ECJ judgement of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, para 65: “precluding national provisions relating to the organisation of justice which are such as to constitute a reduction [...], in the Member State concerned, in the protection of the value of the rule of law”.

<sup>14</sup>Mader (2021b), p. 977; see also Mader (2021a).

<sup>15</sup>See, Closa and Kochenov (2016) and Potacs (2018); as well as various contributions in Jakab and Kochenov (2017).

<sup>16</sup>On an alternative of focussing on infringement procedures instead, see Scheppele et al. (2021).

<sup>17</sup>Pech (2020).

<sup>18</sup>See, *infra*, Sect. 3.3.2.

<sup>19</sup>See also Art 1 Prot No 26 (on services of general interest), OJ 2016 C 202/307.

<sup>20</sup>Calliess (2004), pp. 1035, 1038; translated with DeepL.



## 2.2 Different Levels

Looking at the wording of Art 2 TEU, the **first sentence** refers to values on which the EU “is founded”: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. Hence, these values address the EU as an international (more precisely, supra-national) organisation, including its institutional framework (cf. Art 13 TFEU). The wording of “is founded” implies that these values are pre-existing to the Lisbon Treaty.<sup>21</sup> The same applies to the EU’s agencies and other bodies, which are obviously subject to EU primary law (comprising these values). Member States, which have signed the EU treaties, are bound by these values as well.

The **second sentence** is more sophisticated: “These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” First, this sentence addresses the level of the **Member States**, not the EU. Additionally, it addresses a society in all Member States. This seems to imply that there is one European society, which can be found in the current 27 Member States. In case of the afore-mentioned concept of ‘public morality’<sup>22</sup> we can identify a collective concept, as it is defined by public authorities and not by single individuals.<sup>23</sup> A similar question is also pertinent concerning this second sentence. Are those values<sup>24</sup> addressing individuals, which are members of such a society, or only this collective society as such? While the justiciability of values (*de lege lata*) will be addressed later,<sup>25</sup> the question remains if values are needed (*de lege ferenda*) at the level of individuals (EU citizens and third-country nationals living in the EU<sup>26</sup>).

In a recent case concerning restrictive measures against Iran, AG Hogan has referred to the “right of a business to decide according to its own ethical [!] sense of business values [!] that it will not do business with regimes of that kind [i.e., Iran]” as “a core element of the freedom of conscience protected by Article 10(1) of the Charter and the freedom to conduct business within the meaning of Article 16 of the

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<sup>21</sup> Cf. Sect. 3.1.1.

<sup>22</sup> *Supra*, Sect. 1.5.1.

<sup>23</sup> Cf. Frischhut (2019), p. 33.

<sup>24</sup> Hilf and Schorkopf (2021), para 43 argue that the 2nd sentence does not contain values, as the wording of ‘values in the 2nd sentence only refers to the 1st sentence’. They argue this way, even though Art 7(1) TEU refers to “the values referred to in Article 2 [TEU]”. According to the author of this book, the 2nd sentence also contains values, although with some differences, as will be depicted in the rest of this book (see also Sect. 3.5.1).

<sup>25</sup> *Infra*, Sect. 3.5.1.

<sup>26</sup> E.g., Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are **long-term residents**, OJ 2004 L 16/44, as amended by OJ 2011 L 132/1; Directive (EU) 2016/801 of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of **research, studies**, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ 2016 L 132/21.

**Table 2.1** EU common values applied and further specified [Frischhut (2019), p. 35]

	Health	Non-financial reporting	Sports	Digitalisation
Year	2006	2014	<ul style="list-style-type: none"> <li>• 2017</li> <li>• 2018</li> </ul>	2018
Legal status	Soft-law (conclusions of health ministers)	Binding (amendment to EU directive)	Soft-law: <ul style="list-style-type: none"> <li>• EP resolution (2017)</li> <li>• Council conclusions (2018)</li> </ul>	Soft-law (advisory opinion)
Application or distinct values	(Mainly) distinct values	(Mainly) application	<ul style="list-style-type: none"> <li>• Promotion of EU values, plus distinct values</li> <li>• (Mostly) distinct values</li> </ul>	(Mainly) application

Charter”.<sup>27</sup> This quotation illustrates the link between ethics and values and refers to the level of **individuals** (natural or legal persons), besides the above-mentioned levels of the EU and the Member States.

Besides these different levels, there are various documents in specific fields, which are specifically directed at individuals. In the following, some selected examples will be briefly depicted.

### 2.3 Specific Values, Respectively, Values in Specific Fields (Selection)

While one could reflect on specific values in various fields, the following excerpt will focus on a selection of those fields, where relevant EU documents exist (Sects. 2.3.1–2.3.4), respectively, one *in statu nascendi* (Sect. 2.3.5). See also Sect. 3.2.3 for further details.

These general common values of the EU have been **applied** to two areas (digitalisation and non-financial reporting, partly in sports) and **further specified** in others (health and partly in sports), as can be seen below from Table 2.1 (non-exhaustive overview).<sup>28</sup>

In terms of the legal status, no example except for the non-financial reporting directive, is legally binding (soft-law).

<sup>27</sup> AG Hogan opinion of 12 May 2021, *Bank Melli Iran*, C-124/20, EU:C:2021:386, para 87, with further arguments concerning the “ethical qualms and reservations”.

<sup>28</sup> The following overview is based on Frischhut (2019), pp. 34–36. The topic of lobbying is not covered in this overview.

### 2.3.1 Health

In 2006, thus 3 years before the entry into force of the Lisbon Treaty, the EU **health ministers** have declared the health values of “universality, access to good quality care, equity, and solidarity”.<sup>29</sup> This example is not an application of the general values, but a concretisation, resulting in mainly distinct values, where only solidarity is part of both the general and these specific values.<sup>30</sup> For this example of health values, we can identify the EU’s motto of ‘united in diversity’,<sup>31</sup> as these Council conclusions of 2006 emphasise “that the practical ways in which these values and principles become a reality in the health systems of the EU *vary significantly* between Member States, and *will continue to do so*”.<sup>32</sup> However, as de Ruijter has emphasised, the “2006 Council Conclusions may help shape the interpretation of fundamental rights in the context of EU health law”.<sup>33</sup> Unlike the general values, this document sheds further light on the content of these values. Equity,<sup>34</sup> for instance, is determined in the sense that it “relates to equal access according to need, regardless of ethnicity, gender, age, social status or ability to pay”. It is also worth mentioning that “[b]eneath [!] these overarching values, there is also a set of *operating principles*”,<sup>35</sup> which cover quality, safety, care that is based on evidence and ethics, patient involvement, redress, privacy and confidentiality.<sup>36</sup>

Apart from this official document of EU health ministers, it is worth mentioning that also **NGOs** follow a similar approach. The statement entitled “Public health for the future of humanity. One planet, One people, One health” of October 2020<sup>37</sup> refers to the following “key values in addressing the global pandemic, namely solidarity, equity, trust, autonomy, equal moral respect, and vulnerability”. There are clearly some similarities between these six values and the EU’s health values: Solidarity as an EU value (and legal principle), equity (depending on the definition) linked to equality, justice, and non-discrimination as EU value (and principle), autonomy as (depending on the interpretation) related to human dignity, equal moral respect (in the author’s reading also related to human dignity) and

<sup>29</sup>Council conclusions on Common values and principles in European Union Health Systems, OJ 2006 C 146/1.

<sup>30</sup>On solidarity, see Prainsack and Buyx (2017).

<sup>31</sup>Cf. Treaty establishing a Constitution for Europe (N.B. not entered into force), OJ 2004 C 310 (recital 4; Art I-8[3]); see also Dec No 52 (N.B. of 16 Member States), annexed to the Treaty of Lisbon, OJ 2007 C 306/267.

<sup>32</sup>Ibid, emphases added.

<sup>33</sup>de Ruijter (2017), p. 486; see also de Ruijter (2019), p. 188.

<sup>34</sup>See also Sect. 3.2.1.8 on equality vs. equity.

<sup>35</sup>Ibid, emphasis added.

<sup>36</sup>These values rather address the level of health systems and the principles the level of patients. The author wants to thank Rita Baeten for valuable discussions (‘Health in Europe’ seminar at Lancaster University, 3 November 2021) in this regard.

<sup>37</sup>World Federation of Public Health Associations et al. (2020).

vulnerability as a concept, which can be found both in ethics and in human rights.<sup>38</sup> Depending on the organisation of health systems, one could still argue that these values are directed at Member States, respectively, public stakeholders in health systems.

### 2.3.2 Sports

This finding does not apply to the next field of sports. An **EP resolution** on integrity, etc. in sports<sup>39</sup> took both the approach of promoting the general EU values (“such as pluralism, tolerance, justice, equality and solidarity”),<sup>40</sup> but also coined distinct values (“such as respect, friendship, tolerance and fair play”,<sup>41</sup> or “such as mutual respect, tolerance, compassion, leadership, equality of opportunity and the rule of law”<sup>42</sup>). The 2018 **Council conclusions** on promoting the common values of the EU through sport mainly refer to distinct values (printed in Italics), when they state that “sport can teach values such as *fairness, teambuilding*, democracy, tolerance, equality, *discipline, inclusion, perseverance* and *respect* that could help to promote and disseminate common values of the EU”.<sup>43</sup> The same is true, when they state that “[v]alues such as *mutual respect, fair play, friendship*, solidarity, tolerance and equality should be natural to all those involved in sport”.<sup>44</sup> First, as we can see, most of those values are not part of Art 2 TEU. Second, friendship and related values are clearly directed at individuals and not at public stakeholders.

### 2.3.3 Digitalisation

While these values in the field of sports will mainly concern natural persons, digitalisation will most of the time concern legal persons, i.e. (big) corporations. In this field, the Ethics Advisory Group established by the European Data Protection Supervisor has referred to dignity, freedom, autonomy, solidarity, equality,

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<sup>38</sup>Cf. Peroni and Timmer (2013) and Andorno (2016).

<sup>39</sup>EP resolution of 2 February 2017 on an integrated approach to Sport Policy: good governance, accessibility and integrity, OJ 2018 C 252/2.

<sup>40</sup>Ibid, pt. 45.

<sup>41</sup>Ibid, pt. 31.

<sup>42</sup>Ibid, pt. 44.

<sup>43</sup>Conclusions of the Council [etc.] on promoting the common values of the EU through sport, OJ 2018 C 196/23 (pt. 14). See also, more recently, Resolution of the Council [...] on the key features of a European Sport Model, OJ 2021 C 501/1, pt. 7 (“values, such as solidarity between different levels in sport, in particular between professional and grassroots sport, fairness, integrity, openness, gender equality and good governance”); see also pt. 8.

<sup>44</sup>Ibid, pt. 17.

democracy, justice and truth, to leap from the EU's general common values to 'digital ethics'.<sup>45</sup> As we can see, the majority of values are those from Art 2 TEU (e.g., not comprising the rule of law, non-discrimination, tolerance), while also embracing autonomy. Autonomy can be seen as part of human dignity, and a principle from the 'principlism' of Beauchamp and Childress,<sup>46</sup> as Floridi et al. advocated applying this substantive<sup>47</sup> concept for the field of digitalisation, respectively, more precisely for artificial intelligence (AI).<sup>48</sup>

In the field of **digitalisation**, various EU documents<sup>49</sup> refer to EU values and have also led to individuals dealing with questions of AI etc.<sup>50</sup> The EP, for instance, proposes a "European certificate of ethical compliance", amongst others based on "Union values [and] Union ethical principles by design".<sup>51</sup> The approach of combining values and principles can also be found outside the EU. As recently emphasised by the UNESCO in its recommendation on the ethics of AI, a "set of values [...] inspires desirable behaviour and represents the foundations of principles, the principles unpack the values underlying them more concretely so that the values can be more easily operationalised in policy statements and actions".<sup>52</sup> In this field, many discussions have recently taken place at EU level, that is why this question will be further discussed in Chap. 4.<sup>53</sup>

The current EC **proposal** for an **AI act** refers to the "objective of the Union of being a global leader in the development of secure, trustworthy and ethical artificial intelligence", by "laying down a uniform legal framework in particular for the development, marketing and use of artificial intelligence in conformity with Union values".<sup>54</sup> However, not all EU documents in the area of digitization contain references to ethics or values. The Digital Markets Act (DMA)<sup>55</sup> contains only

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<sup>45</sup>Ethics Advisory Group (2018).

<sup>46</sup>Beauchamp and Childress (2019), chapter 4.

<sup>47</sup>On how to develop such principles etc., see Stix (2021).

<sup>48</sup>Floridi et al. (2018).

<sup>49</sup>High-level Expert Group on Artificial Intelligence (2019a, b, 2020), to name but a few.

<sup>50</sup>Cf. Frischhut (2020a, b, 2021).

<sup>51</sup>EP resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies (2020/2012(INL)), OJ 2021 C 404/63, pts. 135 and 5.

<sup>52</sup>UNESCO (2021), pt. 10.

<sup>53</sup>See, for instance, Fig. 4.1.

<sup>54</sup>EC proposal for a regulation laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain union legislative acts, COM(2021) 206 final 21.4.2021, recitals 5 and 1. See also EC 'Fostering a European approach to Artificial Intelligence', COM(2021) 205 final 21.4.2021.

<sup>55</sup>EC proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final 15.12.2020, recital 78, "Commission should to maintain a high level of protection and respect for the common EU rights and value".

one reference, the Digital Services Act (DSA)<sup>56</sup> contains no reference to the EU's common values.

### 2.3.4 *Non-financial Reporting*

Let us now, in the broader context of corporate social responsibility (CSR),<sup>57</sup> turn to one field where we can find legally binding rules, addressing certain big corporations. An EU directive of 2013 provides certain rules on **financial** reporting.<sup>58</sup> In 2014, this directive was amended to also include **non-financial and diversity** reporting.<sup>59</sup> Two Commission guidelines provide further information, one from 2017 on the methodology for non-financial reporting,<sup>60</sup> and another one from 2019 on climate-related information.<sup>61</sup> This 2014 directive itself refers to a “non-financial statement containing information [...] relating to, as a minimum [...], environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters”.<sup>62</sup> Hence, this directive does not only refer to one of the values (human rights) mentioned in Art 2 TEU, but also to other topics that can be of relevance for EU values.

It is important to mention that this 2014 directive does **not** prescribe a **specific standard**. While mentioning some explicit examples (e.g., ISO 26000), in providing this information, recital 9 allows undertakings that they “may rely on national frameworks, Union-based frameworks [...], or international frameworks [...], or other recognised international frameworks.” Hence, undertakings can rely on different standards, but in the following, one will be further depicted, due to his relevance for the topic at hand.

Based on these EU rules on non-financial reporting for some large companies, the common good matrix, which lies at the heart of the Common Good Balance Sheet, is

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<sup>56</sup>EC proposal for a regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15.12.2020.

<sup>57</sup>On CSR in EU law, see Andhov Horváthová (2018); “Aside of the corporate social responsibility notion, the EU has developed its own concepts emanating from the general principles and fundamental rights and values of EU law interpreted by the Court of Justice of the European Union” (p. 949).

<sup>58</sup>Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings [...], OJ 2013 L 182/19, as amended by OJ 2014 L 334/86.

<sup>59</sup>Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014 L 330/1.

<sup>60</sup>EC ‘Guidelines on non-financial reporting (methodology for reporting non-financial information)’, OJ 2017 C 215/1.

<sup>61</sup>EC ‘Guidelines on non-financial reporting: Supplement on reporting climate-related information’, OJ 2019 C 209/1.

<sup>62</sup>Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014 L 330/1, Art 19a(1).

VALUE	HUMAN DIGNITY	SOLIDARITY AND SOCIAL JUSTICE	ENVIRONMENTAL SUSTAINABILITY	TRANSPARENCY AND CO-DETERMINATION
STAKEHOLDER				
A: SUPPLIERS	A1 Human dignity in the supply chain	A2 Solidarity and social justice in the supply chain	A3 Environmental sustainability in the supply chain	A4 Transparency and co-determination in the supply chain
B: OWNERS, EQUITY- AND FINANCIAL SERVICE PROVIDERS	B1 Ethical position in relation to financial resources	B2 Social position in relation to financial resources	B3 Use of funds in relation to social and environmental impacts	B4 Ownership and co-determination
C: EMPLOYEES, INCLUDING CO-WORKING EMPLOYERS	C1 Human dignity in the workplace and working environment	C2 Self-determined working arrangements	C3 Environmentally-friendly behaviour of staff	C4 Co-determination and transparency within the organisation
D: CUSTOMERS AND OTHER COMPANIES	D1 Ethical customer relations	D2 Cooperation and solidarity with other companies	D3 Impact on the environment of the use and disposal of products and services	D4 Customer participation and product transparency
E: SOCIAL ENVIRONMENT	E1 Purpose of products and services and their effects on society	E2 Contribution to the community	E3 Reduction of environmental impact	E4 Social co-determination and transparency

Fig. 2.1 Common good matrix (Source: <https://www.ecogood.org/en/common-good-balance-sheet/common-good-matrix/>)

based on the ‘values’<sup>63</sup> of human dignity, solidarity and social justice,<sup>64</sup> environmental sustainability, transparency and co-determination (see Fig. 2.1).

While the EU Directive refers to “environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters”, this example of the Common Good Matrix stands out for its strong emphasis on EU values (human dignity, solidarity, justice) and related principles (sustainability, transparency) that are explicitly addressed. Co-determination can be seen to be linked to democracy. While this example was already mentioned in ‘The Ethical Spirit of EU law’,<sup>65</sup> in drafting this book, the author had the opportunity to talk to the *spiritus rector* of this Common Good Matrix, Christian Felber.<sup>66</sup>

The **Common Good Matrix** idea is based, among others,<sup>67</sup> on the Aristotelean idea that sees money not as the end, but only as a means to an end.<sup>68</sup> Without going too much into details, this matrix is based on the ‘common good’,<sup>69</sup> which the

<sup>63</sup>N.B. Here the notion of ‘values’ refers to the wording used by the Common Good Matrix itself (see Fig. 2.1).

<sup>64</sup>According to Art 3(3)(2) TEU (objectives), the Union is tasked to “promote social justice and protection”.

<sup>65</sup>Frischhut (2019), pp. 35–36.

<sup>66</sup>Telephone interview on 14 June 2021. The following is based on Felber and Heindl (2015) and this interview, as well as on an additional interview on 19 October 2021.

<sup>67</sup>Felber and Heindl (2015), pp. 16–17.

<sup>68</sup>Aristotle (2000), p. 7, 1096a.

<sup>69</sup>On the ‘common good’ from Chinese and American perspectives, see various contributions in Solomon and Lo (2014).

Oxford dictionary defines as “the benefit or interests of all”.<sup>70</sup> The common good shall not be **determined** in a utilitarian way, but shall relate to the good of all, hence a strong link to human dignity (see below). An important idea is that the good of everyone has equal value.

How have these **values** been chosen? According to Felber and Heindl, in the economy, “the same values should be honoured and lead to success that are enshrined in the constitutions of democratic states (constitutional values) and make human relationships successful (relational values)”.<sup>71</sup> Having analysed various constitutions of democratic countries worldwide, they have identified these above-mentioned values. Hence, a bottom-up approach based on legal comparison.

In a similar way as within this book, the question occurs, **how** shall the content of these values be **filled with life**? The common good and these values shall be decided by those affected in a democratic decision, hence, again **bottom-up**. This task has to be done now, and in the future by future generations.<sup>72</sup>

Hence, the shaping of the content of these values should be seen as an **ongoing and dynamic** democratic process that, again, shall not take place top-down, but in a bottom-up way.<sup>73</sup>

Within this concept, the common good and **human dignity** shall be seen as the two poles of state action.<sup>74</sup> Equality and freedom are not explicitly mentioned but seen as being closely related to human dignity.

Likewise, freedom and the rule of law do not figure amongst the values chosen, as the two of them are rather seen as **prerequisites** for companies, so that they are able to conduct their business.

Hence, we can identify all of the **EU’s values** that are **explicitly** mentioned, such as human dignity, human rights (including minorities), (social) justice and solidarity. Some are **implicitly** covered, as content-wise there is a strong link of freedom and equality (including non-discrimination) to human dignity. Democracy can be seen as both a **prerequisite** (as a selection criterion for the countries chosen), and included in the sense of self-determination. Likewise, freedom and the rule of law are also seen as prerequisites. Two values do not figure in this list: Those are the two values rather related to human beings, namely, pluralism and tolerance.<sup>75</sup> In EU law, sustainability<sup>76</sup> and transparency<sup>77</sup> are qualified as principles, not as values.

Last but not least it is important to emphasise that these **obligations** do not affect human beings, but **legal persons**.

<sup>70</sup>Stevenson (2010), p. 351.

<sup>71</sup>Felber and Heindl (2015), p. 16, translated with DeepL.

<sup>72</sup>On future generations, see also the referenced BVerfG case-law in Sect. 3.2.1.6.

<sup>73</sup>Felber and Heindl (2015), pp. 18–19.

<sup>74</sup>Felber and Heindl (2015), pp. 27–31.

<sup>75</sup>As will depicted later, pluralism also has an ‘institutional meaning’ in the context of democracy; see, *infra*, Sect. 3.2.1.

<sup>76</sup>Art 3(3) and (5) TEU, etc.

<sup>77</sup>Art 11 TEU, Art 15(3) TFEU, etc.



This is an example of values having a direct impact on (large) companies, where we find an application of some of the EU's values, respectively, principles of sustainability and transparency. In terms of an outlook, it shall be mentioned that due to "a widening gap between the sustainability information companies report and the needs of the intended users of that information" the current legislative framework shall be revised and placed with the overall objective of the 'European Green Deal'.<sup>78</sup>

### 2.3.5 *Lobbying and Beyond*

While these specific fields are not exhaustive, the author wants to mention one, where values and ethics play an important role in (re-)gaining citizens' trust in the EU, i.e., the controversial field of lobbying. Often citizens have the impression that big corporations can simply 'buy laws', as unfortunately some politicians have actively 'contributed' in creating such an impression.<sup>79</sup>

In her speech from July 2019 setting out the political guidelines of the Commission for 2019–2024, President Ursula von der Leyen expressed her will to "support the creation of an independent ethics body common to all EU institutions".<sup>80</sup> Likewise, the European Parliament has also supported this idea and on 16 September 2021 has adopted a resolution 'on strengthening transparency and integrity in EU institutions by setting up an independent EU ethics body'.<sup>81</sup>

The author has drafted a **study** commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, how to set up such an 'Independent Ethics Body' (IEB). This study was based on an analysis of the status quo in the EU, and on a comparison covering France, Ireland and Canada.

**France** stands out as a country with a strong ethics watchdog, the '*Haute Autorité pour la transparence de la vie publique*' (HATVP).<sup>82</sup> The Rules of Procedure of this body require the HATVP members, rapporteurs and officials to perform their duties

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<sup>78</sup>EC proposal for a Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM (2021) 189 final 21.4.2021, p. 3.

<sup>79</sup>For a selection of some scandals, see Dialer and Richter (2014); Tansey (2014); Grad and Frischhut (2019), p. 305. On lobbying and corruption, see Ammann (2020).

<sup>80</sup>European Commission (2019), p. 21.

<sup>81</sup>See EP resolution of 16 September 2021 on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body (2020/2133(INI)), [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0396\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0396_EN.html). See also European Parliament (2021).

<sup>82</sup>For further details, see Frischhut (2020c), pp. 51–64.

with integrity, probity, transparency, impartiality and independence.<sup>83</sup> Another benchmark in this field is **Canada** with its ‘Conflict of Interest and Ethics Commissioner’ (CIEC). The ‘Code of Values for Employees of the Conflict of Interest and Ethics Commissioner’<sup>84</sup> addresses the vision to support a “culture of integrity to achieve a high degree of public confidence”. The four values mentioned in this regard comprise respect for people (fostering “inclusion, civility and dignity”), professionalism (inducing diligence, consistency, and a spirit of collaboration), integrity (building and maintaining trust “by upholding the highest ethical standards”), and impartiality (independence, objectivity, non-partisan behaviour, and maintaining diversity of views). Notably, the staff must adhere to the “highest [!] ethical standards”, to achieve a “high [!] degree of public confidence”.<sup>85</sup> This is an approach, which could also prove useful for the EU.<sup>86</sup>

After a long struggle, the voluntary<sup>87</sup> transparency register comprising the European Parliament and the European Commission was finally turned into a **mandatory<sup>88</sup> transparency register**, also now comprising the Council of the EU.

## 2.4 Relations

These sections of this chapter so far have already addressed some of the following questions. This section shall only address (some additional) questions, which will then be further elaborated and answered in Chap. 4.

This first comprises the **relationship** of values to **each other** (Sect. 4.1). What is the overall relationship between the first and the second sentence of Art 2 TEU? Do they have a different legal significance, respectively, do they address different stakeholders, and are they mutually exclusive, or are there overlaps between the two sentences, respectively, between those addressed by these values, both in terms

<sup>83</sup> *Règlement intérieur de la Haute Autorité pour la transparence de la vie publique*, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000039131341>. Art 4 leg. cit. refers to them as values, whereas Art 1 leg. cit. refers to principles.

<sup>84</sup> <https://ciec-ccie.parl.gc.ca/en/About-APropos/Documents/Code%20of%20Values%202019.pdf>.

<sup>85</sup> For further details, see Frischhut (2020c), pp. 73–83. On Ireland, see Frischhut (2020c), pp. 64–72.

<sup>86</sup> For details on the IEB (including how to set up this body), see Frischhut (2020c), pp. 86–119.

<sup>87</sup> Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, OJ 2014 L 277/11.

<sup>88</sup> Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register, OJ 2021 L 207/1. See also the Political statement of the European Parliament, the Council of the European Union and the European Commission on the occasion of the adoption of the Interinstitutional Agreement on a Mandatory Transparency Register, OJ 2021 L 207/18, and Council Decision (EU) 2021/929 of 6 May 2021 on the regulation of contacts between the General Secretariat of the Council and interest representatives, OJ 2021 L 207/19.

of rights, and in terms of obligations (see also Sect. 3.3). Is the value of non-discrimination the substantive materialisation of the more abstract concept of justice? Besides the two sentences of Art 2 TEU, there can always be conflicting situations between two values. For instance, can the value of democracy limit the rule of law (cf. Poland, Hungary, etc.),<sup>89</sup> or the human rights of minorities?

Section 4.2 will cover the relationship between Art 2 TEU and **other provisions of EU law**. This includes other provisions of EU primary law, which can either reinforce (e.g., Art 4[3] TEU) or weaken (Art 4[2] TEU) the EU's common values (Sect. 4.2.1). Besides values, also human rights have a 'constitutional dimension'.<sup>90</sup> Therefore, also the relationship between Art 2 TEU and other human rights provisions (e.g., CFR, ECHR) must be analysed (Sect. 4.2.3). The relationship of EU values can also be important for the so-called 'reverse Solange' doctrine, which was developed in 2012 and which becomes more important against the background of 'illiberal' tendencies (Sect. 4.2.2).

Finally, the relationship between values **and other concepts** (Sect. 4.3) can be important to determine the content, as vague legal provisions leading to legal consequences can be a problem concerning legal certainty, as part of the rule of law.<sup>91</sup> More concrete legal<sup>92</sup> principles (and other legal provisions) can therefore fill such a concept with substance.

## 2.5 Lessons Learned

Hence, what are the **lessons learned** from this chapter?

Values have been enshrined in Art 2 TEU, but this provision is a **hub**, where other articles of EU primary and secondary law feed into, filling these concepts with life. Maybe non-discrimination is one of the best examples, having displayed some of the provisions that can be seen as jigsaw pieces of the **greater puzzle**.

It is important to have general values, which necessarily must remain rather **abstract**, as they play a role in several fields. However, we also have to see the role of these general values in **specific fields**. For instance, what does human dignity mean in digitalisation, what does solidarity mean in health under 'normal circumstances', or in a pandemic more specifically?

The health values have also contributed the idea of linking more abstract **values** to more specific legal (and or ethical) **principles**, as the latter provide more clarity (legal addressees and consequences) and are less abstract.

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<sup>89</sup> Cf. the various contributions in von Bogdandy and Sonnevend (2015), in Foret and Calligaro (2018) and in von Bogdandy et al. (2021), to name but a few.

<sup>90</sup> Cf. Rensmann (2005).

<sup>91</sup> Cf. Schroeder (2016), pp. 19, 25.

<sup>92</sup> While these principles qualify as law and those 'general principles of EU law' even as primary law, they will be covered in Sect. 4.3, to cover both legal and ethical principles together.

The health field has also highlighted an approach following the EU's motto of '**united in diversity**'. Common values do not necessarily have to be completely uniform but can leave some leeway where necessary. This idea will have to be further developed in the following.

**Values in a specific content** might also have the advantage of providing more substance. Again, this should not be seen as a criticism of abstract general values, as too detailed values most likely will be unapt for a broad range of fields, to which they need to be applied.

One last word on the health field. Here it was also interesting to see that **NGOs** in a specific field seem to go into a similar direction as the health ministers at the time. Seems there is intrinsic consensus. This of course does not mean that there cannot be disagreement on other issues.

The field of sports contributed to the finding of values addressing the **individual**, such as perseverance, respect, mutual respect, friendship, and fair play. While there can be a lengthy discussion whether these should be seen as personal values or rather as virtues ("goodness and rightness in character and [!] conduct"<sup>93</sup>), it is paramount to also include this level of individuals.

Non-financial reporting stands out as one example where human rights and values can have a binding impact via **hard-law**, besides the other examples of **soft-law**. This is an important element in applying values to various fields as whether to best intervene in a **regulatory** approach via soft- or hard law, respectively, on a timeline at what stage a transition from soft- to hard-law might prove necessary, in case the former should be insufficient.

Finally, the field of lobbying and more broadly of ethics in public decision-making has brought to light the necessity of values and ethics to (re-)gain citizens' **trust**. The above-quoted approach of the striving for the "highest [!] ethical standards", to achieve a "high [!] degree of public confidence" can clearly be seen as an approach also worth striving for inside the EU. Here, too, it should be emphasised once again that ethical standards include values and do not exclude them. This quotation from Canada has also revealed that valuable benchmarks can be found both outside the EU's institutional framework, and even outside Europe.

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<sup>93</sup>Chara (2002), p. 912.

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# Chapter 3

## Different Scopes and Implications (*De Lege Lata*)



Based on the general introduction into this topic (previous Chap. 2), let us now turn to the scope of these values. Section 3.1 will focus on the historic development so far and the evolutionary character of these values (scope *ratione temporis*), followed by the scope *ratione materiae* (content) in Sect. 3.2. Section 3.3 addresses the scope *ratione personae*, covering both those entitled and obliged by various values. The external perspective (scope *ratione limitis*), i.e., taking a closer look both inside and outside the EU27, will be covered in Sect. 3.4. Finally, Sect. 3.5 focuses on the implications, i.e. questions of justiciability and restrictions.

### 3.1 Scope *Ratione Temporis*

#### 3.1.1 Development of Values

The history of European integration can be described as a step-by-step approach.<sup>1</sup> The European Coal and Steel Community (ECSC) Treaty of April 1951 did neither refer to values, nor to human rights. What it mentioned in its preamble is ‘world peace’ (“*paix mondiale*”), and the idea expressed in the Schuman declaration

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<sup>1</sup>Although sometimes almost forgotten, there were already plans for a European **Defence** Community (French proposal from 1952, rejected by the French Assembly in August 1954), plans for a European **Health** Community, also called the ‘White Pool’ (proposed by French health minister Paul Ribeyre, failed in 1954), as well as plans for more integration in the field of **agriculture** (the so called ‘Green Pool’), which also failed in 1954; for further details, see Parsons (2003), pp. 67–89; Davesne and Guigner (2013). All three proposals failed due to similar reasons of French politics; Parsons (2003), p. 83. The 330 article draft treaty by Ribeyre for a European Health Community, cf. Parsons (2003), p. 87, is remarkable, given the current discussions for a ‘European Health Union’ due to the Coronavirus pandemic. The European Defence Community would have been linked to a political Union, see Frischhut (2003a), p. 2.



(of May 1950) of concrete actions, which create a real solidarity (“*réalisations concrètes créant d’abord une solidarité de fait*”).<sup>2</sup>

In **academia**, already in 1979, Walter Hallstein has identified the following values of European Community integration: peace, uniformity, equality (between both citizens and Member States), freedom, solidarity, prosperity, progress, and security (own translation).<sup>3</sup> Peace was the overarching objective of the ECSC Treaty, which Schuman strove to achieve via economic integration. Uniformity and equality (non-discrimination) can be seen as essential features (or legal principles) of EU (or Community) law, prosperity, progress, and security rather as concrete achievements of this integration process. What remains are equality, freedom, and solidarity, as three of today’s values. Although not part of the chapter on values (*Grundwerte*), Hallstein has also addressed fundamental rights (*Grundrechte*).<sup>4</sup> Likewise, in relation to the European Community, Calliess (in 2004) referred to the ‘magic triangle of values’ of peace, economy and integration,<sup>5</sup> three concepts, which might rather be seen as two fields (economic and institutional integration), in order (also) to safeguard peace. This European integration process at the time can be qualified as an ‘association of functional integration’ (*Zweckverband funktioneller Integration*), as coined by Ipsen.<sup>6</sup>

Since the ECJ had decided (in 1970) in case *Internationale Handelsgesellschaft* that Community (today: EU) law also enjoys **primacy** over national constitutional law,<sup>7</sup> there was a need also to recognise fundamental rights at Community level.<sup>8</sup> Already in 1969, the ECJ had introduced the concept of “fundamental human rights enshrined in the general principles of Community law and protected by the Court” in *Stauder*, although there was no **fundamental rights** infringement in this particular case.<sup>9</sup> In case *Internationale Handelsgesellschaft*, the ECJ had clarified that these “general principles of law” are “inspired by the constitutional traditions common to the Member States”.<sup>10</sup> This source of inspiration has later been expanded in 1974 to

<sup>2</sup>The ECSC Treaty has not been published in the EU’s OJ, but, for instance, in the German *Bundesgesetzblatt* (1952), part II, pp. 445–504, and is available on EUR-Lex: <http://data.europa.eu/eli/treaty/ceca/sign>.

<sup>3</sup>Hallstein (1979), pp. 66–71: “*Friede, Einheit, Gleichheit, Freiheit, Solidarität, Wohlstand, Fortschritt und Sicherheit*” (p. 66).

<sup>4</sup>Hallstein (1979), pp. 71–72.

<sup>5</sup>Calliess (2004), p. 1034.

<sup>6</sup>Ipsen (1972), pp. 196–200.

<sup>7</sup>ECJ judgement of 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114, para 3, where the Court refers to constitutional law and even basic constitutional principles (“constitution of that State or the principles of a national constitutional structure”).

<sup>8</sup>Cf. Calliess (2004), p. 1035.

<sup>9</sup>ECJ judgement of 12 November 1969, *Stauder vs. Stadt Ulm*, C-29/69, EU:C:1969:57, para 7.

<sup>10</sup>ECJ judgement of 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114, para 4, also referring to the necessity to take into account “the framework of the structure and objectives of the Community”.

include international treaties,<sup>11</sup> and (in 1975) to the ECHR.<sup>12</sup> This approach of the ECJ has been endorsed by both the EU institutions (in 1977),<sup>13</sup> and by the Member States in the Treaty of **Maastricht** (February 1992)<sup>14, 15</sup> Already the European Council of April 1978 endorsed this joint declaration of EU institutions (from 1977) and referred to “the cherished values of [the] legal, political and moral order”.<sup>16</sup> In the end,<sup>17</sup> this development<sup>18</sup> has been codified (with other sources<sup>19</sup>) in the CFR.<sup>20</sup>

Besides this internal development, if we turn to the external perspective,<sup>21</sup> i.e., accession of new Member States, the European Council meeting in June 1993 in **Copenhagen** has defined the following criteria for accession to (what today is) the EU:<sup>22</sup>

Membership requires that the candidate country has achieved [a] stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of

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<sup>11</sup>ECJ judgement of 14 May 1974, *Nold vs. Commission*, C-4/73, EU:C:1974:51, para 13: “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”.

<sup>12</sup>ECJ judgement of 28 October 1975, *Rutili vs. Ministre de l’intérieur*, C-36/75, EU:C:1975:137, para 32.

<sup>13</sup>Joint declaration by the European Parliament, the Council and the Commission, OJ 1977 C 103/1; see also EP resolution of 12 April 1989 adopting the Declaration of fundamental rights and freedoms, OJ 1989 C 120/51.

<sup>14</sup>Treaty of Maastricht, OJ 1992 C 224/1 (Art F[2] TEU).

<sup>15</sup>The Single European Act (OJ 1987 L 169/1) of 1986 mentioned (recital 3) some of today’s values, although not entitling them as values: “DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice”.

<sup>16</sup>European Council in Copenhagen, Conclusions of the Presidency of 7–8 April 1978, pp. 12–13: “The Heads of State or of Government confirm their will, as expressed in the Copenhagen Declaration on the identity, to ensure that the cherished values [!] of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of justice and of respect for human rights [!]”.

<sup>17</sup>See also the EP resolution of 12 April 1989 adopting the Declaration of fundamental rights and freedoms, OJ 1989 C 120/51, which comprised a ‘Declaration of Fundamental Rights and Freedoms’ (of 29 Articles) and referred to values (“whereas the identity of the Community makes it essential to give expression to the shared values of the citizens of Europe”).

<sup>18</sup>For further details on the history of fundamental rights, see Nicolaysen (2020).

<sup>19</sup>See Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17, for further details.

<sup>20</sup>Solemn proclamation by the European Parliament, the Council and the Commission both in Nice (OJ 2000 C 364/1), as well as in Strasbourg (OJ 2007 C 303/1), finally legally binding via the Lisbon Treaty (OJ 2007 C 306), which entered into force on 1 December 2009.

<sup>21</sup>See *infra*, Sect. 3.4.

<sup>22</sup>European Council in Copenhagen, Conclusions of the Presidency of 21–22 June 1993, p. 13. Another criterion, addressing not the candidate country but the EU itself, is the “Union’s capacity to absorb new members”.

minorities, [b] the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's [c] ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

Besides the (ad b) economic (functioning market economy, etc.) and the (ad c) legal (ability to take on the so-called *acquis*<sup>23</sup>), the (ad a) **political** category of the 1993 Copenhagen **criteria** ("stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities") are well-known values of today's Art 2 TEU.

A brief look into the **constitutional debate**<sup>24</sup> reveals that these 1993 political 'Copenhagen-criteria' correspond to what the so-called 1984 '*Spinelli-draft*' of the EP had mentioned in its preamble: "commitment to the principles of pluralist democracy, respect for human rights and the rule of law".<sup>25</sup> The 1994 EP '*Herman-draft*' first referred to values, and listed quite some of those mentioned today in Art 2 TEU: "stressing that membership of the European Union is based on values [!] shared by its peoples, in particular freedom, equality, solidarity, human dignity, democracy, respect for human rights and the rule of law".<sup>26</sup>

In 1997, the **Amsterdam** Treaty has taken the next step, enshrining concepts that today figure in Art 2 TEU, although under a different terminology. According to Art F(1), "[t]he 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".<sup>27</sup> While primary law at the time clearly referred to **principles**, these concepts have sometimes been referred to as values ("*valeurs fondamentales*") in academia.<sup>28</sup> Compared to the 1994 '*Herman-draft*', equality, solidarity, and human dignity did not make it in the 1997 Amsterdam Treaty, besides not adopting the 'value' terminology. Today, liberty has been replaced by freedom and the notion of 'values common to the Member States' was part of this first sentence, where the second sentence did not yet exist. Two values were missing, that is equality and human dignity.

<sup>23</sup>The EU defines the EU *acquis* as "the body of common rights and obligations that are binding on all EU countries, as EU Members", comprising primary law, secondary law, case-law, soft-law, as well as international agreements; EUR-Lex (2021).

<sup>24</sup>For further details on these draft constitutional documents, see Frischhut (2003b). On the 'constitutional debate' as such see, for instance, Weiler (1999).

<sup>25</sup>EP [resolution] of 14 February 1984, Draft Treaty Establishing the European Union, OJ 1984 C 77/33 ('*Spinelli-draft*'), recital 3.

<sup>26</sup>EP resolution of 10 February 1994, Resolution on the Constitution of the European Union, OJ 1994 C 61/155 ('*Herman-draft*'), recital 4 (of the Draft Constitution in the Annex to this Resolution).

<sup>27</sup>Treaty of Amsterdam, OJ 1997 C 340/1.

<sup>28</sup>Simon (1998), p. 56.

The latter value of **human dignity** occurred in ECJ case-law as of 2001.<sup>29</sup> In a case concerning the patentability of isolated parts of the human body, the ECJ has held that it “is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right [!] to human dignity and integrity is observed”.<sup>30</sup> The concept of ‘human dignity’ did it not come out of nowhere, but was mentioned in recital 38<sup>31</sup> of the directive<sup>32</sup> relevant to this dispute. Briefly to mention that in case-law before 2001, the Court itself has not referred to human dignity, although it was put forward as an argument by the parties of the proceeding,<sup>33</sup> or mentioned in relevant EU secondary law.<sup>34</sup> As in the case of the Treaty of Amsterdam referring to principles, here we have the concept of human dignity denominated as a fundamental right, before it later on was referred to as a value.

Three years later (i.e., in 2004), in the famous *Omega* case, the ECJ has held that “the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law”.<sup>35</sup> This case was about the question of whether Germany could be obliged to allow laserdromes, which offer ‘playing at killing’ via the freedom of services, as one of the EU’s fundamental economic<sup>36</sup> freedoms. These fundamental freedoms are not unlimited and can be restricted in case of proportional national measures, regarding accepted ‘reasons of justification’. Human dignity, as a German ‘constitutional principle’ has been accepted by the

<sup>29</sup>Please note that already EP resolution of 12 April 1989 adopting the Declaration of fundamental rights and freedoms, OJ 1989 C 120/51 referred to human dignity in its first article (“Human dignity shall be inviolable”).

<sup>30</sup>ECJ judgement of 9 October 2001, *Netherlands vs. Parliament and Council*, C-377/98, EU:C:2001:523, para 70.

<sup>31</sup>“Whereas the operative part of this Directive should also include an illustrative list of inventions excluded from patentability so as to provide national courts and patent offices with a general guide to interpreting the reference to ordre public and morality; whereas this list obviously cannot presume to be exhaustive; whereas processes, the use of which offend against human dignity, such as processes to produce chimeras from germ cells or totipotent cells of humans and animals, are obviously also excluded from patentability”.

<sup>32</sup>Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, OJ 1998 L 213/13. On this directive, see also Frischhut (2015), pp. 537, 551, 561; Frischhut (2019), p. 46.

<sup>33</sup>ECJ judgement of 27 March 1985, *Scrivner vs. Centre public d’aide sociale de Chastre*, C-122/84, EU:C:1985:145, para 11 (where this Centre referred to human dignity in the context of Art 2 ECHR ‘right to life’).

<sup>34</sup>ECJ judgement of 9 July 1997, *Konsumentombudsmannen vs. De Agostini and TV-Shop*, joined cases C-34/95, C-35/95 and C-36/95, EU:C:1997:344, para 31 (quoting Art 12[a] [“respect for human dignity”] of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298/23, as repealed by OJ 2010 L 95/1).

<sup>35</sup>ECJ judgement of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, para 34.

<sup>36</sup>It is important to emphasise the attribute ‘economic’ (i.e., activities in return for remuneration), as the Court also refers to Art 21(1) TFEU (EU citizens’ right to move and reside freely within the territory of the Member States) as a ‘fundamental freedom’; ECJ judgement of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, para 84.

ECJ as a ‘general principle of law’, which can feed into ‘public policy’ as a well-known<sup>37</sup> reason of justification.<sup>38</sup> This did not only allow Germany to prohibit these laser games, but also put this German ‘constitutional principle’ of human dignity on the European agenda.

The **transition** from principles **to values** finally occurred in the European Convention leading to the **Constitutional Treaty** (October 2004).<sup>39</sup> Already in February 2003, a draft referred to values, also including human dignity, where freedom was still referred to as liberty. There was already a second sentence, although still worded differently.<sup>40</sup> Another draft from June 2003 referred to equality (instead of liberty) and added pluralism and non-discrimination to the second sentence, and the beginning of this sentence was similar to today’s version (“These values are common to the Member States in a society [. . .]”).<sup>41</sup> Although the Constitutional Treaty has not entered into force because of the two negative referenda in France and the Netherlands (May and June 2005),<sup>42</sup> its Art I.2 corresponds to today’s Art 2 TEU. Hence, since the entry into force of the **Lisbon Treaty**, the EU can be referred to as a Community<sup>43</sup> (or now: Union) of values.<sup>44</sup>

This historic development, as mentioned above, can be summarised as follows (see Table 3.1). Please note that this overview only summarises what has been outlined so far. There are both additional documents,<sup>45</sup> which have not been integrated, and, apart from human dignity and fundamental or human rights, other

<sup>37</sup> Art 36 TFEU, Art 45(3) TFEU, Art 52(1) TFEU (i.c.w. Art 62 TFEU), Art 65(1)(b) TFEU; see also Art 202 TFEU.

<sup>38</sup> ECJ judgement of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, para 41.

<sup>39</sup> Treaty establishing a Constitution for Europe (N.B. not entered into force), OJ 2004 C 310.

<sup>40</sup> CONV 528/03, p. 2 (“The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity”). Please note that already EP resolution of 12 April 1989 adopting the Declaration of fundamental rights and freedoms, OJ 1989 C 120/51, referred to tolerance (recital C).

<sup>41</sup> CONV 797/03, p. 5 (“The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination”).

<sup>42</sup> Cf. *The Economist* (May 26th–June 1st 2012), p. 25.

<sup>43</sup> Reimer (2003); Calliess (2004); Schmitz (2005), p. 80; Rensmann (2005); Mandry (2009); Sommermann (2020), pp. 258–260.

<sup>44</sup> On the reference to the “Community of values” in the context of the EGE, see Frischhut (2021b).

<sup>45</sup> E.g.: European Council in Laeken, Conclusions of the Presidency of 14–15 December 2001, p. 20: “The European Union’s one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law”. CONV 369/02 of 28 October 2002, p. 8: “This article sets out the values of the Union: human dignity, fundamental rights, democracy, the rule of law, tolerance, respect for obligations and for international law”. CONV 574/1/03 REV 1 of 26 February 2003, p. 17: suggestion to add equality and equality between men and women; transfer of all or some of the values in the second sentence “peace, tolerance, justice, solidarity” to the first sentence; suggestions to add pluralism, diversity, cultural and linguistic diversity, respect for minorities and disabled persons, social justice, transparency, cultural diversity, preservation of national and regional

**Table 3.1** Historic development of Art 2 TEU values (excerpt)

Art 2 TEU	Case-law	Copenhagen 1993	Amsterdam 1997	Conv 528/03; 02/2003	Conv 797/03; 06/2003	Const. Treaty 2004
Human dignity	Since <i>NL vs. EP &amp; Council</i> (2001), <i>Omega</i> (2004)			X	X	X
Freedom			<b>X (liberty)</b>	X (liberty)	X (liberty)	X
Democracy		<b>X</b>	X	X	X	X
Equality					<b>X</b>	X
Rule of law		<b>X</b>	X	X	X	X
Human rights	Since <i>Stauder</i> (1969)	X	X	X	X	X
Rights of minorities		<b>X</b>				X
Pluralism					<b>X</b>	X
Non-discrimination					<b>X</b>	X
Tolerance				<b>X</b>	X	X
Justice				<b>X</b>	X	X
Solidarity				<b>X</b>	X	X
Equality women and men						<b>X</b>
(other)				<i>Peace</i>		

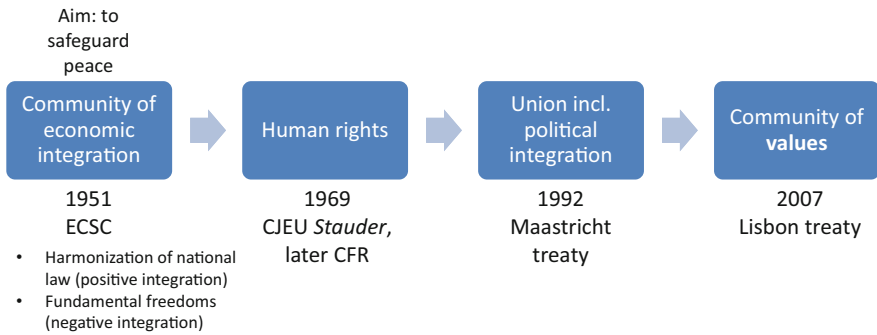
values have also been addressed in CJEU case-law.<sup>46</sup> The box where this concept first occurred in this overview (again, not considering other documents), is highlighted in bold. The columns of Table 3.1 should be read in chronological order (from left to right), where the column on the left (Art 2 TEU) should be seen as a reference, keeping in mind that the column on the right (Constitutional Treaty) corresponds to the Lisbon Treaty (i.e., Art 2 TEU).

To **summarise**, the overall development of EU integration can be depicted as follows (see Fig. 3.1). This process started with integration in the economic field. It then also embraced human rights (mainly developed by the CJEU) and spilled over to political integration via the Maastricht Treaty. Finally, the Lisbon Treaty made the CFR legally binding and enshrined the common values in Art 2 TEU. It is important to emphasise that the respective following steps do not replace but supplement the previous ones.

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identity, and national minorities; as well as the suggestion to replace human rights by fundamental rights.

<sup>46</sup>For the extensive case-law on non-discrimination, as mentioned above, see Ellis and Watson (2015), Khaitan (2015) and Zaccaroni (2021).



**Fig. 3.1** Development of EU integration (own illustration)

Thus, several building blocks were gradually put together and first found their way into primary law under the label of principles, and finally became values through the Treaty of Lisbon. These building blocks have also been identified in academia and many of them developed by the CJEU case-law, which is especially true for fundamental rights. Likewise, also the European Council contributed to the shaping of these values, amongst others via the Copenhagen criteria. These various steps mentioned so far always went into a certain direction, although certain contributions (e.g., the reference to values in the ‘*Herman-draft*’ of 1994) were not adopted (e.g., the 1997 Amsterdam Treaty, only referring to principles). While the values in the EU treaties have not been changed since the signing of the Lisbon Treaty (signed 13 December 2007), we must acknowledge that Art 2 TEU represents the consensus at the time. This raises the question, whether the 2007 status quo can or should be further developed.

### 3.1.2 *Living Instruments*

The **ECHR** preamble takes an evolutive approach,<sup>47</sup> which is also true for the EU.<sup>48</sup> As it is “firmly rooted”<sup>49</sup> in ECtHR case-law, “the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas

<sup>47</sup>It refers to “greater unity between its members and [...] further realisation of Human Rights and Fundamental Freedoms” (recital 3), as well as to the objective of taking “the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration” (recital 5).

<sup>48</sup>The TEU preamble refers to “a new stage in the process of European integration” (recital 1), to “the process of creating an ever closer union among the peoples of Europe” (recital 13), as well as to “further steps to be taken in order to advance European integration” (recital 14). On the ‘ever closer’ Union (see also Art 1[1] TEU, recital 1 TFEU, recital 1 CFR) and Brexit, see ECJ judgement of 10 December 2018, *Wightman*, C-621/18, EU:C:2018:999, paras 61, 67.

<sup>49</sup>ECtHR judgement of 23 March 1995, *Loizidou vs. Turkey (preliminary objections)*, 15318/89, para 71.

prevailing in democratic States today”.<sup>50</sup> These changing circumstances concern economic and social conditions, and changes in ethical perceptions.<sup>51</sup> As a corollary, the Court must, for instance, “have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved”.<sup>52</sup>

This **dynamic<sup>53</sup> and evolutive interpretation** can be seen as a sub-category of teleological interpretation,<sup>54</sup> which, as mentioned above,<sup>55</sup> refers to the *telos* (goal, purpose) of a provision. This ‘living instrument’ approach is especially relevant in case of indeterminate legal concepts and can be problematic in case of precise facts.<sup>56</sup> Besides broad concepts, this approach of referring to ‘present-day conditions’ is especially relevant for concepts relating to a non-legal discipline, as in the case of morality.<sup>57</sup> Morality refers to attitudes of what is right or wrong, relative to culture, region and especially time. Besides morality, also public order<sup>58</sup> is a concept that is open to such an evolutionary interpretation.<sup>59</sup> As we have seen in the previous section, in *Omega* the ECJ has used the well-established concept of ‘public policy’ to accommodate the German constitutional principle of ‘human dignity’.

To the best knowledge of the author, for the first time in December 2020, the ECJ<sup>60</sup> has held that “the **Charter** is a living instrument [!] which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today”.<sup>61</sup> Hence, an identical wording as we know it from ECtHR case-law.<sup>62</sup> This qualification led the ECJ to the result that “changes in values [!] and ideas, both in terms of society and legislation, in the Member States” must be taken into account. This case decided by the Grand Chamber was about the obligation to stun animals

<sup>50</sup> ECtHR judgement of 24 January 2017, *Khamtokhu and Aksenchik vs. Russia*, 60367/08 and 961/11, para 73.

<sup>51</sup> Mayer (2015), p. 12; Meyer-Ladewig and Nettesheim (2017), p. 33.

<sup>52</sup> ECtHR judgement of 7 July 2011, *Bayatyan vs. Armenia*, 23459/03, para 102.

<sup>53</sup> On the dynamic character of the principle of energy solidarity, see AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 117.

<sup>54</sup> Grabenwarter and Pabel (2021), p. 39.

<sup>55</sup> See Sect. 1.5.1, in the context of normative theories of ethics (utilitarianism, more precisely).

<sup>56</sup> Grabenwarter and Pabel (2021), p. 40.

<sup>57</sup> See Fig. 1.1, *supra*, Sect. 1.3.

<sup>58</sup> See Grabenwarter and Pabel (2021), p. 40.

<sup>59</sup> Grabenwarter and Pabel (2021), p. 40.

<sup>60</sup> Concerning opinions of Advocates General, see, for instance, AG Szpunar opinion of 18 May 2017, X, joined cases C-360/15 and C-31/16, EU:C:2017:397, para 2 (“I would not want to go so far as asserting that the internal market is a ‘living instrument’ [...]”).

<sup>61</sup> ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 77, referring to ECtHR judgement of 7 July 2011, *Bayatyan vs. Armenia*, 23459/03, para 102.

<sup>62</sup> For the Universal Declaration of Human Rights (see note 709) as a “living document”, see Mason Meier et al. (2020), p. 39.



before they are killed, and possible derogations in the context of ritual slaughter. As the ECJ has held in this case, animal welfare is a “value [!] to which contemporary democratic societies have attached increasing importance for several years”, which consequently “may, in the light of changes in society, be taken into account to a greater extent in the context of ritual slaughter and thus help to justify the proportionality of legislation such as that at issue in the main proceedings.”<sup>63</sup>

The **key findings** of this case<sup>64</sup> (stunning of animals) can be summarised as follows:

While the Court has formally referred to the CFR (not Art 2 TEU) as a ‘**living instrument**’, in the following the ECJ has referred to values, where “changes in society” need to be considered. This ‘living instrument’ character of both the CFR and value is not surprising, given the fact that both **Art 2 TEU** and the **CFR** are mutually connected.<sup>65</sup> Likewise, ECJ president Lenaerts has referred to both “the Treaties and the Charter as a ‘living instrument’”.<sup>66</sup>

Referring to the CFR as a living instrument, the Court has addressed the necessity to consider “changes in values and ideas, both in terms of society and legislation”.<sup>67</sup> Changes in **society** relate, for instance, to the evolutive concept of (public) morality. Changes in **legislation** must be taken into account as well. It is worth mentioning that both in the case that led to the first reference to human dignity,<sup>68</sup> and in this ‘stunning of animals’ case, the Court has not ‘invented’ the relevant value ‘from scratch’ but has adopted what already existed in EU secondary law. In case of ‘stunning of animals’, the preamble (recital 4) of the relevant regulation stated that “[a]nimal welfare is a Community value [!] that is enshrined in the Protocol (No 33)”.<sup>69</sup>

The **evolutive character** in this particular case can also be seen, compared to earlier case-law. In 2001, the Court has “declined the invitation”<sup>70</sup> to recognise animal welfare as a ‘general principle of law’.<sup>71</sup> While from a formal perspective both ‘general principles of EU law’ and values are EU primary law, qualifying

<sup>63</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 77.

<sup>64</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031.

<sup>65</sup>For further details, see *infra*, Sect. 4.2.3.

<sup>66</sup>Lenaerts et al. (2021), p. 84.

<sup>67</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 77.

<sup>68</sup>*Supra*, note 32.

<sup>69</sup>Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, OJ 2009 L 303/1, as amended by OJ 2018 L 122/11.

<sup>70</sup>Tridimas (2006), p. 27.

<sup>71</sup>ECJ judgement of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420, para 76: “Lastly, although there exist various provisions of secondary legislation referring to animal welfare, they likewise contain no indication that the need to ensure animal welfare is to be regarded as a general principle of Community law”.

animal welfare as a value can clearly be seen as ‘more’ from a substantive perspective.

This case-law does not stand out as the first case adopting this ‘living instrument’ approach but can also be seen as a change of paradigm as now we have the first value not entitling human beings, but animals. This can be seen as a shift from a mainly **anthropocentric** to a more **bio-centric** approach. This analysis regarding **values** corresponds to what was identified concerning the ‘**ethical** spirit’ of EU law.<sup>72</sup> On the question of who is entitled by EU values, see also Sect. 3.3.1.

On a broader scale, this evolutive character also corresponds to what has been identified for the ‘ethical spirit’ of EU law, which has been qualified as ‘*in statu nascendi*’, comparable to the **step-by-step** approach of the Schuman declaration.<sup>73</sup>

Finally, we can find **values** not only in Art 2 TEU, but via the evolutive interpretation of the CFR as a living instrument also **outside** this key provision, namely, in case of animal welfare in Art 13 TFEU.<sup>74</sup>

This last finding leads us to the content of these values.

## 3.2 Scope *Ratione Materiae*

In the following, some light should be shed on the content of these values, keeping in mind that whole books have been written on single values<sup>75</sup> only, e.g., approx. 700 pages on ‘understanding human dignity’.<sup>76</sup> Levits has aptly stated that just as physics cannot provide us with an exact definition of the basic physical categories of mass and time, and yet we work with them, we also do not need an exact definition of values.<sup>77</sup> Nevertheless, it is worth shedding more light on the content of these values.

### 3.2.1 Common and Constitutional Values of Art 2 TEU

Let us first take a closer look at the common values, enshrined by the Lisbon Treaty in Art 2 TEU, which reads as follows:

<sup>72</sup>Frischhut (2019), p. 145, in thesis No 17.

<sup>73</sup>Frischhut (2019), p. 145, in thesis No 18.

<sup>74</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 65.

<sup>75</sup>For further details on the different values, see the different contributions in Sedmak (2010, 2012, 2013, 2014, 2015b, 2016, 2017).

<sup>76</sup>McCrudden (2014).

<sup>77</sup>Levits (2018), p. 240.

*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.*

*These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

The first sentence states the values, which according to the wording are pre-existing (“founded on”).<sup>78</sup> Unlike most documents of EU secondary law (typically in one of the first articles), the treaties do not entail an official definition of these values. The second sentence seems to have a different legal significance, as the wording does not refer to the EU, but to the MS, precisely their society. Perhaps one would expect a plural here, but the second sentence speaks of “a society”. According to Pechstein, this formulation fluctuates between (desirably guided) description and prescription,<sup>79</sup> and can be seen as ‘less’, as it cannot trigger Art 7 TEU (sanctions in case of violations of values).<sup>80</sup>

In the following, the values of Art 2 TEU will be shortly depicted not in the order of this provision, but following this structure:

- Human dignity, as the corner-stone of the EU’s values
- Democracy, the rule of law, and human rights (including those of minorities), as the ‘three pillars’ of the Council of Europe<sup>81</sup>
- Solidarity
- Justice
- Equality, including equality between women and men, non-discrimination
- Freedom, pluralism, tolerance

Within each section, the following questions will be addressed:

- What is the **legal quality** of the relevant concept: A value, a (general) principle (of EU law), an objective, and/or a fundamental right?
- Is the relevant concept **defined**, or at least to some extent determined? Either in the Treaties, in EU Secondary law, or in CJEU case-law? If not determined in law, can we find some clarification in philosophical literature?
- **Where** in EU law can we trace this concept?

Please note if in the following reference is made to the EU treaties, this refers to the latest consolidated version.<sup>82</sup>

<sup>78</sup>The fact that the values are pre-existent could mean that they could not be abolished even in a treaty amendment procedure. Obwexer (2020), para 9, refers to a “substantive limitation of any future treaty amendment” (translation).

<sup>79</sup>Pechstein (2018), p. 1.

<sup>80</sup>Pechstein (2018), p. 8. See Sect. 3.5.1.

<sup>81</sup>European Commission for Democracy through law (Venice Commission) (2011), para 1; see also Venice Commission (2016).

<sup>82</sup>OJ 2016 C 202.

### 3.2.1.1 Human Dignity

In terms of **legal quality**, human dignity<sup>83</sup> can be qualified as a value and as a human right (Art 1 CFR). According to the CFR explanations, human dignity is also referred to as a fundamental right,<sup>84</sup> and can even be qualified as “the real basis [!] of fundamental rights”.<sup>85</sup> In the famous *Omega* case, the Court has clarified that “the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law”.<sup>86</sup> Art 21(1) TEU (external action) refers to various principles, including human dignity. Hence, human dignity can also be qualified as a principle. However, human dignity is not mentioned in Art 3 TEU (objectives).

Human dignity is both the first value mentioned in Art 2 TEU and the first title of the CFR. It also figures prominently in the first article of the CFR. All of this is no coincidence, similar as in the case of the German constitution,<sup>87</sup> where human dignity can be found in Art 1(1).<sup>88</sup> For all these reasons, human dignity could be seen as a ‘**super-value**’.<sup>89</sup> This is reminiscent of the reasons of justification in the field of the economic fundamental freedoms of the internal market. While those reasons are part of EU primary law and therefore formally equal, it is settled case-law of the Court that “health and life of humans rank foremost [!] among the assets and interests protected by TFEU”.<sup>90</sup> Again, from a formal perspective, all values have the same legal quality. However, content wise human dignity can be seen as of supreme importance.<sup>91</sup>

According to the Oxford Dictionary, dignity can be **defined** as “the state or quality of being worthy of honour or respect”.<sup>92</sup> The term dignity goes back to the Latin word *dignitas*, which can be translated with worthiness, honour, or

<sup>83</sup>For various more specific bioethical and other clarifications of human dignity, see Frenz (2009), pp. 252–263.

<sup>84</sup>See also ECJ judgement of 9 October 2001, *Netherlands vs. Parliament and Council*, C-377/98, EU:C:2001:523, para 70.

<sup>85</sup>OJ 2007 C 303/17. See also AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 76, “the underlying basis and starting point for all human rights distinguishable from it”.

<sup>86</sup>ECJ judgement of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, para 34.

<sup>87</sup>Cf. [https://www.gesetze-im-internet.de/gg/art\\_1.html](https://www.gesetze-im-internet.de/gg/art_1.html).

<sup>88</sup>The wording of the CFR (“Human dignity is inviolable. It must be respected and protected.”) and the German Constitution is almost identical, except for the latter in addition referring to ‘all state authorities’ that have to respect and protect human dignity.

<sup>89</sup>Also emphasising the importance of ‘human dignity’ as an important value, Müller-Graff (2021), para 98.

<sup>90</sup>ECJ judgement of 7 March 1989, *Schumacher vs. Hauptzollamt Frankfurt am Main-Ost*, C-215/87, EU:C:1989:111, para 17; ECJ judgement of 10 March 2021, *Ordine Nazionale dei Biologi and Others*, C-96/20, EU:C:2021:191, para 36.

<sup>91</sup>The author wants to thank Andreas Müller for valuable discussions in this regard.

<sup>92</sup>Stevenson (2010), p. 490.

honourability.<sup>93</sup> Human dignity is not defined in the EU treaties, neither positively nor negatively, as Borowsky mentions because this is ‘hardly possible’.<sup>94</sup> Hermerén mentions the following examples that are against human dignity and the closely related concept of integrity: “eugenics, discrimination, stigmatisation, commercialisation, reproductive cloning, and degrading treatment, including trafficking and instrumentalisation of human beings”.<sup>95</sup>

**Where** in EU law can we trace this concept? Two CFR<sup>96</sup> articles refer to dignity. According to Art 25 CFR, the “Union recognises and respects the rights of the elderly to lead a life of dignity [!] and independence”, and Art 31(1) CFR states that “[e]very worker has the right to working conditions which respect his or her health, safety and dignity [!]”.

Besides EU primary law, there are also several examples of EU **secondary** law, which address human dignity, to name but a few:

- While space precludes a comprehensive overview, there are some EU directives in the field of **migration** referring to human dignity. This is true for the ‘mass influx’ directive,<sup>97</sup> the return directive,<sup>98</sup> ‘asylum reception’,<sup>99</sup> ‘common procedures’,<sup>100</sup> and ‘asylum qualification’.<sup>101</sup>
- Likewise, **in other examples** of EU secondary law we find references to human dignity, such as in the case of the **services** directive,<sup>102</sup> in case of **citizens’**

<sup>93</sup> Stowasser et al. (1987), p. 139, translations.

<sup>94</sup> Borowsky (2019), p. 127.

<sup>95</sup> Hermerén (2006), p. 13.

<sup>96</sup> In declaration No 61 (OJ 2016 C 202/358), Poland (hence, not all EU Member States) argued that they have a right “to legislate in the sphere of public morality, family law, as well as the protection of human dignity [!] and respect for human physical and moral integrity”.

<sup>97</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12, Art 21 (voluntary return) and Art 22 (enforced return).

<sup>98</sup> Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98, recital 2, recital 17, Art 8(4).

<sup>99</sup> Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180/96, Art 20(5) “dignified standard of living”, see also recitals 11, 18, 25, and 35.

<sup>100</sup> Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180/60, Art 13(2)(d) and recital 60.

<sup>101</sup> Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337/9, recital 16 (“Directive seeks to ensure full respect for human dignity and the right to asylum”). See on this provision, ECJ judgement of 14 May 2019, *M*, joined cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403, para 82.

<sup>102</sup> Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ 2006 L 376/36, recitals 27 and 41.

**rights**,<sup>103</sup> in case of combatting **terrorism**<sup>104</sup> or in the ‘**Schengen Borders Code**’. According to the latter, border guards when performing their duties must “fully respect human dignity”,<sup>105</sup> as also confirmed by the ECJ.<sup>106</sup> An early example can be found in the contested<sup>107</sup> field of the legal protection of **biotechnological inventions**. The directive of 1998 clarified that patent law must respect “the dignity and integrity of the person” (recital 16) and that “processes to produce chimeras from germ cells or totipotent cells of humans and animals” that “offend against human dignity” are consequently excluded from patentability (recital 38).<sup>108</sup>

- An interesting reference to human dignity can also be found in soft-law, in a resolution of the European Parliament against the **commodification**<sup>109</sup> of **citizenship**, more precisely the selling of Maltese<sup>110</sup> citizenship to ‘third-country nationals’ to then also acquire EU citizenship.<sup>111</sup> Parliament clearly stated that “the rights conferred by EU citizenship are based on human dignity and should not be bought or sold at any price”, as “EU citizenship should never become a tradable commodity”.<sup>112</sup> This commodification occurring in various countries has been rightly criticised in literature.<sup>113</sup>

As we have also seen so far, human dignity also plays an important role in CJEU **case-law**, sometimes related to the above-mentioned examples of EU secondary law.

- In *Omega*, the Court has accepted the German prohibition of **laser games** (‘playing at killing’), which can be seen as a restriction of the economic fundamental freedom of providing such services. As aptly stated by AG Stix-Hackl in this case, this German prohibition must be seen against the background of

<sup>103</sup>Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [...], OJ 2004 L 158/77, as corrected by OJ 2007 L 204/28, recital 15.

<sup>104</sup>Directive (EU) 2017/541 of 15 March 2017 on combating terrorism [...], OJ 2017 L 88/6, Art 25 and recitals 1 and 2.

<sup>105</sup>Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2016 L 77/1, as amended by OJ 2019 L 135/27, Art 7, see also recital 7.

<sup>106</sup>ECJ judgement of 17 January 2013, *Zakaria*, C-23/12, EU:C:2013:24, para 40.

<sup>107</sup>See, for instance, Altavilla (2013); Frischhut (2019), pp. 46–47, et passim.

<sup>108</sup>Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, OJ 1998 L 213/13.

<sup>109</sup>On criticism with regard to various questions of commodification, see Sandel (2012).

<sup>110</sup>See also, more recently, EP resolution of 18 December 2019 on the rule of law in Malta following the recent revelations surrounding the murder of Daphne Caruana Galizia (2019/2954 (RSP)), OJ 2021 C 255/22.

<sup>111</sup>Cf. Art 9 TEU: “Every national of a Member State shall be a citizen of the Union”; see also Art 20 TFEU.

<sup>112</sup>EP resolution of 16 January 2014 on EU citizenship for sale (2013/2995(RSP)), OJ 2016 C 482/117, pts. 8 and 7.

<sup>113</sup>Ammann (2020).

German history and the atrocities of the Second World War.<sup>114</sup> In finding a possible reason of justifying the German restriction, the Court has accepted human dignity, “a fundamental constitutional principle and supreme constitutional value” of Germany,<sup>115</sup> as a ‘general principle of law’ at European level. This general principle of EU law, encapsulated in the ‘reason of justification’ of ‘**public policy**’, ultimately led to the German provision not being qualified as an infringement of the freedom to provide services.<sup>116</sup> Hence, an example of the Court referring to human dignity irrespective of EU secondary law, and qualifying it as a ‘general principle of law’.

- The Court also had to decide on the above-mentioned directive on the protection of **biotechnological inventions**. According to the Court, with this directive “the EU legislature intended to exclude any possibility of patentability where respect for human dignity [!] could thereby be affected and that it follows that the concept of ‘human embryo’ within the meaning of Article 6(2)(c) of that directive must be understood in a wide sense.”<sup>117</sup> Based on the wording “to exclude any possibility of patentability”, Bührer has concluded an absolute character of human dignity.<sup>118</sup> However, one should keep in mind that this refers to the approach of the relevant directive. Concluding from there to the concept of human dignity as such (as part of Art 2 TEU) might go too far. An **action for annulment** against this directive argued that “patentability of isolated parts of the human body [according to this] Directive reduces living human matter to a means to an end, undermining human dignity”.<sup>119</sup> This argument is reminiscent of the Kantian approach of treating human beings as subjects<sup>120</sup> and not as objects. As stated by the AG in this case, the “human body is the vehicle for human dignity. Making living human matter an instrument [!] is not acceptable from the perspective of

<sup>114</sup>“Historically, the concept of human dignity was especially formulated as a counterpart to the wielding of unbridled State authority, initially under absolutism and then under national socialism and totalitarianism”; AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 77 (in note 48).

<sup>115</sup>BVerfG judgement from 15 February 2006, *Shooting down terror plane*, 1 BvR 357/05, para 117 (translation).

<sup>116</sup>ECJ judgement of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, paras 34–41. Also mentioned in ECJ judgement of 11 December 2007, *The International Transport Workers’ Federation and The Finnish Seamen’s Union*, C-438/05, EU:C:2007:772, para 46; in ECJ judgement of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809, para 94; as well as in Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ 2006 L 376/36, recital 41.

<sup>117</sup>ECJ judgement of 18 December 2014, *International Stem Cell Corporation*, C-364/13, EU:C:2014:2451, para 24; referring to ECJ judgement of 18 October 2011, *Brüstle*, C-34/10, EU:C:2011:669, para 34.

<sup>118</sup>Bührer (2020), p. 172.

<sup>119</sup>ECJ judgement of 9 October 2001, *Netherlands vs. Parliament and Council*, C-377/98, EU:C:2001:523, paras 69, and 70–80.

<sup>120</sup>Bührer (2020), p. 168 mentions that this decision indicates that the Court also attaches a subjective-legal dimension to the guarantee of human dignity.

human dignity”.<sup>121</sup> However, in the end this action has been dismissed by the Court, as human dignity has been guaranteed by the directive.<sup>122</sup>

- In the context of asylum qualification,<sup>123</sup> the Court had to decide on the fear of persecution on grounds of **sexual orientation**, and possible infringements of human dignity when it comes to how to prove one’s sexual orientation. One way to investigate this was by means of “homosexual acts to be performed, the submission of the applicants to possible ‘tests’ in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts”.<sup>124</sup> The Court has made clear that “besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature [!] infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter”.<sup>125</sup>
- In the field of ‘international protection’, the Court has held that respect for human dignity leads to the following **minimum standard**, in case of “a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty”.<sup>126</sup> In such a case, human dignity can determine a certain ‘minimum level’. As the Court has held, such a situation, which “does not allow [this person] to meet his most basic needs, such as, inter alia, food, personal hygiene, and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible [!] with human dignity”.<sup>127</sup>
- In the context of the citizens’ rights directive and for questions of **social assistance benefits**, the Court has emphasised, “the predominant function of the benefits at issue in the main proceedings is in fact to cover the minimum [!] subsistence costs necessary to lead a life in keeping with human dignity”.<sup>128</sup> Hence, again human dignity leading to a minimum level of (social) benefits.

<sup>121</sup> AG Jacobs opinion of 14 June 2001, *Netherlands vs. Parliament and Council*, C-377/98, EU:C:2001:329, para 190.

<sup>122</sup> ECJ judgement of 9 October 2001, *Netherlands vs. Parliament and Council*, C-377/98, EU:C:2001:523, para 71; amongst other reasons.

<sup>123</sup> N.B. This case concerned the preceding directive.

<sup>124</sup> ECJ judgement of 2 December 2014, A, joined cases C-148/13 to C-150/13, EU:C:2014:2406, para 65.

<sup>125</sup> ECJ judgement of 2 December 2014, A, joined cases C-148/13 to C-150/13, EU:C:2014:2406, para 65. See also ECJ judgement of 25 January 2018, F, C-473/16, EU:C:2018:36, para 35 (N.B. on Directive 2011/95/EU, note 101). Additionally, the Court has clarified that “the suitability of an expert’s report such as that at issue in the main proceedings may be accepted only if it is based on sufficiently reliable methods and principles in the light of the standards recognised by the international [!] scientific community” (para 58).

<sup>126</sup> ECJ judgement of 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218, para 92.

<sup>127</sup> ECJ judgement of 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218, para 92. See also ECJ judgement of 12 November 2019, *Haqbin*, C-233/18, EU:C:2019:956, para 46, where the Court also referred to recital 35 of the above mentioned (note 99) Directive 2013/33/EU.

<sup>128</sup> ECJ judgement of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597, para 45; see also ECJ judgement of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794, para



- However, in case of the above-mentioned citizens' rights directive, human dignity via the concept of 'public policy'<sup>129</sup> can even be used as argument against a person in case of **expulsion** and certain serious crimes, mentioned in the Geneva Convention.<sup>130</sup> According to the Court, the conduct of an individual "that shows the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, such as human dignity and human rights [is] capable of constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society",<sup>131</sup> i.e., public policy.<sup>132</sup>
- In the context of the **European Arrest Warrant** (EAW), in the seminal *Aranyosi and Căldăraru* judgement, the Court has used human dignity as an argument for qualifying Art 4 CFR (prohibition of torture and inhuman or degrading treatment or punishment) as an absolute right, i.e., without the possibility for limitations. "As regards the prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, that prohibition is absolute [!] in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter".<sup>133</sup> As the Court further outlined in another case, *Dorobantu*, "the respect for human dignity that must be protected pursuant to that article would not be guaranteed if the executing judicial authority's review of conditions of detention in the issuing Member State were limited to obvious inadequacies only".<sup>134</sup>
- In a case from the 1990s, the Court had to decide on equal treatment of men and women in matters of employment and occupation<sup>135</sup> in case of a **transsexual**<sup>136</sup>

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57, "minimum means of subsistence necessary to lead a life in keeping with human dignity". See also ECJ judgement of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, para 69.

<sup>129</sup>As mentioned above, in *Omega* 'public policy' was also the vehicle for integrating human dignity.

<sup>130</sup>Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951, United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954).

<sup>131</sup>ECJ judgement of 2 May 2018, *K (Right of residence and alleged war crimes)*, joined cases C-331/16 and C-366/16, EU:C:2018:296, para 60.

<sup>132</sup>On expulsion, see also the above-mentioned ECJ judgement of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, para 56 (in the context of Art 19 CFR, protection in the event of removal, expulsion or extradition).

<sup>133</sup>ECJ judgement of 5 April 2016, *Aranyosi and Căldăraru*, joined cases C-404/15 and C-659/15 PPU, EU:C:2016:198, para 85. See also para 90, where the Court referred to human dignity and ECtHR case-law on the equivalent provision in the ECHR (Art 3). See also ECJ judgement of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, para 56 (in the context of Art 19 CFR, protection in the event of removal, expulsion or extradition).

<sup>134</sup>ECJ judgement of 15 October 2019, *Dorobantu*, C-128/18, EU:C:2019:857, para 62.

<sup>135</sup>Now: Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

<sup>136</sup>By referring to ECtHR case-law, according to the ECJ "the term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other;

person and gender reassignment. Roughly 13 years before the entry into force of the Lisbon Treaty, the Court has held that to “tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity [!] and freedom to which he or she is entitled, and which the Court has a duty to safeguard”.<sup>137</sup> Hence, the Court linked equal treatment (directive), human dignity and freedom. The combination of dignity and equality has been referred to as “*égale dignité*”.<sup>138</sup> This concept is well known from ECtHR case-law. In a case on ‘hate speech’, the Strasbourg Court has stated that “tolerance and respect for the equal dignity [!] of all human beings constitute the foundations of a democratic, pluralistic society”.<sup>139</sup>

Having covered some case-law on human dignity, it is worth taking a closer look at the opinion of AG Stix-Hackl in the seminal *Omega* case.

Nowadays, the second recital of the TEU refers to 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>140</sup> This goes in a similar direction as Stix-Hackl, referring to human dignity as “an expression of the respect and value to be attributed to each human being on account of his or her **humanity**”, which “concerns the protection of and respect for the **essence** [!] or **nature** of the human being per se – that is to say, the ‘substance’ of **mankind**”.<sup>141</sup>

The key element of human dignity is that it is not “negotiable by the State, the people and the majority”, hence endowing individual human beings “with **inherent and inalienable** rights”.<sup>142</sup>

This leads to the afore-mentioned reference to the **Kantian understanding** that a human being is “a person (subject) and must not be downgraded to a thing or object”.<sup>143</sup>

Stix-Hackl also addresses the **relational** aspect of human dignity and self-determination and freedom, where “the idea of the dignity of man also often finds

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they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature”. ECJ judgement of 30 April 1996, *P vs. S and Cornwall County Council*, C-13/94, EU:C:1996:170, para 22.

<sup>137</sup> ECJ judgement of 30 April 1996, *P vs. S and Cornwall County Council*, C-13/94, EU:C:1996:170, para 16.

<sup>138</sup> Bührer (2020), p. 167.

<sup>139</sup> ECtHR judgement of 4 December 2003, *Gündüz vs. Turkey*, 35071/97, para 40.

<sup>140</sup> Emphasis added.

<sup>141</sup> AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 75, emphases added.

<sup>142</sup> AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 77, emphases added.

<sup>143</sup> AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 78.

expression in other concepts and principles”.<sup>144</sup> She also addresses the relationship between dignity and equality, embodied in the above-mentioned concept of ‘*égale dignité*’.<sup>145</sup>

The German Constitutional Court, which stated as follows, has addressed the **relationship** of human dignity not to other concepts but to the **current contextual framework**: “What respect for human dignity requires in detail cannot be completely detached from the respective social conditions [. . .]. A violation of the claim to respect can not only lie in the humiliation, branding, persecution or ostracism of persons [. . .], but also in the commercialisation of human existence.”<sup>146</sup>

**In summary**, human dignity is not only the ‘corner-stone’<sup>147</sup> of the EU’s common values. It is also a human right itself (Art 1 CFR), as well ‘the real basis [!] of fundamental rights’, a general principle of law, and a principle; however, not an official EU objective according to Art 3 TEU.<sup>148</sup>

Human dignity refers to the idea of an **intrinsic**<sup>149</sup> value, which all human beings possess, and which cannot be taken from them (i.e. **inalienable**).

According to Böckenförde, the **conceptual core** of human dignity, with reference to Kant’s object formula, comprises the status and recognition of one’s own subject, the freedom to develop oneself, the exclusion of humiliation and instrumentalisation in the manner of a thing.<sup>150</sup>

At the same time, human dignity stands out as a good example of the same concept **sometimes interpreted in opposite directions**. For instance, suicide as being against the Kantian idea of human dignity, or others arguing for a right to ‘die in dignity’. The Austrian<sup>151</sup> Constitutional Court has emphasised that the right to free self-determination includes both the right to shape one’s life, and the right to die with dignity.<sup>152</sup> Frenz has even referred to autonomy as the “very heart of human dignity”.<sup>153</sup>

<sup>144</sup> AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 79.

<sup>145</sup> AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 80.

<sup>146</sup> BVerfG order of 12 November 1997, *Child as a damage*, 1 BvR 479/92 and 307/94, para 65 (translation).

<sup>147</sup> Frischhut (2015), p. 532.

<sup>148</sup> Human dignity has both a defensive and a protective dimension; cf. Obwexer (2020), para 17.

<sup>149</sup> Cf. Aristotle (2000), p. 10, 1097a, “We speak of that which is worth pursuing for its own sake as more complete than that which is worth pursuing only for the sake of something else [. . .]”.

<sup>150</sup> Böckenförde (2004), p. 1225.

<sup>151</sup> For the recent decision in Germany, see: BVerfG judgement of 26 February 2020, *Criminalisation of assisted suicide services unconstitutional*, 2 BvR 2347/15, 2 BvR 2527/16, 2 BvR 2354/16, 2 BvR 1593/16, 2 BvR 1261/16, 2 BvR 651/16.

<sup>152</sup> VfGH judgement of 11.12.2020, *Prohibiting any form of assisted suicide without exception is unconstitutional*, G 139/2019, para 65; the right to self-determination is derived from the principle of equality of Austrian constitutional law (para 72).

<sup>153</sup> Frenz (2009), p. 261; translated with DeepL (“*Autonomie ist daher das Herzstück der Menschenwürde*”).

Human dignity has often been referred to as a **European** concept,<sup>154</sup> which, however, can also be found elsewhere in the world.<sup>155</sup>

Samuel Moyn has convincingly written about the **history**<sup>156</sup> of this concept, which has been nourished by both<sup>157</sup> religion and secular ideas, what he refers to as “religious constitutionalism”.<sup>158</sup>

Several examples of EU secondary law and CJEU case-law, as depicted in a non-exhaustive way above, have helped to further sharpen the **content** of this concept. Still, one must accept that such a value, even if legally binding as ‘general principles of EU law’ (also in combination with ‘public policy’), must remain abstract to a certain extent. Having shed some light on this **abstract** concept, let us now turn to the other values.

### 3.2.1.2 Democracy

In terms of **legal quality**, democracy is both a value (Art 2 TEU) and a principle<sup>159</sup> of EU law.<sup>160</sup> This double legal character is already visible from the preamble of the TEU, where the second recital speaks of “universal values” and the fourth recital of “principles”.<sup>161</sup> However, democracy is not an official objective of the EU (Art 3 TEU), nor has it been qualified as a general principle of EU law.<sup>162</sup> Democracy is not exactly defined, but quite some provisions (see below) clarify this concept, amongst them also some fundamental rights (title V CFR, on citizens’ rights). On a broader scale,<sup>163</sup> democracy also occurs within one of the United Nations’ (UN) Social Development Goals (SDGs), more precisely SDG16.<sup>164</sup>

According to the **Oxford Dictionary**, democracy is “a system of government by the whole population or all the eligible members of a state, typically through elected

<sup>154</sup> Arguing for a true European understanding of human dignity, Dupré (2015).

<sup>155</sup> On human dignity and Confucianism (see also *infra*, Sect. 5.4), see Zhang (2000, 2016).

<sup>156</sup> On the history and conceptions of human dignity, see also Pfordten (2016).

<sup>157</sup> See also Sommermann (2020), pp. 273–274, referring, amongst others, to Christianity and the rational philosophy of the Enlightenment.

<sup>158</sup> Moyn (2012, 2014).

<sup>159</sup> ECJ judgement of 29 October 1980, *Roquette vs. Council*, C-138/79, EU:C:1980:249, para 33. See also ECJ judgement of 11 June 1991, *Commission vs. Council [titanium dioxide]*, C-300/89, EU:C:1991:244, para 20.

<sup>160</sup> ECJ judgement of 3 June 2021, *Hungary vs. Parliament [votes cast]*, C-650/18, EU:C:2021:426, para 94.

<sup>161</sup> See also recital 2 CFR (principle of democracy) and recital 7 TEU, which refers to “democratic and efficient functioning of the institutions”.

<sup>162</sup> Tridimas (2006).

<sup>163</sup> For additional references, see also Hilf and Schorkopf (2021), para 29.

<sup>164</sup> United Nations General Assembly (2015), pp. 25–26, “responsive, inclusive, participatory and representative decision-making at all levels”.

representatives”.<sup>165</sup> The EU’s motto ‘united in diversity’ also applies to the different forms of democracy, which can be identified in various Member States (more republican, monarchy, etc.).

The EU comprises both elements of a representative and of participatory democracy. According to Art 10(1) TEU, “the functioning of the Union is to be based on representative democracy, which gives concrete expression to democracy as a value”.<sup>166</sup> Art 20(2)(b) TFEU on citizens’ rights states “the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State”. The right to vote and to stand as a candidate in **municipal** elections is further clarified in a directive.<sup>167</sup> At EU level, this **representative** democracy has a direct and an indirect dimension. EU citizens are “directly represented at Union level in the European Parliament”,<sup>168</sup> (Art 10[2] [1] TEU),<sup>169</sup> and indirectly in the European Council and the Council of the EU (Art 10[2] [2] TEU).

This system of representative democracy was complemented, with the Treaty of Lisbon, “by instruments of **participatory** democracy, such as the [European citizens’ initiative] mechanism, the objective of which is to encourage the participation of citizens in the democratic process and to promote dialogue between citizens and the EU institutions”.<sup>170</sup>

The term of ‘democracy’ “derives from its Greek origins in *demos* (the people) and *kratos* (rule) and refers to a form of government based on rule by the people with popular sovereignty as its defining feature”.<sup>171</sup> This **rule by the people** has been emphasised by the ECJ already in early case-law. Regarding the involvement of the EP in the legislative process (of the Community at the time), the Court has referred to the institutional balance, which “reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly”.<sup>172</sup>

<sup>165</sup>Stevenson (2010), p. 465.

<sup>166</sup>ECJ judgement of 19 December 2019, *Puppinck and Others vs. Commission*, C-418/18 P, EU: C:2019:1113, para 64.

<sup>167</sup>Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, OJ 1994 L 368/38, as amended by OJ 2013 L 158/231. See also Art 40 CFR.

<sup>168</sup>According to Art 14(3) TEU, the EP is “elected for a term of five years by direct universal suffrage in a free and secret ballot”.

<sup>169</sup>On national parliaments, see Art 12 TEU.

<sup>170</sup>ECJ judgement of 19 December 2019, *Puppinck and Others vs. Commission*, C-418/18 P, EU: C:2019:1113, para 65.

<sup>171</sup>Smith (2008).

<sup>172</sup>ECJ judgement of 29 October 1980, *Roquette vs. Council*, C-138/79, EU:C:1980:249, para 33. See also ECJ judgement of 11 June 1991, *Commission vs. Council [titanium dioxide]*, C-300/89, EU:C:1991:244, para 20.

Citizen **involvement**<sup>173</sup> is enshrined in Art 10(3) TEU, according to which every citizen has “the right to participate in the democratic life of the Union”.<sup>174</sup> This can take place individually, or in a collective way. **Individual** involvement can relate to elections but should not be seen to be restricted to one moment every 5 years. According to Art 39 CFR, every EU citizen has the right to vote and to stand as a candidate at elections to the European Parliament and according to Art 40 CFR regarding municipal elections. Please note, that (even within title V on ‘citizens’ rights’) these two articles are one of the few, which only entitle EU citizens, and not all human beings.<sup>175</sup> A **collective** form of involvement would be the already mentioned EU citizens’ initiative (ECI).<sup>176</sup> In this context of the ECI, the General Court has used the value of democracy to derive a broad interpretation of ‘the concept of legal act’.<sup>177</sup>

A prerequisite for both forms of citizens’ involvement (especially between elections) is **transparency**<sup>178</sup> and that decisions are “taken as openly and as closely as possible to the citizen” (Art 10[3] TEU; see also Art 1[2] TEU). Transparency is also addressed in two relational aspects. First in case of the “open, transparent and regular dialogue with representative associations and civil society”,<sup>179</sup> which all EU institutions shall maintain (Art 11[2] TEU), and by giving “citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action” (Art 11[1] TEU). Second, in case of the “broad consultations with parties concerned to ensure that the Union’s actions are coherent and transparent” (Art 11[3] TEU), which the European Commission “shall carry out”.

While in a democracy, decisions of the people are taken by **majority**, also the rights of **minorities** must be taken into account, both as a value of the EU (Art 2 TEU, “human rights, including the rights of persons belonging to minorities”) and from an

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<sup>173</sup> See also the EU citizens’ right to petition the EP (Art 24[2] TFEU and Art 227 TFEU), the right to apply to the European Ombudsman (Art 24[3] TFEU and Art 228 TFEU), as well as the right to write to the institutions (and get an answer) in one of the 24 official languages (Art 24[4] TFEU).

<sup>174</sup> On political parties, see Art 10(4) TEU.

<sup>175</sup> See also Art 22 TFEU.

<sup>176</sup> Art 11(4) TEU and Regulation (EU) 2019/788 of 17 April 2019 on the European citizens’ initiative, OJ 2019 L 130/55, as amended by OJ 2019 L 257/1.

<sup>177</sup> GC judgement of 10 May 2017, *Efler and Others v Commission*, T-754/14, EU:T:2017:323, para 37.

<sup>178</sup> Transparency obviously also plays a role in lobbying, cf. Frischhut (2020d), as well as in the case of access to documents (Art 15[3] TFEU, Art 42 CFR, Regulation [EC] No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43). Interesting also to note that Member States themselves emphasised transparency in Dec No 10 (OJ 2016 C 202/342) for a situation where the number of Commissioners would be below the number of Member States (cf. note 440).

<sup>179</sup> On the “open, transparent and regular dialogue with these churches and organisations”, see Art 17(3) TFEU.

ethical<sup>180</sup> perspective. As emphasised by Tridimas, the CJEU and the ECtHR “both understand democracy in the same way, namely, not merely as a majoritarianism but as ‘tolerance, pluralism, and broadmindedness’”.<sup>181</sup>

Besides this internal dimension,<sup>182</sup> in terms of the **external** dimension, Art 21 (1) TEU tasks the EU to adhere to “the principles” of democracy (etc.) “on the international scene”.

Democracy is not only about the involvement of people, but also about the **equal**<sup>183</sup> involvement.<sup>184</sup> According to Art 9 TEU, “the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies”. This requirement can be particularly challenging when it comes to lobbying.<sup>185</sup>

Besides minority rights and equality, democracy is also closely linked other **values**, such as freedom (or liberty). As the Austrian Constitutional Court has emphasised, the democratic constitutional state, as constituted by the Austrian Federal Constitution, presupposes the **freedom** and equality of all people.<sup>186</sup> In the famous *Wightman* case (on Brexit), the ‘Full Court’ has emphasised “the importance of the values of **liberty and democracy**, [...] which are among the common values referred to in Article 2 of that Treaty and in the preamble to the Charter of Fundamental Rights of the European Union, and which thus form part of the very foundations of the European Union legal order”.<sup>187</sup>

The relationship between democracy and some **fundamental rights** (Art 39 CFR [EP] and Art 40 CFR [municipal elections]) has already been addressed. Some fundamental rights (also related to the concept of freedom) that are highly relevant for democracy are freedom of thought (Art 10 CFR), freedom of expression and information (Art 11 CFR), freedom of assembly and of association (Art 12 CFR), and the right to education<sup>188</sup> (Art 14 CFR). As the Court has stated, the right to

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<sup>180</sup>G. Pennings (2005), p. 2, “Although the majority has the political right to impose its views on the minority, a number of important ethical values urge the majority to tread cautiously. Among these values, we count autonomy (the right to organize one’s life according to one’s own moral principles), tolerance and respect for different moral positions”.

<sup>181</sup>Tridimas (2006), pp. 556–557.

<sup>182</sup>See also Art 165(2) TFEU (on the “participation of young people in democratic life in Europe”), Art 222(1) (a) TFEU (solidarity clause and the protection of “democratic institutions”), Prot No 29, OJ 2016 C 202/311 (on the system of public broadcasting and its direction relation to democracy), and Art 14 CFR (“freedom to found educational establishments with due respect for democratic principles”).

<sup>183</sup>See Sect. 3.2.1.8.

<sup>184</sup>On equality and lobbying, see also Ammann (2021).

<sup>185</sup>On a broader scale, this equality has also been criticised when it comes to the composition of the EP, etc.

<sup>186</sup>VfGH judgement of 11.12.2020, *Prohibiting any form of assisted suicide without exception is unconstitutional*, G 139/2019, para 64.

<sup>187</sup>ECJ judgement of 10 December 2018, *Wightman*, C-621/18, EU:C:2018:999, para 62, emphases added.

<sup>188</sup>On the EU and education for democratic citizenship, see Grimonprez (2020).



freedom of expression as guaranteed in Art 11 CFR “constitutes one of the essential foundations [!] of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded”.<sup>189</sup>

Apart from these provisions of EU law, the **Council of Europe**, to which all EU Member States are contracting parties, has also shaped the concept of democracy. Art 3 of the (first) protocol to the ECHR states the “right to free elections”.<sup>190</sup> Having just mentioned various freedoms that could also be used against the concept of democracy, from ECtHR case-law we know the “principle of a ‘democracy capable of defending itself’”.<sup>191</sup> In terms of the two courts of the EU and the Council of Europe, the CJEU and the ECtHR “share the same liberal underpinnings”, as emphasised by Tridimas.<sup>192</sup>

The direct (EP) and the indirect (European Council and Council of the EU) dimension of representative democracy have already been mentioned. It is worth addressing **Habermas’** concept of a “‘doubled’ sovereign”. This concept consists of “the European citizens and the European peoples (the States)”, which also might require Treaty reform.<sup>193</sup> Concerning this indirect dimension, he has addressed the following challenge: “While conflicts between the states are negotiated in the Council, the European citizens lack an arena in which they can even recognise their shared social interests across national boundaries and transform them into political conflicts”.<sup>194</sup> Such an arena is necessary to reflect on different conceptions of the ‘common good’.<sup>195</sup> In the words of Rosenfeld, democracy “requires self-government by the *citoyen* joined with all other *citoyens* in pursuit of the common good [!], which Rousseau calls ‘la volonté générale’ (‘the general will’)”.<sup>196</sup> Habermas also addressed the necessity for a “*European* public sphere” that does not necessarily need new and additional media, but “[n]ational arenas [that] have to

<sup>189</sup> ECJ judgement of 6 October 2020, *Privacy International*, C-623/17, EU:C:2020:790, para 62.

<sup>190</sup> “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. Hilf and Schorkopf (2021), para 28, emphasise the legal quality of a subjective right.

<sup>191</sup> ECtHR judgement of 26 September 1995, *Vogt vs. Germany*, 17851/91, para 51, “Germany because of that country’s experience under the Weimar Republic, which, when the Federal Republic was founded after the nightmare of nazism, led to its constitution being based on the principle of a ‘democracy capable of defending itself’”.

<sup>192</sup> Tridimas (2006), p. 556.

<sup>193</sup> Habermas (2015), pp. 554–555. In terms of Treaty reform, he addresses the right of initiative for the EP, cf. also Maurer and Wolf (2020), an extension of the ‘ordinary legislative procedure’ “to all policy fields”, an incorporation of the European Council into the Council of the EU, as well as the Commission as “a government answerable equally to Council and Parliament”.

<sup>194</sup> Habermas (2015), p. 551.

<sup>195</sup> Habermas (2015), p. 552.

<sup>196</sup> Rosenfeld (2012), p. 803, no emphases in Italics added.



be opened up” and national media need to “perform a complex task of translation”.<sup>197</sup>

**In summary**, it can be said that the value and principle of democracy has gained more importance throughout European integration. This is confirmed by the fact when searching in EU encyclopaedias, one would rather find the keyword of ‘democratic deficit’, instead of ‘democracy’.<sup>198</sup> Clearly, the process of making the EU more democratic has not yet reached its peak, both regarding the representative and the participatory element. Possible improvement lies both in proposals to change EU primary law (cf. Habermas), and strengthening existing tools. The long struggle for a mandatory transparency register and an inclusion of the Council of the EU has happened at a rather late stage of the EU integration process.<sup>199</sup> Citizen involvement has to take place during elections, but especially also in-between. Throughout such a timeline, equality of citizens, transparency and integrity are of utmost importance. Hence, democracy is related to various other values, such as equality, freedom, human rights, and many more.

### 3.2.1.3 Rule of Law

In 1986<sup>200</sup> in *Les Verts*, the ECJ has stated that the Community (now EU) “is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”.<sup>201</sup> In academia,<sup>202</sup> the rule of law has been referred to as a “central principle of constitutional governance”,<sup>203</sup> respectively, that it concerns the “restraint of state power”<sup>204</sup> and according to the Commission, it is “a prerequisite for the protection of all fundamental values listed in Article 2 TEU”.<sup>205</sup> Hallstein has referred to a

<sup>197</sup> Habermas (2015), p. 553, no emphasis added.

<sup>198</sup> Eberhard (2008) and Bergmann (2015).

<sup>199</sup> Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register, OJ 2021 L 207/1. See also the Political statement of the European Parliament, the Council of the European Union and the European Commission on the occasion of the adoption of the Interinstitutional Agreement on a Mandatory Transparency Register, OJ 2021 L 207/18, and Council Decision (EU) 2021/929 of 6 May 2021 on the regulation of contacts between the General Secretariat of the Council and interest representatives, OJ 2021 L 207/19.

<sup>200</sup> Classen (2021), p. 58 mentions that since the caesura of the mid-1970s, the concept of the rule of law has appeared in European constitutions.

<sup>201</sup> ECJ judgement of 23 April 1986, *Les Verts vs. Parliament*, C-294/83, EU:C:1986:166, para 23.

<sup>202</sup> See also the various contributions in von Bogdandy et al. (2021).

<sup>203</sup> Craig (1997), p. 487.

<sup>204</sup> Classen (2021), p. 57; translation.

<sup>205</sup> EC ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 4.

‘community of law’ (*Rechtsgemeinschaft*).<sup>206</sup> According to Classen, the rule of law is about the idea “that all domination is not solely factual but can be traced back to certain rules”.<sup>207</sup> AG Bobek has referred to the rule of law as “one of the primary [!] values on which the European Union is founded”.<sup>208</sup> All these quotations prove the **importance** of this value, which has recently given rise to numerous CJEU judgements.

**Where** does the rule of law occur in the EU treaties? Besides Art 2 TEU and the CFR (recital 2), the rule of law is mentioned twice in the TEU preamble, once as a value (recital 2), and once as a principle (recital 4). Art 21 TEU, on the EU’s external action also refers twice to the rule of law, which shall guide “Union’s action on the international scene” (para 1) and where the Union shall support the rule of law in defining and pursuing “common policies and action” (para 2, lit a).<sup>209</sup>

In a nutshell, the rule of law shall set certain constraints on the exercise of public authority.<sup>210</sup> While the concept of the rule of law might differ in the Member States, there is a **certain consensus** based on the case-law of the CJEU, the ECtHR, and based on notably the Council of Europe’s Venice Commission. They “provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU”.<sup>211</sup>

Those **principles**, which are part of the ‘rule of law’, “include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law”.<sup>212</sup>

Paul Craig distinguishes between **formal and substantive** meanings of the rule of law. The formal conception refers to “the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individuals’ conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm, (was it prospective or retrospective, etc.)”.<sup>213</sup> The substantive conception goes beyond that and tries to derive certain substantive rights

<sup>206</sup>Hallstein (1979), p. 51, i.e. title of third chapter of his book.

<sup>207</sup>Classen (2021), p. 57, translation, referring to “since law makes the king”.

<sup>208</sup>AG Bobek opinion of 4 March 2021, *Euro Box Promotion and Others*, joined cases C-357/19 and C-547/19, EU:C:2021:170, para 175.

<sup>209</sup>The wording ‘rule of law’ occurs twice (Art 263[2] TFEU and Art 14.2[2] Prot 4, OJ 2016 C 202/230), but not as in other language versions as this value (*Rechtsstaatlichkeit, l’État de droit*), but as “any rule of law relating to their application”.

<sup>210</sup>Cf. EC communication ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 4.

<sup>211</sup>EC ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 4.

<sup>212</sup>EC ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 4 (emphases in the original not reproduced here).

<sup>213</sup>Craig (1997), p. 467.

from the rule of law, “which are then used to distinguish between ‘good’ laws, which comply with such rights, and ‘bad’ laws which do not”.<sup>214</sup> The EU, and the Council of Europe,<sup>215</sup> clearly follow **both** approaches.<sup>216</sup> Likewise, the Commission also identifies formal and substantive requirements of the rule of law, where the substantive requirements (i.e. ‘good’ vs. ‘bad’ laws) refer to the yardstick of “the general principles of law which include fundamental rights”.<sup>217</sup> Hence, this means “that respect for the rule of law is intrinsically [!] linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa”.<sup>218</sup> Besides fundamental rights, Calliess also refers to the principle of proportionality<sup>219</sup> as a substantive element of the rule of law.<sup>220</sup>

Without claiming to provide a comprehensive overview on various **elements of the rule of law** as identified by the European Commission<sup>221</sup> and the Venice Commission of the Council of Europe,<sup>222</sup> in the following some clarification should be provided:<sup>223</sup>

**Legality:** This “fundamental principle”<sup>224</sup> implies a transparent, accountable, democratic and pluralistic process for enacting laws. As AG Bobek has recently stated, “in a system that is compliant with the rule of law, there should be at least some transparency and accountability”.<sup>225</sup>

**Legal certainty:** As stated by the ECtHR, this element of the rule of law implies “that the domestic law must be formulated with sufficient precision”.<sup>226</sup> This general principle<sup>227</sup> of EU law requires, amongst others, that “legislation must be clear and

<sup>214</sup>Craig (1997), p. 467.

<sup>215</sup>Venice Commission (2011), para 28.

<sup>216</sup>According to Tridimas (2006), p. 548, “[t]he Community judiciary subscribes to a substantive rather than a formal version of the rule of law”.

<sup>217</sup>EC ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 4, referring, amongst others, to ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 316.

<sup>218</sup>EC ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 4.

<sup>219</sup>See, *infra*, Sect. 4.3.2.5.

<sup>220</sup>Calliess (2016), p. 44.

<sup>221</sup>EC ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014 and EC ‘Further strengthening the Rule of Law within the Union’, COM(2019) 163 final 3.4.2019.

<sup>222</sup>See also Venice Commission (2011), pp. 10–13.

<sup>223</sup>Unless otherwise indicated, the following is based on these three documents.

<sup>224</sup>ECJ judgement of 29 April 2004, *Commission vs. CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, para 63.

<sup>225</sup>AG Bobek opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, joined cases C-748/19 to C-754/19, EU:C:2021:403, para 181.

<sup>226</sup>ECtHR judgement of 29 April 2014, *L.H. vs. Latvia*, 52019/07, para 47.

<sup>227</sup>Tridimas (2006), pp. 242–297, legal certainty and protection of legitimate expectations.

predictable for those who are subject to it”.<sup>228</sup> However, as the Austrian Constitutional Court has emphasised, the constitutional requirement of certainty (“*Bestimmtheitsgebot*”) does not mean that the legislature may not also use indeterminate legal terms.<sup>229</sup>

**Prohibition of arbitrariness** of the executive powers: As stated by the ECtHR, this element of the rule of law implies “adequate legal protection against arbitrariness”.<sup>230</sup> In EU law, this “general principle” requires that “any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention”.<sup>231</sup>

**Independent and impartial courts** (closely connected to ‘judicial review’, i.e. the next element): According to the ECJ, the Union (at the time, the Community), is “based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights”.<sup>232</sup> “Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles [!] of law stemming from the constitutional traditions common to the Member States”.<sup>233</sup> Now, since the Lisbon Treaty, the ECJ links the rule of law to **Art 19 TEU**, “which gives concrete expression to the value of the rule of law”.<sup>234</sup> “The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the

<sup>228</sup> ECJ judgement of 12 November 1981, *Meridionale Industria Salumi and Others*, joined cases C-212 to C-217/80, EU:C:1981:270, para 10. See also, ECJ judgement of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335, para 51 (“[...] that principle requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular, where they may have adverse consequences for individuals and undertakings. Specifically, in order to meet the requirements of that principle, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly”).

<sup>229</sup> VfGH judgement of 11.12.2020, *Prohibiting any form of assisted suicide without exception is unconstitutional*, G 139/2019, para 111.

<sup>230</sup> ECtHR judgement of 29 April 2014, *L.H. vs. Latvia*, 52019/07, para 47, “Accordingly the domestic law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise”.

<sup>231</sup> ECJ judgement of 21 September 1989, *Hoehchst vs. Commission*, C-46/87, EU:C:1989:337, para 19.

<sup>232</sup> ECJ judgement of 25 July 2002, *Unión de Pequeños Agricultores vs. Council*, C-50/00 P, EU:C:2002:462, para 38.

<sup>233</sup> ECJ judgement of 25 July 2002, *Unión de Pequeños Agricultores vs. Council*, C-50/00 P, EU:C:2002:462, para 39, also referring to Art 6 and Art 13 ECHR.

<sup>234</sup> ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 188; ECJ judgment of 22 February 2022, *RS (Effet des arrêts d’une cour constitutionnelle)*, C-430/21, EU:C:2022:99, para 39.

rule of law”.<sup>235</sup> Key elements in this regard are “the guarantees of **independence and impartiality** required under EU law [that] presuppose rules that are such as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it”.<sup>236</sup> The independence of courts “forms part of the essence [!] of the right to effective judicial protection”<sup>237</sup>.<sup>238</sup> This includes the necessity “that judges are protected from external intervention or pressure liable to jeopardise their independence”, both with regard to direct (instructions) and indirect (appearance of lack of independence or impartiality, prejudicing individuals’ trust) **influence**, to prevent the risk of “political control of the content of judicial decisions”.<sup>239</sup> These requirements are essential for “trust which justice in a democratic society governed by the rule of law must inspire in individuals”.<sup>240</sup> The recent Commission’s rule of law report has revealed quite some differences concerning ‘perceived judicial independence’, ranging from high (above 75%, Austria, Finland, Germany, the Netherlands, and Luxembourg) to countries like Croatia, Poland and Slovakia, where the level of perceived judicial independence remains low (below 30%).<sup>241</sup>

**Effective judicial review**<sup>242</sup> (continued), including respect for **fundamental rights**: According to the ECJ, “the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of

<sup>235</sup> ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 189.

<sup>236</sup> ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 196, emphases added.

<sup>237</sup> ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 195.

<sup>238</sup> This right to an effective judicial protection is linked to Art 19(1) (2) TEU, it is “a general principle of EU law stemming from the constitutional traditions common to the Member States”, it is enshrined in Art 6 and Art 13 ECHR, and “is now reaffirmed” by Art 47 CFR; ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 52.

<sup>239</sup> ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paras 197–198.

<sup>240</sup> ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 212.

<sup>241</sup> EC ‘2021 Rule of Law Report. The rule of law situation in the European Union’, COM(2021) 700 final 20.7.2021, p. 6.

<sup>242</sup> “The principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law”, ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 190.

Justice to review the legality of acts of the institutions”.<sup>243</sup> This also includes “the principle of the separation of powers which characterises the operation of the rule of law”.<sup>244</sup>

**Equality before the law:** This element is now enshrined in Art 20 CFR, according to which “[e]veryone is equal before the law”. The Commission also addressed Art 21 CFR on non-discrimination.<sup>245</sup>

As stated by the European Commission, these elements have been recognised as general principles of EU law.<sup>246</sup>

Like in case of other values, the close **relationship** between **values** becomes obvious. According to the Venice Commission, the rule of law is “a fundamental ingredient of any democratic society”.<sup>247</sup> The rule of law, together with democracy and human rights have been referred to as the ‘three pillars’ of the Council of Europe.<sup>248</sup>

In terms of **legal quality**, as we have seen some elements of the rule of law (e.g., legal certainty, protection of legitimate expectations, fundamental rights) have been recognised as general principles of EU law. Additionally, besides being a value (Art 2 TEU and TEU preamble, recital 2), the rule of law is also a principle (TEU preamble, recital 4). The rule of law is not explicitly mentioned in the EU’s objectives (Art 3 TEU). In the CFR, it explicitly only figures in the preamble, indirectly of course in various articles (Art 20, Art 21, Art 47, Art 49, to name but a few). On a broader scale, the rule of law also occurs within SDG16.<sup>249</sup>

So far, the “nuclear option”<sup>250</sup> of Art 7 TEU<sup>251</sup> has not proven successful, especially in a situation where two proceedings against two countries should be launched. If those two countries mutually support each other, both proceedings can be blocked in the end. Based on the idea that the EU is more than a cash machine, this led to the idea of protecting the EU’s budget from rule of law breaches (the so-called ‘**conditionality**’ mechanism<sup>252</sup>), which has been viewed quite critically in

<sup>243</sup>ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 281.

<sup>244</sup>ECJ judgement of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, para 58.

<sup>245</sup>On the relationship between Art 20 CFR and Art 21 CFR, see, *infra*, note 451.

<sup>246</sup>EC ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, Annex I. See also Lenaerts (2017b), with further references.

<sup>247</sup>Venice Commission (2011), para 34.

<sup>248</sup>Venice Commission (2011), para 1; see also Venice Commission (2016).

<sup>249</sup>United Nations General Assembly (2015), pp. 25–26.

<sup>250</sup>EC communication ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 2.

<sup>251</sup>See also *infra*, Sect. 3.5.1.

<sup>252</sup>Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L1 433/1 (see also the other documents in this OJ edition). See also European Council, Conclusions of 10–11 December 2020, EUCO 22/20, part I.

literature.<sup>253</sup> Another important element of enforcing the rule of law has been the **ECJ**, which emphasised the requirement of independent courts, as one key element of the rule of law. The Commission contributed to the whole situation with its annual rule of law reports.<sup>254</sup> Where the Art 7 TEU procedure mainly driven by the Council and the European Council has not proven successful, the ECJ has made an **important contribution**, as “respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded”.<sup>255</sup>

### 3.2.1.4 Human Rights

In the ‘ethical spirit of EU law’, I have argued for EU values and human rights to fill the gaps that might occur in case of EU law referring to non-legal concepts such as ethics, where in the end one lacks the necessary determination. Human rights, as developed by the CJEU and as nowadays enshrined in the CFR, are also mentioned as one of the values of Art 2 TEU.

Besides the **legal quality** of ‘human rights’ and as a value, fundamental rights have also been qualified as general principles of EU law.<sup>256</sup> The reference to human rights in Art 2 TEU does not really conflict with the notion of ‘fundamental rights’ as used in the CFR. As already mentioned throughout this book, almost all articles of the CFR entitle human beings, even within the provisions on citizens’ right. Human rights are only mentioned in Art 3 TEU as objectives in the context of the EU’s “relations with the wider world” (para 5). Human rights are mentioned twice in the TEU preamble, once as a value (“the inviolable and inalienable rights of the human person”, recital 2), and once as principles (“respect for human rights and fundamental freedoms”, recital 4). On a broader scale, fundamental freedoms also occur within SDG16.<sup>257</sup>

The **definition** of human rights (see also below) can be cut short, as the concept of human rights as been extensively discussed in literature of both law and philosophy. The CJEU case-law starting in 1969, shaping fundamental rights as general principles of law and today’s case-law further elaborating the CFR-based rights contribute

<sup>253</sup> Alemanno and Chamon (2020) and Mader (2021). Less critical, Tridimas (2020) and Baraggia and Bonelli (2022).

<sup>254</sup> EC ‘2021 Rule of Law Report. The rule of law situation in the European Union’, COM(2021) 700 final 20.7.2021.

<sup>255</sup> Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L1 433/1, recital 6.

<sup>256</sup> Tridimas (2006), pp. 298–369.

<sup>257</sup> United Nations General Assembly (2015), pp. 25–26, “protect fundamental freedoms, in accordance with national legislation and international agreements”. N.B. fundamental freedoms here have to be understood in the sense of fundamental rights, not in the sense of economic fundamental freedoms of the EU’s internal market.



to this concept. Whole books<sup>258</sup> and commentaries<sup>259</sup> have been written on the CFR, etc. Therefore, only a few **selected** aspects will be addressed in the following.

Not only are human rights one of the values addressed in Art 2 TEU, also the CFR refers to the “indivisible, universal values” on which “the Union is founded” (recital 2), and to the “preservation and to the development of these common values” (recital 3). A close **connection** between the values enshrined in Art 2 TEU and the CFR can also be found in the structure of the latter:<sup>260</sup> dignity (title I), freedom(s) (title II), equality (title III), solidarity (title IV) and justice (title VI). Citizens’ rights (title V) can be seen to be closely related to democracy in terms of elections to the EP (Art 39 CFR) and at municipal elections (Art 40 CFR). Likewise, other articles are also closely connected to democracy, such as the right to good administration (Art 41 CFR), access to documents (Art 42 CFR), the European Ombuds(wo)man (Art 43 CFR) and the right to petition (Art 44 CFR). The remaining articles are more related to the concept of EU citizenship (Art 45 CFR, Art 46 CFR), however, also linked to democracy.

Human rights are also strongly **connected** to **other values**, as they concretise other values, such as human dignity, freedom, and the substantive element of the rule of law.<sup>261</sup>

Fundamental or human rights<sup>262</sup> cannot only be **found** in the CFR but are still also part of the CJEU’s case-law identifying and shaping ‘general principles of EU law’ (Art 6[3] TEU),<sup>263</sup> “as they result from the constitutional traditions common to the Member States” (Art 52[4] CFR). Other international treaties and especially the ECHR (Art 52[3] CFR) also play an important role. In terms of the **external** dimension, Art 21(1) TEU tasks the EU to “be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world”, namely, “the universality and indivisibility of human rights and fundamental freedoms”, etc.

The ECHR in its title refers to ‘Human Rights and Fundamental Freedoms’. Likewise, the CFR also refers to “rights and freedoms” (Art 52[1] CFR, Art 54 CFR, Art 47 CFR). Freedoms can also be seen as a value and as an emanation of one type of human rights, which are often distinguished in **positive** and **negative** rights. Beauchamp and Faden explain it as follows: “This distinction is based on the difference between the right to be free to do something (a right to non-interference) and the right to be provided by others with a particular action,

<sup>258</sup>Frenz (2009); Douglas-Scott and Hatzis (2019); Heselhaus and Nowak (2020), to name but a few.

<sup>259</sup>Geiger et al. (2015); Holoubek and Lienbacher (2019); Meyer and Hölscheidt (2019); Jarass (2021); Peers et al. (2021), to name but a few.

<sup>260</sup>See also, *infra*, Table 4.1.

<sup>261</sup>Calliess (2016), p. 46.

<sup>262</sup>See also, *supra*, Sect. 3.1.1.

<sup>263</sup>See also Art 340 TFEU, on the EU’s non-contractual (para 2) and the ECB’s (para 3) liability, as well as Art 41(3) CFR (in the context of the right to good administration). Art 49(2) CFR refers to “general principles recognised by the community of nations”.



good, or service (a right to benefits). A negative right is a right to be free to pursue a course of action or to enjoy a state of affairs, whereas a positive right is a right to obtain a good, opportunity, or service.”<sup>264</sup> This is reminiscent of the two types of freedom,<sup>265</sup> the ‘freedom’ to, and the ‘freedom from’.<sup>266</sup> In the context of the right to healthcare, it has been argued to rather follow a “tri-partite structure of duties: duties to respect, protect, and fulfil”,<sup>267</sup> an idea that can also be found in the United Nations’ ‘Committee on Economic and Social and Cultural Rights’ General Comment No 14.<sup>268</sup>

Within the CFR, discussion centres on the legal qualification of various provisions as **rights** or (only) as **principles**. Art 51(1) CFR tasks those bound by the CFR<sup>269</sup> to “respect the rights” and to “observe the principles”. Principles are clearly ‘less’ compared to ‘rights’, as Art 52(5) CFR states that “[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only [!] in the interpretation of such acts and in the ruling on their legality”. It is mainly<sup>270</sup> up to the explanations<sup>271</sup> “drawn up as a way of providing guidance in the interpretation” of the CFR (Art 52 [7] CFR<sup>272</sup>), to clarify which provision is qualified as a right, and which only as a ‘CFR principle’.

Linking this distinction of CFR rights and principles to the above-mentioned relationship between values and (general) principles,<sup>273</sup> we can identify **directly** legally enforceable principles, such as proportionality, and these principles in the sense of ‘interpretation guidelines’, which can impact at an **indirect** level. Hence, we can identify rather abstract values, more concrete legal principles, and finally ‘CFR principles’ that can be qualified as less in the sense of ‘legal value’. Both EU values and ‘CFR principles’ can have an indirect impact in terms of contributing to the interpretation of other provisions of EU law. A direct impact of (serious) human

<sup>264</sup> Beauchamp and Faden (1979), p. 120. “A second and different analysis is that such rights are complex, containing both negative rights and positive rights within their broad sweep. Yet a third strategy in the attempt to analyse such rights is to deny the validity of the positive/negative distinction, while a fourth is to say that there are vast gray areas in the set of rights where the distinction fails to apply.”

<sup>265</sup> See, *infra*, Sect. 3.2.1.11.

<sup>266</sup> Cf. Hermerén (2006), p. 14.

<sup>267</sup> Wolff (2015), p. 494.

<sup>268</sup> United Nations Committee on Economic, Social and Cultural Rights (2000), para 33, “The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*” (no emphases added).

<sup>269</sup> See, *infra*, Sect. 3.3.2.

<sup>270</sup> N.B. Besides the CJEU.

<sup>271</sup> Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17.

<sup>272</sup> See also Art 6(1) (3) TEU and recital 5 CFR.

<sup>273</sup> See, *supra*, Sect. 1.5.3.

rights violations has recently been enacted in a Council regulation and a decision ‘concerning restrictive measures against serious human rights violations and abuses’.<sup>274</sup>

### 3.2.1.5 Rights of Minorities

The rights of minorities are especially addressed as one sub-category of human rights within the values enshrined in Art 2 TEU. In terms of legal quality, besides Art 2 TEU and the link to human rights, minorities do not occur in Art 3 TEU on the EU’s objectives. The rights of minorities as such are not mentioned as general principles of EU law.<sup>275</sup>

As mentioned above, the political category of the 1993 Copenhagen criteria refers to “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.<sup>276</sup> In terms of the **historic** genesis of Art 2 TEU it noteworthy, that the “reference to the rights of minorities was included in the final text by the Inter Governmental Conference of June 2004”, which followed “the pattern of many Central and Eastern European constitutions which make express reference to the protection of minority rights separately and in addition to classic human rights”.<sup>277</sup>

This value is **not** further **defined** in the EU treaties. According to the Oxford Dictionary, a minority is defined as “a smaller group of people within a community of country, differing from the main population in race, religion, language or political persuasion”.<sup>278</sup> These criteria are reminiscent of some criteria in the context of non-discrimination.<sup>279</sup>

Art 21(1) CFR that mentions several grounds, according to which discrimination is prohibited, also mentioning “membership of a national minority”. Although not directly addressing minorities, Art 22 CFR tasks the EU to “respect cultural, religious and linguistic diversity”.

Clarification of the content of this concept can be found in the Council of Europe’s ‘Framework Convention for the Protection of National Minorities’,<sup>280</sup> which also relates to ‘national’ minorities. The wording of Art 2 TEU is

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<sup>274</sup>Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ 2020 L1 410/1, as amended by OJ 2021 L1 445/10; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ 2020 L1 410/13, as amended by OJ 2021 L1 445/17.

<sup>275</sup>Tridimas (2006).

<sup>276</sup>European Council in Copenhagen, Conclusions of the Presidency of 21–22 June 1993, p. 13.

<sup>277</sup>Tridimas (2006), p. 16.

<sup>278</sup>Stevenson (2010), p. 1128.

<sup>279</sup>See, *infra*, Sect. 3.2.1.10.

<sup>280</sup>Signed 1 February 1995, entered into force 1 February 1998, ETS No 157. N.B. France has neither signed nor ratified this document.

consequently broader than Art 21 CFR and this Council of Europe document. Hence, national and ethnic<sup>281</sup> **minorities** are clearly covered. A broader reading can also include other minorities.<sup>282</sup> Nationality and ethnicity have been clarified by the General Court as follows: “although nationality is a legal and political link between an individual and a sovereign State, the concept of ethnicity has its origin in the idea that societal groups share the sense of belonging to a common nation, religious faith, language, cultural and traditional origins and backgrounds”.<sup>283</sup>

In literature, it has been clarified that these rights of minorities address individuals, not minorities as a group.<sup>284</sup> As in the case of equality (equal rotation between Member States),<sup>285</sup> it is worth mentioning that the concept of minority occurs again for the advantage of Member States in case of voting in the Council and a ‘blocking minority’.<sup>286</sup> So to speak, another form of minority protection, but on the level of the Member States. Hence, not addressing the core of this value.

The protection of minorities is clearly related to democracy and pluralism.<sup>287</sup> While decisions of the people are taken by majority, this necessarily includes the need to provide some safeguards for minorities.<sup>288</sup>

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<sup>281</sup> Cf. Art 10 TFEU and Art 19 TFEU (both: “combat discrimination based on [. . .] ethnic origin”), as well as in Art 21(1) CFR itself (“ethnic or social origin”). For ‘ethnic’ minorities, Hilf and Schorkopf (2021), para 38 refer to Dec No 32 on the Sami people [annexed to the Treaty establishing a Constitution for Europe], OJ 2004 C 310/465, to emphasise the ethnic element.

<sup>282</sup> According to Obwexer (2020), para 44, the decisive factor is that a group differs from the majority on the basis of certain characteristics.

<sup>283</sup> GC judgement of 20 November 2017, *Voigt vs. Parliament*, T-618/15, EU:T:2017:821, para 76. See also ECJ judgement of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, para 46, “the concept of ethnicity, which has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds”.

<sup>284</sup> Jacqu  (2015), para 5; Klamert and Kochenov (2019), p. 25; Obwexer (2020), para 45. See also Stevenson (2010), p. 1367 on ‘pluralism’: “a form of society in which the members of minority groups [!] maintain their independent cultural traditions” and in philosophy as “a form of society in which the members of minority groups [!] maintain their independent cultural traditions”.

<sup>285</sup> See note 440.

<sup>286</sup> Art 16(4) (2) TEU, Art 238(3)(a) TFEU, Dec No 7 (OJ 2016 C 202/338–340).

<sup>287</sup> Stevenson (2010), p. 1367 on ‘pluralism’: “a form of society in which the members of minority [!] groups maintain their independent cultural traditions” and in philosophy as “a form of society in which the members of minority [!] groups maintain their independent cultural traditions”.

<sup>288</sup> On democracy, see Sect. 3.2.1.2.

### 3.2.1.6 Solidarity

As AG Sharpston has stated, “[s]olidarity is the lifeblood of the European project”.<sup>289</sup> Based on this opinion, Bieber has aptly stated that solidarity is a manifestation of the comprehensive principle of mutual responsibility.<sup>290</sup> Solidarity is another value enshrined in Art 2 TEU that is **not defined**, neither in the treaties,<sup>291</sup> nor in CJEU case-law,<sup>292</sup> although both shed some light on the meaning of this ‘concept’, as depicted in the following. Solidarity is a good example of the **horizontal** nature of such a “multifaceted”<sup>293</sup> concept, which occurs as an EU value (Art 2 TEU),<sup>294</sup> as an EU objective (Art 3 TEU), as a (general) principle,<sup>295</sup> and in the form of fundamental rights (Title IV CFR, Articles 27–38).<sup>296</sup>

According to the **Oxford Dictionary**, solidarity is defined as the “unity or agreement of feeling or action, especially among individuals with a common interest”, respectively, as “mutual support within a group”.<sup>297</sup>

In the **EU treaties**, solidarity as a concept can explicitly<sup>298</sup> be found several times. The Lisbon Treaty has introduced the solidarity clause of Art 222 TFEU, which requires the Member States to act jointly “in a spirit [!] of solidarity” in case of terrorist attacks, and natural or man-made disasters.<sup>299</sup> The preamble of the TEU

<sup>289</sup> AG Sharpston opinion of 31 October 2019, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, para 253.

<sup>290</sup> Bieber (2021), p. 226. In the context of mutual responsibility, he refers (pp. 226–227) to the principle of sincere cooperation (see at note 316), to infringement proceedings initiated by another Member State (Art 259 TFEU), and to the ‘mutual trust’ (see *supra*, Sect. 1.5.4) case-law.

<sup>291</sup> Cf. also Frenz (2021), p. 164.

<sup>292</sup> Cf. AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 65, “without providing a general definition of its features”.

<sup>293</sup> AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 70.

<sup>294</sup> See also CFR recital 2.

<sup>295</sup> GC judgement of 10 September 2019, *Poland vs. Commission [energy solidarity]*, T-883/16, EU:T:2019:567, paras 69, 70.

<sup>296</sup> See also Dec No 62 by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom, OJ 2016 C 202/358, which refers to the social movement of *Solidarność*.

<sup>297</sup> Stevenson (2010), p. 1698.

<sup>298</sup> AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 59, refers to “other provisions of primary law which are founded on [!] solidarity. These include the financial assistance mechanism for countries outside the euro zone (Article 143 TFEU) and the provisions on economic, social and territorial cohesion (Articles 174–178 TFEU)”. See also Klamert (2015), p. 269.

<sup>299</sup> See also Dec No 37 on Article 222 of the Treaty on the Functioning of the European Union, OJ 2016 C 202/349, which emphasises the possibility of a single Member State to adopt its “own solidarity obligation” towards the affected Member State, besides the Union’s approach. See also Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013

(recital 6), amongst others,<sup>300</sup> refers to the “solidarity between their [i.e. of the Member States] peoples”, and Art 3 (3)(3) TEU (on the EU’s objectives) to the “solidarity among Member States”. In the political field, we can find “political solidarity among Member States” in the Common Foreign and Security Policy (CFSP),<sup>301</sup> other provisions in the same field refer to “mutual solidarity”.<sup>302</sup> These examples can be seen to fall within the **‘internal field’**, i.e., mainly relating to the relationship of the EU and Members States amongst themselves.

Besides the solidarity between the EU and MS and another MS (Art 222 TFEU), and the above-mentioned examples of solidarity between MS, we can also find “solidarity between generations” as another reference to solidarity in Art 3 TEU<sup>303</sup> (on the EU’s objectives). This ‘solidarity **between generations**’ has recently been stressed by the German Constitutional Court (BVerfG) in the field of climate change. Although the BVerfG has not explicitly referred to solidarity, it has referred to the obligation<sup>304</sup> of Germany “to protect the natural foundations of life, also in responsibility for future generations”, which “also concerns the distribution of environmental burdens between the generations”.<sup>305</sup> This idea of **burden sharing** has also been addressed in a different sector.

In the field of **border checks, asylum and immigration**, Art 80 TFEU refers to the “the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member State”. In the context of this provision, some Member States have legally challenged the so-called **‘relocation decision’**, which aimed at relocating third-country nationals from Italy and Greece to other Member States, due to the sudden inflow in fall 2015, especially to those two countries.<sup>306</sup> As the ECJ has stated, in case of such an emergency situation (cf. Art 78

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on a Union Civil Protection Mechanism, OJ 2013 L 347/924, as amended by OJ 2021 L 185/1, which shall “contribute to the implementation of [Art 222 TFEU]”.

<sup>300</sup> Art 67(2) TFEU (area of freedom, security and justice), Art 122(1) TFEU (economic policy), Art 194(1) TFEU (energy), Prot No 28 on economic, social and territorial cohesion, OJ 2016 C 202/309 (preamble, recital 1).

<sup>301</sup> Art 24(2) TEU.

<sup>302</sup> Art 24(3) TEU, Art 31(1)(2) TEU, Art 32(1) TEU, Art 24(3). N.B. Art 24(3)(2) TEU also refers to “mutual political solidarity”.

<sup>303</sup> Art 3(3)(2) more precisely.

<sup>304</sup> This was based on the active obligation to protect the right to life and the right to physical integrity, as enshrined in the German Constitution.

<sup>305</sup> BVerfG order of 24 March 2021, *Constitutional complaints against the Climate Protection Act partially successful*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, para 193 (translation). This “includes the need to treat the natural foundations of life with such care and to leave them to posterity in such a state that subsequent generations could not continue to preserve them only at the price of radical abstinence of their own [ . . . ]”.

<sup>306</sup> Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2015 L 248/80, amended by OJ 2016 L 268/82; N.B. No longer in force.

[3] TFEU<sup>307</sup>), the burdens must “be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy”.<sup>308</sup> The Council, when adopting the contested decision, “was in fact required [. . .] to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States”.<sup>309</sup> The actions of the Slovak Republic and Hungary against the relocation decision have consequently been dismissed and the principle of solidarity (and fair sharing of responsibility) has been confirmed.

After this field of ‘policies on border checks, asylum and immigration’ (Arts 77–80 TFEU) and the before-mentioned internal examples of solidarity, we can also find examples of solidarity in the **external** field. In its relations with the wider world, the Union is tasked to “promote its values [!] and interests and contribute to the protection of its citizens”, and to “contribute to peace, security, the sustainable development of the Earth, solidarity [etc.]” (Art 3[5] TEU).<sup>310</sup> This objective is complemented by Art 21(1) TEU (on general provisions on the Union’s external action), which requires the “Union’s action on the international scene [to] be guided by the principles which have inspired its own creation, development and enlargement”. These principles comprise “democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”. The coherence between the internal and external field is convincing. However, interesting to note is that Art 2 TEU values are referred to as principles, and that not all values of Art 2 TEU are mentioned here. Finally, a last reference to solidarity can be found in the TFEU preamble (recital 6), which refers to “solidarity which binds Europe and the overseas countries”.

Besides EU Treaties (and the above-mentioned corresponding CJEU clarifications), we can also find some elucidation in **CJEU case-law**. In an early case from 1973, the ECJ has stressed the “equilibrium between advantages and obligations flowing from” EU membership (more precisely, “adherence to the Community” at

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<sup>307</sup>“In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament”.

<sup>308</sup>ECJ judgement of 6 September 2017, *Slovakia vs. Council [relocation]*, joined cases C-643/15 and C-647/15, EU:C:2017:631, para 291, see also paras 253, 293. Confirmed in ECJ judgement of 2 April 2020, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, para 80.

<sup>309</sup>ECJ judgement of 6 September 2017, *Slovakia vs. Council [relocation]*, joined cases C-643/15 and C-647/15, EU:C:2017:631, para 252.

<sup>310</sup>This is the third (out of three) reference to solidarity in Art 3 TEU on the EU’s objectives.

the time).<sup>311</sup> This quotation can be interpreted as an ECJ statement against ‘cherry picking’. Being a member of a community obviously entails advantages and disadvantages, as “[i]n permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules”.<sup>312</sup> If a Member State would unilaterally break those rules, it would endanger this **equilibrium** and bring into question “the equality of Member States before Community law”, as the “duty of solidarity [!] accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis [!] of the Community legal order”.<sup>313</sup> This idea has also recently been confirmed by the General Court, emphasising that “the principle of solidarity entails rights and obligations both for the European Union and for the Member States”.<sup>314</sup> This principle binds the EU and the Member States, as “the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it”.<sup>315</sup>

The principle of solidarity has also been linked with the principle of **sincere cooperation**,<sup>316</sup> according to which “the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties” (Art 4[3] TEU).<sup>317</sup> As the General Court has stated in the field of energy solidarity, “[t]he ‘spirit of solidarity’ referred to in Article 194(1) TFEU is the specific expression in this field of the general principle of solidarity between the Member States”, which “is at the basis of the whole Union system in accordance with the undertaking provided for in Article 4(3) TEU”.<sup>318</sup> As Klamert aptly states, both the principle of sincere cooperation and solidarity serve the cohesion of the Union,<sup>319</sup> however they

<sup>311</sup> ECJ judgement of 7 February 1973, *Commission vs. Italy [slaughtering cows]*, C-39/72, EU:C:1973:13, para 24.

<sup>312</sup> ECJ judgement of 7 February 1973, *Commission vs. Italy [slaughtering cows]*, C-39/72, EU:C:1973:13, para 24.

<sup>313</sup> ECJ judgement of 7 February 1973, *Commission vs. Italy [slaughtering cows]*, C-39/72, EU:C:1973:13, para 25.

<sup>314</sup> GC judgement of 10 September 2019, *Poland vs. Commission [energy solidarity]*, T-883/16, EU:T:2019:567, para 70. See also AG Sharpston opinion of 31 October 2019, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, para 253.

<sup>315</sup> GC judgement of 10 September 2019, *Poland vs. Commission [energy solidarity]*, T-883/16, EU:T:2019:567, para 70.

<sup>316</sup> On this principle, see Klamert (2014).

<sup>317</sup> For implicit examples of loyalty in EU law, see Klamert (2015), p. 267.

<sup>318</sup> GC judgement of 10 September 2019, *Poland vs. Commission [energy solidarity]*, T-883/16, EU:T:2019:567, para 69. On the other hand, as the Court has held, “the principle of solidarity underpins the entire legal system of the European Union [...] and it is closely linked [!] to the principle of sincere cooperation”, ECJ judgement of 15 July 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:598, para 41.

<sup>319</sup> Klamert (2015), p. 284.



also must be differentiated; at the same time, they are both “cooperative and value based”.<sup>320</sup>

Solidarity in this context of **energy policy** “also entails a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders”.<sup>321</sup> This “implies, inter alia, obligations of mutual assistance in the event that, following for example natural disasters or acts of terrorism, a Member State is in a critical or emergency situation”.<sup>322</sup> The effects of the principle of energy solidarity (Art 194 [1] TFEU) have been described as “not merely political but legal”.<sup>323</sup> According to the ECJ, “the spirit of solidarity between Member States, mentioned in that provision, constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law”.<sup>324</sup>

In the field of **social security**, the ECJ was asked to characterise social security schemes applying the principle of solidarity. In a positive way, they are “in particular” characterised as follows:<sup>325</sup>

by the **compulsory nature** of affiliation both for insured persons and for the insurance bodies; **contributions** which are fixed by law **in proportion to the income** of the insured persons and not the risk they represent individually on account of their age or state of health; the rule that compulsory benefits set by law are **identical for all insured** persons and do not depend on the amount of the contributions paid by each; and a mechanism for the **equalisation of costs** and risks through which schemes that are in surplus contribute to the financing of those with structural financial difficulties.

In a negative way, they have been defined in the same judgement as “not applying the principle of solidarity and are, therefore, engaging in an economic activity”, in case of organisations managing “an insurance scheme based on a system of **optional**

<sup>320</sup> Klamert (2015), p. 285; translated with DeepL.

<sup>321</sup> GC judgement of 10 September 2019, *Poland vs. Commission [energy solidarity]*, T-883/16, EU:T:2019:567, para 72. See also ECJ judgement of 15 July 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:598, para 73, “the EU institutions and the Member States are required to take into account, in the context of the implementation of that policy, the interests both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict”.

<sup>322</sup> GC judgement of 10 September 2019, *Poland vs. Commission [energy solidarity]*, T-883/16, EU:T:2019:567, para 71.

<sup>323</sup> AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 96. This legal dimension can have the following effects: “a) as a criterion for interpreting provisions of secondary law adopted in implementation of the European Union’s powers in energy matters; b) as a means of filling any gaps identified in those provisions; and c) as a parameter for judicial review, either of the legality of the aforementioned provisions of secondary law, or of decisions adopted by the bodies of the European Union in that field”.

<sup>324</sup> ECJ judgement of 15 July 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:598, para 38.

<sup>325</sup> ECJ judgement of 11 June 2020, *Commission vs. Dôvera zdravotná poisťovňa*, joined cases C-262/18 P and C-271/18 P, EU:C:2020:450, para 32 (emphases added).



affiliation, operating according to a principle of **capitalisation** under which there is a direct link between the amount of the contributions paid by the insured person and their financial performance, on the one hand, and the benefits provided to that insured person, on the other, and incorporating extremely limited elements of solidarity”.<sup>326</sup> This positive and negative definition can be seen as a characterisation of the **European welfare approach**. Precaution<sup>327</sup> and solidarity have been mentioned as characteristics of this European approach, in distinguishing it from the American.<sup>328</sup>

**To summarise**, as stated by AG Campos Sánchez-Bordona, it “is difficult, however, to infer from the foregoing collection of provisions a full and all-encompassing **definition** of solidarity in EU law”.<sup>329</sup> Nevertheless, based on what has been depicted so far,<sup>330</sup> in the following this ‘concept’ (see below) shall be described as far as possible.

Solidarity has occurred in **various fields**, such as state aid,<sup>331</sup> agriculture,<sup>332</sup> energy,<sup>333</sup> migration,<sup>334</sup> social security,<sup>335</sup> solidarity between producers,<sup>336</sup> and in EU citizenship,<sup>337</sup> to name but a few. The European Commission has clarified its

<sup>326</sup> ECJ judgement of 11 June 2020, *Commission vs. Dôvera zdravotná poisťovňa*, joined cases C-262/18 P and C-271/18 P, EU:C:2020:450, para 35 (emphases added). As the Court has further stated, running a system in an effective and least costly manner does not affect the solidarity based nature of such a system (para 43).

<sup>327</sup> *Infra*, Sect. 4.3.2.3.

<sup>328</sup> Prainsack and Buyx (2011), p. 32.

<sup>329</sup> Cf. AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 60.

<sup>330</sup> As a disclaimer, it has to be emphasised that this excerpt depicted above is not comprehensive.

<sup>331</sup> ECJ judgement of 10 December 1969, *Commission vs. France [conjunctural policy]*, C-6/69, EU:C:1969:68, para 16.

<sup>332</sup> ECJ judgement of 7 February 1973, *Commission vs. Italy [slaughtering cows]*, C-39/72, EU:C:1973:13, paras 24–25.

<sup>333</sup> GC judgement of 10 September 2019, *Poland vs. Commission [energy solidarity]*, T-883/16, EU:T:2019:567; ECJ judgement of 15 July 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:598.

<sup>334</sup> ECJ judgement of 6 September 2017, *Slovakia vs. Council [relocation]*, joined cases C-643/15 and C-647/15, EU:C:2017:631, paras 253, 291, 293; ECJ judgement of 2 April 2020, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, para 80.

<sup>335</sup> ECJ judgement of 11 June 2020, *Commission vs. Dôvera zdravotná poisťovňa*, joined cases C-262/18 P and C-271/18 P, EU:C:2020:450, paras 30–35.

<sup>336</sup> ECJ judgement of 22 January 1986, *Eridania*, C-250/84, EU:C:1986:22, para 20, in the context of the “distribution of burdens”; ECJ judgement of 11 May 2000, *Gascogne Limousin viands*, C-56/99, EU:C:2000:236, para 40, “spirit of solidarity and equality”.

<sup>337</sup> ECJ judgement of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458, para 44, “a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States”.

understanding of solidarity in different fields, such as the social field<sup>338</sup> or in health,<sup>339</sup> where obviously solidarity has been extensively discussed in the field of the pandemic.<sup>340</sup> Jacqué has referred to institutional and financial solidarity.<sup>341</sup>

In EU law, we can find solidarity as a value (Art 2 TEU), as an EU objective (Art 3 TEU), as a (general) principle, and in the form of fundamental rights. In the context of another value, the above-mentioned ‘rule of law’, the question has occurred if there are different types of ‘judicial independence’, as this concept is linked to Art 19(1) second sentence TEU (effective legal protection<sup>342</sup>), Art 47 CFR (right to an effective remedy and to a fair trial) and Art 267 TFEU (preliminary ruling proceeding<sup>343</sup>). As AG Bobek has recently confirmed, “there is *only one and the same principle* of judicial independence”.<sup>344</sup> However, this “same content does not necessarily mean the same outcome in an individual case”, as these “three provisions are different as to their scope and purpose within the structure of the Treaties” and this “difference means that a slightly different type of examination must be carried out under each of the three provisions”.<sup>345</sup> The same approach should be embraced in case of solidarity. Therefore, solidarity is referred to as a ‘**concept**’, as this meta-level terminology can be seen as more neutral.

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<sup>338</sup>EC ‘Renewed social agenda: Opportunities, access and solidarity in 21<sup>st</sup> century Europe’, COM (2008) 412 final 2.7.2008.

<sup>339</sup>EC ‘Solidarity in Health: Reducing Health Inequalities in the EU’, COM(2009) 567 final 20.10.2009.

<sup>340</sup>Greer (2020); Sokol (2020); von Bogdandy and Villarreal (2021); Frenz (2021); Kienzler and Prainsack (2021), to name but a few.

<sup>341</sup>Jacqué (2015), para 11.

<sup>342</sup>“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.

<sup>343</sup>As mentioned by AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, paras 65, “the analysis under Article 267 TFEU has always been concerned merely with identifying the proper institutional interlocutors [!] for the Court”.

<sup>344</sup>AG Bobek opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, joined cases C-748/19 to C-754/19, EU:C:2021:403, para 162 (no emphases added).

<sup>345</sup>AG Bobek opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, joined cases C-748/19 to C-754/19, EU:C:2021:403, para 163. See further details on the three emanations (of the three different articles) in paras 164–166. See also AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, paras 35–42.

The **status**<sup>346</sup> of this horizontal<sup>347</sup> and multifaceted concept has been described as “materially constitutional”<sup>348</sup> or as a “constitutional principle”<sup>349</sup>. The “variety of forms in which the principle of solidarity manifests itself makes it difficult for that principle to be applied in the same way and to the same extent in all areas of EU competence”.<sup>350</sup> This finding is true for all values (and principles), as we must accept that a broad field of application does not favour a precise definition.

This is also because solidarity in EU law clearly has both a **political** and a **legal** dimension. This analysis does not mean that solidarity cannot have an ethical dimension too, for example, but not exclusively, when EU law refers to the ‘spirit’ of solidarity.

Solidarity also has a **social** dimension, where Viehoff and Nicolaidis have offered a ‘solidarity compass’ “which locates solidarity at the intersection of two continuums, namely one between (*self*) *interest* and *community*, and one between *altruism* and *obligation*”.<sup>351</sup> The idea is then to reach a balanced approach in the middle of the two axes.<sup>352</sup>

Solidarity applies at different **levels** in a horizontal and a vertical way, as solidarity “is a notion which appears to be linked to relations both horizontally (between Member States, between institutions, between peoples or generations and between Member States and third countries) and vertically (between the European Union and its Member States), in a variety of contexts”.<sup>353</sup> However, according to Klamert it “primarily governs horizontal relationship” between Member States.<sup>354</sup>

Especially in the CFSP,<sup>355</sup> the **mutual** aspect of solidarity has been stressed. This approach is reminiscent of mutual trust, as described above<sup>356</sup> and refers to this

<sup>346</sup> AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 70, mentioned with regard to the legal status that the principle of solidarity “may be regarded as significant enough to create legal consequences”.

<sup>347</sup> ECJ judgement of 15 July 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:598, para 41, “the principle of solidarity underpins the entire legal system of the European Union”, see also para 67.

<sup>348</sup> Cf. AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 61.

<sup>349</sup> AG Mengozzi opinion of 26 July 2017, *Eni and Others*, C-226/16, EU:C:2017:616, para 33.

<sup>350</sup> AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 72.

<sup>351</sup> Viehoff and Nicolaidis (2015), pp. 283–284.

<sup>352</sup> See also Fig. 4.2.

<sup>353</sup> AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 60.

<sup>354</sup> Klamert (2014), p. 40.

<sup>355</sup> *Supra*, note 301.

<sup>356</sup> Section 1.5.4.

relational dimension, where trust and solidarity should not be seen as a ‘one-way street’.<sup>357</sup>

Prainsack and Buyx have defined<sup>358</sup> solidarity as “an enacted commitment to carry ‘costs’ (financial, social, emotional or otherwise) to assist others with whom a person or persons recognise similarity in a relevant respect”.<sup>359</sup> From what we have seen in EU law, the concept of solidarity clearly has this element of **action** (‘to assist’), which we have seen both in the field of energy solidarity case-law and as an element of the principle of loyalty (Art 4[3] TEU). The element of ‘**similarity**’ is found in our context in the EU membership of Member States, respectively, in EU citizenship in case of EU citizens. Solidarity as a concept naturally gains relevance in a situation of **need**<sup>360</sup> or emergency, as mentioned in the field of energy.<sup>361</sup>

Prainsack and Buyx also distinguish three ‘**tiers**’ of solidarity.<sup>362</sup> An inter-personal tier (No 1), which refers to solidarity practised between individuals. Tier No 2 applies to ‘group-based or community-based practices’, where solidarity between individuals becomes common in a specific context or community that it is seen as ‘normal’. The next step would be the codification (or ‘solidification’, as mentioned by the authors) of these “values or principles enacted and emerged through group or community-based practices” via “contractual, legal or administrative norms” (tier No 3).<sup>363</sup> The concept of solidarity, as identified<sup>364</sup> here in this book, ideally should embrace all three tiers. While the approach of Prainsack and Buyx seems to primarily emerge from tier No 1 to (eventually) tier No 3, in case of the EU the question is whether solidarity enshrined in the EU treaties (as depicted above) can also make its way down to the group (No 2) and the individual (No 1) level.<sup>365</sup>

The ECJ has also referred to the idea of **balance** (or equilibrium) regarding the advantages and obligations of EU membership. This idea has also been expressed in one field also covered by solidarity-related case-law, i.e., social security. In this context, according to the ECJ “the risk of seriously undermining the financial

<sup>357</sup>This distinguishes solidarity from charity, as the latter is characterised by this “notion of giving or helping without expecting anything in return”; Prainsack and Buyx (2011), p. 41.

<sup>358</sup>More precisely, they refer to a “working definition”.

<sup>359</sup>Prainsack and Buyx (2017), p. 52. See also Prainsack and Buyx (2011), p. 46: “It is important to note that solidarity is understood here as a practice [!] and not merely as an inner sentiment or an abstract value. Solidarity requires actions. Motivations and feelings such as empathy etc. are not sufficient to satisfy this understanding of solidarity, unless they manifest themselves in acts.” Following this approach, solidarity could be qualified as a ‘virtue’ (see Sect. 1.5.1).

<sup>360</sup>See also, in the context of biomedical ethics, Hermerén (2006), p. 20.

<sup>361</sup>GC judgement of 10 September 2019, *Poland vs. Commission [energy solidarity]*, T-883/16, EU:T:2019:567, para 71.

<sup>362</sup>Prainsack and Buyx (2017), pp. 54–57. See also Prainsack and Buyx (2011), pp. 47–49.

<sup>363</sup>Prainsack and Buyx (2017), p. 56.

<sup>364</sup>As mentioned above (note 329) solidarity as a concept of EU law can be described, although not exactly defined.

<sup>365</sup>See, *infra*, Chap. 6, thesis No 17.

balance [!] of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier” to the economic fundamental freedoms.<sup>366</sup>

At the level of Member States, solidarity has been described as “an expression of the fundamental principle of the equality [!] of the Member States in the European Union”.<sup>367</sup> The above-mentioned examples in the field of solidarity have also revealed the **relation to other** concepts. Also due to the mention in Art 80 TFEU, in migration the ECJ has referred to solidarity and fairness (on justice see in the following).

### 3.2.1.7 Justice

Justice has been referred to as “relative to social meanings”,<sup>368</sup> and “as a human construction, and it is doubtful that it can be made in only one way”.<sup>369</sup> At the same time, it is an essential element of every society. Justice also fulfils a similar purpose as the rule of law, i.e. to avoid arbitrary decisions.

In 2010, Williams has argued “[. . .] justice as a governing ideal has failed to be taken seriously in the EU”.<sup>370</sup> This is remarkable, even though when searching in the consolidated version of the EU treaties, the word of ‘justice’ occurs 276 times, prominently also as part of the ‘are of freedom, security and justice’. Williams’ analysis obviously addresses a qualitative, not a quantitative dimension. Justice has rather been covered in literature, than in CJEU case-law.<sup>371</sup> Most prominently, justice essentially describes the EU’s judiciary branch of power, the Court of *Justice*. In German, law (*Recht*) and justice (*Gerechtigkeit*) are closely related.

Although one has to admit that justice “has no fixed meaning, no settled criteria”,<sup>372</sup> according to the Oxford Dictionary, justice is **defined** as “the quality of being fair and reasonable”.<sup>373</sup> These two elements of fairness (in its relation to justice) and reasonableness (cf. the cardinal virtue of practical wisdom) are both covered below.

Justice affects the **relationship** of human beings (social component) concerning rights and obligations, or more broadly, advantages or disadvantages and in the end

<sup>366</sup> ECJ judgement of 28 April 1998, *Kohll vs. Union des caisses de maladie*, C-158/96, EU:C:1998:171, para 41.

<sup>367</sup> Klamert (2014), p. 37.

<sup>368</sup> Walzer (1983), p. 312.

<sup>369</sup> Walzer (1983), p. 5.

<sup>370</sup> Williams (2010), p. III. In a similar way to the lack of democracy (note 198) in the EU, a deficit was also noted with regard to justice. See the numerous contributions in Kochenov et al. (2015).

<sup>371</sup> Klamert and Kochenov (2019), p. 29.

<sup>372</sup> Walker (2015), p. 247.

<sup>373</sup> Stevenson (2010), p. 951.

is related to questions of morality in the sense of ‘what is the right thing to do’<sup>374</sup>. As Aristotle has stated, justice “is complete virtue, not without qualification, but in relation to another person”<sup>375</sup>.

Justice can be seen as a **virtue** or as a principle. Justice as a virtue refers to “traits of character that are judged to be morally admirable or valuable”<sup>376</sup>. According to Aristotle, “justice is the greatest of the virtues [. . .]. We express this in the proverb, ‘In justice is all virtue combined’”<sup>377</sup>. Justice (*iustitia*) is also one of the ‘cardinal virtues’, besides temperance (*temperantia*), courage (*fortitudo*) and practical wisdom (*prudentia*)<sup>378</sup>. The already mentioned principlism approach of Beauchamp and Childress has justice as one of the four principles, besides respect for autonomy, non-maleficence and beneficence, where justice is described as “a cluster of norms for fairly distributing benefits, risks, and costs” (on distributive justice, see below).<sup>379</sup>

Justice can also be seen as a normative **principle**, according to which standards are to be established. Justice as a principle can be related to actions of individual human beings (e.g., standards for an individual judge, such as *audiatur et altera pars*) or to institutional frameworks for human beings (e.g., court proceedings for fundamental rights violations).

There are various **types** of justice, also depending on the relationship of the entities concerned. In case of a vertical situation of unequal entities (e.g., public authorities<sup>380</sup> and sub-ordinated individuals), **distributive** justice (*iustitia distributiva*) is about the distribution<sup>381</sup> of rights or obligations, advantages or disadvantages.<sup>382</sup> Such challenges arise in particular in the case of scarce resources and potential conflicts between various individuals. Criteria applied shall be objective, coherent<sup>383</sup> (i.e., logical, continuous, and comprehensible) and consistent (i.e., not entailing a contradiction) in application, to avoid arbitrariness.<sup>384</sup> One can either follow an egalitarian approach (leading to the same result), or a proportional one.<sup>385</sup>

<sup>374</sup>Cf. Sandel (2010).

<sup>375</sup>Aristotle (2000), p. 83, 1129b.

<sup>376</sup>Louden (2012), p. 503. See also Ferkany (2021), p. 59: “Virtues are character traits belonging to morally and intellectually good persons”.

<sup>377</sup>Aristotle (2000), p. 83, 1129b.

<sup>378</sup>Klein (1971–2007), p. 695.

<sup>379</sup>Beauchamp and Childress (2019), p. 13.

<sup>380</sup>Both in case of a nation state, or in case of a supra-national organisation such as the EU.

<sup>381</sup>Cf. also Aristotle (2000), p. 85, 1130b.

<sup>382</sup>E.g., European Group on Ethics in Science and New Technologies (EGE) (2000), p. 24, “the principle of justice, which implies fair access of all individuals to the benefits of scientific advances”.

<sup>383</sup>For coherence in the EU, cf. Schuster (2017).

<sup>384</sup>Please note that ECJ case-law referring to ‘coherence’ is about attaining an “objective in a consistent and systematic manner”, ECJ judgement of 16 December 2010, *Josemans*, C-137/09, EU:C:2010:774, para 70.

<sup>385</sup>Cf. Kalb and Wallner (2017), p. 137.

In case of a horizontal situation of equal entities (e.g., private individuals), **exchange** justice (*iustitia commutativa*) aims at establishing equivalence of performance and consideration.<sup>386</sup> This applies especially in the field of private law and includes the valuation of rights and obligations, advantages, and disadvantages, and the equality of the persons involved (e.g., in consumer issues). **Corrective** justice (*iustitia regulativa sive correctiva*) concerns compensation (and or punishment) in case of damage occurred, where questions revolve around the valuation of the damage, responsibility of individuals involved, adequacy of damages payments, etc.

Especially in complex situations, **procedural** justice relates to the idea of fairness in the process. Principles such as impartiality, transparency, equality of arms, rules of interpretation or the burden of proof, etc. can try to lead to a fair decision. However, given the complexity of the situation at hand, these principles might increase the chance of a fair or fairer decision, but might not provide a guarantee.<sup>387</sup>

There are various **theories** of social justice<sup>388</sup> in terms of what people owe each other in a society, in terms of rights and obligations, or more broadly, advantages or disadvantages.<sup>389</sup> One important contribution in this context is the ‘capability approach’, which “gives a central role to a person’s *actual* ability to do the different things she values doing” by focussing “on human lives, and not just on the resources people have”.<sup>390</sup> Hence, by “proposing a fundamental shift in the focus of attention from the *means* of living to the *actual opportunities* a person has, the capability approach aims at a fairly radical change in the standard evaluative approaches widely used in economics and social studies”.<sup>391</sup>

Justice can put an emphasis on **freedom**, which leads to a far-reaching privatisation of the issue. According to this theory of **libertarianism**, the focus is not on the common good, but on individuals. In his book ‘Anarchy, State, and Utopia’ published in 1974, Robert Nozick has argued for a minimal state<sup>392</sup> taking only care of the most essential tasks (e.g., internal, and external security<sup>393</sup>).

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<sup>386</sup>Cf. Aristotle (2000), p. 88, 1132a, “It follows that in voluntary transactions the just is a mean between some kind of gain and loss; it consists in having an equal amount both before and after the transaction”.

<sup>387</sup>Cf. Kalb and Wallner (2017), p. 140.

<sup>388</sup>According to Art 3(3)(2) TEU (objectives), the Union is tasked to “promote social justice and protection”.

<sup>389</sup>The following overview is of course far from being comprehensive.

<sup>390</sup>Sen (2010), p. 253, no emphasis added.

<sup>391</sup>Ibid, no emphases added.

<sup>392</sup>Nozick (1974), p. 333 mentions “that the minimal state is morally legitimate” and “that no more extensive state could be morally justified, that any more extensive state would (will) violate the rights of individuals”.

<sup>393</sup>He refers to the “night-watchman state of classical liberal theory, limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts, and so on”, Nozick (1974), p. 26.

The **liberal** school does not only focus on freedom, but also on equality. Three years before Nozick, in 1971<sup>394</sup> John Rawls has published his ‘Theory of Justice’, putting an emphasis on **fairness**. Rawls tries to establish a well-ordered society that is based on a common understanding of justice. Everyone has different interests that can influence the interpretation of a just situation, such as “his place in society, his class position or social status; [ . . . ] his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like”.<sup>395</sup> Therefore, he proposes the thought experiment of a ‘veil of ignorance’: “I assume that the parties are situated behind a veil of ignorance. They do not know how various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.”<sup>396</sup> Additionally, he offers two principles of justice: “First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties of others [= egalitarian liberalism]. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”<sup>397</sup>

Turning now to a third theory, **communitarianism** unlike libertarianism places the focus not on individuals, but on the common good. Questions of social justice must be placed in the concrete context as shaped by culture and history.<sup>398</sup> Famous proponents comprise Alasdair MacIntyre,<sup>399</sup> Amitai Etzioni,<sup>400</sup> Michael Walzer<sup>401</sup> and Michael Sandel. In ‘Justice. What’s the right thing to do?’, published 2010, Sandel argues that a “just society can’t be achieved simply by maximizing utility or by securing freedom of choice. To achieve a just society, we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that will inevitably arise.”<sup>402</sup>

Besides these various types of justice, there can also be a **clash of law and justice**, as also between law and morality.<sup>403</sup> According to the Radbruch formula, for the sake of legal certainty, in principle “positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice”.<sup>405</sup> Radbruch’s formula

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<sup>394</sup> A revised edition has been published in 1999, which is referred to in this book.

<sup>395</sup> Rawls (1999), p. 118.

<sup>396</sup> Rawls (1999), p. 118.

<sup>397</sup> Rawls (1999), p. 53.

<sup>398</sup> Kalb and Wallner (2017), p. 151.

<sup>399</sup> MacIntyre (1981).

<sup>400</sup> Etzioni (2012).

<sup>401</sup> Walzer (1983).

<sup>402</sup> Sandel (2010), p. 261.

<sup>403</sup> On the relationship between morality and the nature of law, see Himma (2019).

<sup>404</sup> The following draws on Frischhut (2019), p. 8.

<sup>405</sup> Radbruch (2006), p. 7.



attempted to challenge intolerable unjust law (for example, of the Nazi regime) by the principle of justice. Radbruch's approach must be seen against the background of legal positivism,<sup>406</sup> whereby law and morality have been strictly separated. As Hart put it: "I argue in this book that though there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality: and hence morally iniquitous provisions may be valid as legal rules or principles. One aspect of this separation of law from morality is that there can be legal rights and duties which have no moral justification of force whatever".<sup>407</sup> As justice is one of the EU's common values, there should be no rule of positive EU law that infringes this value. This raises the issue of the justiciability of this value.<sup>408</sup>

In terms of **legal value**, the value of justice has been described as a 'descriptive ideal', having a purely programmatic character, as its content is undetermined and therefore **hardly justiciable**.<sup>409</sup>

The issue of justiciability can also be addressed regarding **fairness**. So far, fairness was address in the context of procedural justice (as relating to the idea of fairness in the process), and as part of the liberal school, where in his 'Theory of Justice', Rawls puts an emphasis on fairness. Although they are often used synonymously, the two concepts of fairness and justice must be kept neatly apart, just as in the case of ethics and morality.<sup>410</sup> While definitions of these concepts are challenging, Morelli offers the following: "A moral principle used to judge procedures for distributing benefits and burdens among parties".<sup>411</sup> This definition is reminiscent of distributive justice. He also admits "the concepts of justice and fairness are closely related", however "not identical". According to Morelli, the terms just/unjust "often carry a stronger tone of condemnation than fair/unfair".<sup>412</sup>

Identifying the general principles of EU law, Tridimas stated that the "meaning of fairness is so vague that it lacks objective determination", also because what "appears fair to one person may appear unfair to another".<sup>413</sup> In one of the earlier cases, the **Court** had to decide on the question of whether the application of a

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<sup>406</sup> See also, most prominently, Kelsen (2008), p. 25, "The main aim here is to free the law from the connection it has always had with morality. Of course, this does not mean that the demand that law be moral, i.e., good, is rejected. This demand is self-evident; what it actually means is another question. It merely rejects the view that law as such is a component of morality [...]", translated with DeepL. Or, Kelsen (1960), p. 68, "The demand for a separation of law and morality, law and justice, means that the validity of a positive legal order is independent of the validity of this one [morality]".

<sup>407</sup> Hart (1994), p. 268.

<sup>408</sup> See, *infra*, Sect. 3.5.1.

<sup>409</sup> Obwexer (2020), paras 48–49.

<sup>410</sup> See, *supra*, Sect. 1.5.1.

<sup>411</sup> Morelli (2002), p. 301.

<sup>412</sup> Morelli (2002), p. 301.

<sup>413</sup> Tridimas (2006), p. 28.

regulation “may be suspended in an individual case for reasons of fairness”.<sup>414</sup> The Court stated “that there is no such thing as a general principle of objective unfairness under Community law. The Court has held that there is no legal basis in Community law for exemption on grounds of natural justice from charges due under that law”.<sup>415</sup> Hence, a clear rejection and again a reference to both **fairness** and (natural) justice. Comparing this case to a more recent one might help to understand the possible underlying motivation of the Court. Poland once tried to challenge a Directive on genetically modified organisms<sup>416</sup> arguing with both “fears expressed by the general public in Poland concerning the harm posed by GMOs”<sup>417</sup> and with the religion and values of “most members of the Polish Parliament”.<sup>418</sup> Likewise, in this case it was not surprising that the Court did not allow a Member State to derogate from the provisions and obligations of a Directive based on “ethical or religious arguments”.<sup>419</sup> These two cases can be summarised as follows: **ethics** and values are important in EU law, but they cannot be used to remove obligations under EU law. Tridimas in the end has concluded that “[i]n short, the principle [of fairness] is too abstract to have any autonomous normative concept outside the bounds of other principles such as equality, legitimate expectations, or proportionality”.<sup>420</sup>

In terms of **legal quality**, justice is a value, not a general principle of EU law<sup>421</sup> or an objective (Art 3 TEU). Justice-related rights can be found in title VI CFR, comprising the right to an effective remedy and to a fair trial (Art 47 CFR), the presumption of innocence and right of defence (Art 48 CFR), principles of legality and proportionality of criminal offences and penalties (Art 50 CFR), and *ne bis in idem* (Art 50 CFR<sup>422</sup>). On a broader scale, justice is part of SDG16.<sup>423</sup>

Although this value is part of the judicial branch of power in the EU (Court of *Justice*), this concept at the interface of law and philosophy is mainly **determined** by the philosophical literature, where it can be seen as a principle and or as a virtue. For

<sup>414</sup> ECJ judgement of 28 June 1990, *Hoche*, C-174/89, EU:C:1990:270, para 30.

<sup>415</sup> ECJ judgement of 28 June 1990, *Hoche*, C-174/89, EU:C:1990:270, para 31.

<sup>416</sup> Directive 2001/18/EC of 12 March 2001 on the deliberate release into the environment of genetically modified organisms [...], OJ 2001 L 106/1, as amended by OJ 2019 L 231/1.

<sup>417</sup> ECJ judgement of 16 July 2009, *Commission vs. Poland [GMOs]*, C-165/08, EU:C:2009:473, para 19.

<sup>418</sup> ECJ judgement of 16 July 2009, *Commission vs. Poland [GMOs]*, C-165/08, EU:C:2009:473, para 41.

<sup>419</sup> ECJ judgement of 16 July 2009, *Commission vs. Poland [GMOs]*, C-165/08, EU:C:2009:473, para 51, “In that connection, however, the Court considers that, for the purposes of deciding the present case, it is not necessary to rule on the question whether – and, if so, to what extent and under which possible circumstances – the Member States retain an option to rely on ethical or religious arguments in order to justify the adoption of internal measures which, like the contested national provisions, derogate from the provisions of Directives 2001/18 or 2002/53”.

<sup>420</sup> Tridimas (2006), p. 28.

<sup>421</sup> Tridimas (2006).

<sup>422</sup> The right not to be tried or punished twice in criminal proceedings for the same criminal offence.

<sup>423</sup> United Nations General Assembly (2015), pp. 25–26.

the EU, all types of justice questions can be of relevance. Questions of distributive justice in case of EU funding, relocation decisions, etc. Questions of exchange justice less in the case of classical private law,<sup>424</sup> but in case of consumer protection law.<sup>425</sup> Finally, questions of corrective justice can be an issue in case of compensation of damages, such as in the case of breach of competition law (private enforcement<sup>426</sup>).

Justice has been more an issue in academia<sup>427</sup> than in case-law,<sup>428</sup> and should be taken more seriously, as argued by Williams.<sup>429</sup> In a judgement from 2007, the Court has held that “on grounds of consistency and justice”, an entity must be able to contest a legal measure.<sup>430</sup> This ‘basis’ has been used after the entry into force of the Lisbon Treaty to link this statement to the values enshrined in Art 2 TEU and to link justice not to coherence, but to the rule of law.<sup>431</sup> In some recent ‘rule of law’ judgements, the ECJ has stated as follows: “In particular, it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice [!] prevails”.<sup>432</sup> It remains to be seen, whether this reference to justice can be seen as a turning point, towards taking justice more seriously.

<sup>424</sup>Cf. Art 345 TFEU, “The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”.

<sup>425</sup>E.g., Directive 2011/83/EU of 25 October 2011 on consumer rights [...], OJ 2011 L 304/64, as amended by OJ 2019 L 328/7; see also Howells (2020).

<sup>426</sup>Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1, codifying some earlier ECJ case-law. Cf. ECJ judgement of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465.

<sup>427</sup>Williams (2009, 2010); de Witte (2015), and the contributions in Kochenov et al. (2015).

<sup>428</sup>Klamert and Kochenov (2019), p. 29 mention that justice “has been in the shadow of other, presumably easier concretizeable values and principles”.

<sup>429</sup>Williams (2009, 2010).

<sup>430</sup>ECJ judgement of 18 January 2007, *PKK and KNK vs. Council*, C-229/05 P, EU:C:2007:32, para 112.

<sup>431</sup>Emphasising the nexus between justice and democracy, de Búrca (2015), p. 463.

<sup>432</sup>ECJ judgement of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, para 62. See also ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 160; ECJ judgement of 22 June 2021, *Venezuela vs. Council*, C-872/19 P, EU:C:2021:507, para 48; ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 50.

### 3.2.1.8 Equality

Equality is another value enshrined in Art 2 TEU<sup>433</sup> that is **not defined** in the EU treaties. Equality can be qualified as an EU value (Art 2 TEU) and as a (general<sup>434</sup>) principle<sup>435</sup> of EU law. In its form of equality between women and men<sup>436</sup> it is also an EU objective (Art 3[3] [2] TEU). Finally, equality is also a fundamental right (Title III CFR, Art 20 CFR). As clarified by the Court, according to “the principle [!] of equal treatment”, “comparable situations must not be treated differently and [...] different situations must not be treated in the same way unless such treatment is objectively justified”.<sup>437</sup>

The concept of equality (including ‘equal’ treatment, etc.) occurs approx. 50 times in the consolidated version of the EU treaties,<sup>438</sup> relating to various issues. Most prominently, Art 4(2) TEU tasks the Union to “respect the equality of Member States before the Treaties as well as their national identities”. Equality does not only apply at the **level** of Member States, but also of individuals. According to Art 9 TEU, “the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies”. These two provisions reveal that equality has a **vertical and a horizontal** dimension, where the higher level (vertical) has an obligation to treat the members of a certain group (peers at a horizontal level) in an equal way. In case of ‘services of general interest’, according to Prot No 26,<sup>439</sup> the “shared values [!] of the Union in respect of services of general economic interest” (cf. Art 14 TFEU) “include in particular” “a high level of quality, safety and affordability, equal treatment [!] and the promotion of universal access and of user rights”. Besides these and other more specific examples (e.g., equal rotation between Member States,<sup>440</sup> equally authentic languages<sup>441</sup>), equality also has a **horizontal** dimension. According to the horizontal clause of Art 8 TFEU, in “all its activities, the Union shall aim to eliminate inequalities” (and to promote equality, between men and women). In addition to

<sup>433</sup> See also TEU preamble, recital 2.

<sup>434</sup> ECJ judgement of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806, para 89, “the principle of equal treatment as a general principle of law”; see also Tridimas (2006), pp. 59–135.

<sup>435</sup> ECJ judgement of 3 June 2021, *Hungary vs. Parliament [votes cast]*, C-650/18, EU:C:2021:426, paras 94, 98–100.

<sup>436</sup> See, *infra*, Sect. 3.2.1.9.

<sup>437</sup> ECJ judgement of 3 June 2021, *Hungary vs. Parliament [votes cast]*, C-650/18, EU:C:2021:426, para 98.

<sup>438</sup> OJ 2016 C 202.

<sup>439</sup> OJ 2016 C 202/307.

<sup>440</sup> Art 16(9) TEU and Dec No 9 (OJ 2016 C 202/341) (Council presidency), Art 17(5) (2) (European Commission). N.B. The latter possibility of reducing the number of Commissioners below the number of Member States is not currently invoked. See also Art 244 TFEU (Commission), Art 294(10) TFEU and Art 314(5) TFEU (Conciliation Committee), etc.

<sup>441</sup> Art 55(1) TEU.

this internal dimension, the principle of equality also has an **external** dimension in the context of the EU's external action (Art 21[1] TEU).

As aptly stated by ECJ president Koen Lenaerts,<sup>442</sup> in negative terms equality is the opposite of the (adapted) maxim in George Orwell's 'Animal Farm', according to which 'all animals are equal, but some animals are more equal than others'.<sup>443</sup> According to the **Oxford Dictionary**, equality—in positive terms—is "the state of being equal, especially in status, rights, or opportunities".<sup>444</sup>

Equality and justice (see above<sup>445</sup>) are closely related, as already stated by Aristotle.<sup>446</sup> **Equality** requires a standard that has general validity beyond the individual case. Both in law (see above) and philosophy, certain **maxims** are applied in this context, according to which substantially the same things are to be treated equally and substantially unequal things are to be treated unequally. The distinctions (and unequal treatment based on them) must be grounded on an objective reason. The **criteria** according to which a differentiation is applied have to be consented by society and can change over time. In ancient Greece, there was obviously a consensus that differentiation based on a person's status (free person vs. slave) was acceptable. As a more recent example, differentiation based on a person's sexual orientation (e.g., homosexuality) was an accepted criterion some time ago (even making it punishable under criminal law) and is now considered discrimination. Equality can aim at equal entitlement (equality of **origin**) or aim at a situation where a decision leads to an equally actual situation (equality of **result**). Applying the 'golden mean' to equality, Aristotle has stated that "the equal is a sort of mean between excess and deficiency".<sup>447</sup>

Equality must be differentiated from **equity**. Laws are by nature very general. Therefore, justice might need to be considered in individual cases, as a strict application of the law might lead to undue hardship, going against the spirit of the law. As Aristotle has stated in his 'Nicomachean Ethics': "And this is the very nature of what is equitable – a correction of law, where it is deficient on account of its universality".<sup>448</sup> Despite this prominent supporter, equity can also be problematic, as

<sup>442</sup> Lenaerts (2017a), pp. 807–808.

<sup>443</sup> Orwell (2008), p. 90, "There was nothing there now except a single Commandment. It ran: ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS" (no emphases added). N.B. Compared to the seven commandments mentioned on p. 15, "1. Whatever goes upon two legs is an enemy. 2. Whatever goes upon four legs, or has wings, is a friend. 3. No animal shall wear clothes. 4. No animal shall sleep in bed. 5. No animal shall drink alcohol. 6. No animal shall kill any other animal. 7. All animals are equal".

<sup>444</sup> Stevenson (2010), p. 591.

<sup>445</sup> Section 3.2.1.7.

<sup>446</sup> Aristotle (2000), p. 85, 1131b, "So if what is unjust is unequal, what is just must be equal – something that everyone thinks, even without argument".

<sup>447</sup> Aristotle (2000), p. 29, 1106b.

<sup>448</sup> Aristotle (2000), p. 100, 1137b.

it can conflict with the principle of legal certainty<sup>449</sup> and lead to potential abuses of the law.

Hence, equality is not only closely related to the value of justice, but also to the principle (and value) of non-discrimination. The two can be seen as two sides of the same coin, once in terms of a positive (equality) and once in terms of a negative (non-discrimination) explanation of the same idea. This close relationship can also be seen in the two CFR articles on equality before the law<sup>450</sup> (Art 20) and non-discrimination (Art 21). The ECJ has referred to the “principle of equal treatment [a]s a general principle of EU law, now enshrined in Articles 20 and [!] 21 of the Charter”.<sup>451</sup> However, in another case, the EJC has assessed these two provisions separately.<sup>452</sup> In a case of alleged discrimination based on obesity decided some years after<sup>453</sup> the entry into force of the Lisbon Treaty, the ECJ has not (!) accept a general principle of non-discrimination on grounds of obesity. Although obesity is neither mentioned in the EU treaties (e.g., Art 10 TFEU, Art 19 TFEU) nor in EU secondary law,<sup>454</sup> the Court could have invoked Art 20 CFR for additional reasons, such as obesity. However, the Court did not opt for this approach.<sup>455</sup> Consequently, the relationship between Art 20 CFR (equality) and Art 21 CFR (non-discrimination) remains to some extent unclear and should be seen as two sides of the same coin. In literature, it has simply been described as a reflection of the “Aristotelian principle that ‘likes should be treated alike’”.<sup>456</sup>

As we have also seen, in terms of **legal value**, equality can be seen as a value (Art 2 TEU), a principle, a fundamental right (e.g., Art 20 CFR, equality before the law) and has been characterised as a (general) principle of EU law. It is also interesting to note that the ECJ has used equality of individuals and of Member States **as an argument** for the primacy of EU law.<sup>457</sup>

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<sup>449</sup>On legal certainty (as part of the ‘rule of law’, see below). Cf. also Gamper (2016).

<sup>450</sup>On equality before the law in Austria, see Pöschl (2008).

<sup>451</sup>ECJ judgement of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, para 55.

<sup>452</sup>ECJ judgement of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, paras 41–73 (Art 21 CFR) and paras 80–85 (Art 20 CFR); as well as Art 26 CFR (paras 74–79).

<sup>453</sup>Another famous case in this regard concerning alleged discrimination based on disability (now: Art 26 CFR) was decided at a time where the CFR had been solemnly proclaimed (Nice, 7 December 2000, OJ 2000 C 364/1), but was not yet legally binding; ECJ judgement of 11 July 2006, *Chacón Navas*, C-13/05, EU:C:2006:456.

<sup>454</sup>The Court referred to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16. See, *infra*, Sect. 3.2.1.10.

<sup>455</sup>ECJ judgement of 18 December 2014, *FOA*, C-354/13, EU:C:2014:2463, paras 31–40. One argument of the Court (paras 38–39) was that such a situation falls outside the scope of EU law (referring to ECJ judgement of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105), and hence the CFR is “inapplicable”.

<sup>456</sup>Martin (2019), p. 2163. Cf. Aristotle (2000), pp. 85–86, 1131a–1131b.

<sup>457</sup>ECJ judgment of 21 December 2021, *Euro Box Promotion and Others*, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paras 246 (individuals) and

### 3.2.1.9 Equality Between Women and Men

In terms of **legal quality**, in EU law the equality between women and men occurs as an EU value (Art 2 TEU), as an EU objective (Art 3[3] [2] TEU), as a (general)<sup>458</sup> principle (Art 157 TFEU; see below), as well as in the form of fundamental rights (Art 23 CFR). The predecessor provision of Art 157 TFEU was qualified as a fundamental right by the ECJ at an early stage. As stated in the seminal case of *Defrenne II*, “[t]here can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights”.<sup>459</sup> Besides including minorities in Art 2 TEU, another change “made by the 2004 Inter Governmental Conference was the express reference to the principle of equal treatment between men and women in the final sentence”.<sup>460</sup> On a broader scale, gender equality is part of SDG5.<sup>461</sup>

Equality between women and men can be found at various levels of **EU law**. Both in EU primary law (Art 157 TFEU), and in EU secondary law. According to Art 157 (1) TFEU, “[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied”. This provision has “direct effect in proceedings between individuals”.<sup>462</sup> This principle “is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified”<sup>463</sup> and “imposes, clearly and precisely, an obligation to achieve a particular result”.<sup>464</sup>

Art 157(4) TFEU also allows for positive discrimination, also referred to as **affirmative action**<sup>465</sup> measures to establish “full equality in practice” in favour of the “underrepresented sex”.<sup>466</sup> Likewise, Art 23(2) CFR states that the “principle of

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249 (Member States). See also ECJ judgment of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, EU:C:2022:99, paras 48 and 55.

<sup>458</sup> ECJ judgement of 15 June 1978, *Defrenne vs. Sabena II*, C-149/77, EU:C:1978:130, para 26, the “respect for fundamental personal human rights is one of the general principles of Community law”.

<sup>459</sup> ECJ judgement of 15 June 1978, *Defrenne vs. Sabena II*, C-149/77, EU:C:1978:130, paras 26–27.

<sup>460</sup> Tridimas (2006), p. 17.

<sup>461</sup> United Nations General Assembly (2015), p. 18.

<sup>462</sup> ECJ judgement of 3 June 2021, *Tesco Stores*, C-624/19, EU:C:2021:429, para 39. See already ECJ judgement of 8 April 1976, *Defrenne vs. Sabena I*, C-43/75, EU:C:1976:56, para 40: “the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals”.

<sup>463</sup> ECJ judgement of 3 June 2021, *Tesco Stores*, C-624/19, EU:C:2021:429, para 27.

<sup>464</sup> ECJ judgement of 3 June 2021, *Tesco Stores*, C-624/19, EU:C:2021:429, para 31.

<sup>465</sup> Feinberg (2003); Boxill (2010); Sandel (2010), pp. 167–183; Burri (2015).

<sup>466</sup> “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”.



equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex”. Art 23(1) CFR expands the equality between women and men besides “employment, work and pay” to “all areas”.

Besides the employment field, the equality between women and men is also part of the **horizontal** clause of Art 8 TFEU, according to which in “all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”. Hence, another example of mainstreaming. A specific provision can be found in **social policy**. According to Art 153(1) (i) TFEU, the EU shall support and complement the activities of the Member States, amongst others, in the field of “equality between men and women with regard to labour market opportunities and treatment at work”.

In EU secondary law, we can find provisions on equal treatment in the field of ‘employment and occupation’,<sup>467</sup> ‘access to and supply of goods and services’,<sup>468</sup> and in ‘activities in a self-employed capacity’.<sup>469</sup>

While the treaties clearly speak about women and men, two questions arise. The first refers to **intersexual** people, i.e., whose biological sex is not clearly ‘male’ or ‘female’. Their rights have been strengthened recently, as, for instance, in Austria, where the Constitutional Court has stated that “Art. 8 ECHR therefore grants persons with a variant of sexual development compared to male or female the constitutionally guaranteed right that regulations based on sex recognise their variant of sexual development as an independent gender identity, and in particular protects people with an alternative gender identity from an externally determined gender assignment”.<sup>470</sup> Please note that there is no German translation for gender and the VfGH has referred to “*Geschlechtsentwicklung*”, i.e., referring to sex.

The second question relates to the question of referring to this biological concept of ‘sex’, or to the social construct of ‘**gender**’. Fischer mentions that in the Inter Governmental Conference (IGC) leading to the Lisbon Treaty, the ‘gender debate’ and the question of whether more than just the two genders of man and woman should be recognised did not enter the debate at any point.<sup>471</sup> This has changed in the meantime and nowadays, it is common to refer to gender, in academia,<sup>472</sup> in case of

<sup>467</sup> Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

<sup>468</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

<sup>469</sup> Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity [ . . . ], OJ 2010 L 180/1.

<sup>470</sup> See VfGH judgement of 29.06.2018, *Intersexual persons have the right to adequate designation in the civil status register*, G 77/2018, para 18, (translated with DeepL).

<sup>471</sup> Fischer (2016), p. 131.

<sup>472</sup> See, for instance, on ‘gender, sexuality and the law’, various contributions in Ashford and Maine (2020).



the ECJ<sup>473</sup> and in case of EU institutions.<sup>474</sup> However, while it is easier to adapt the terminology in EU secondary law, in case of EU primary law this is clearly more challenging. Hence, a similar legal situation as for the notion of ‘race’ (Art 10 TFEU, Art 19[1] TFEU, Art 21 CFR), which is nowadays often avoided as it could give rise to misunderstandings.

### 3.2.1.10 Non-discrimination

In terms of **legal quality**, besides being a value enshrined in Art 2 TEU, non-discrimination is both a long-standing<sup>475</sup> and a key principle of EU law. Non-discrimination is also a general principle<sup>476</sup> of EU law, and one of the objectives addressed in Art 3(3) (3) TEU, according to which the EU “shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”. Finally, non-discrimination is also a human right figuring in Art 21 CFR.<sup>477</sup> If one sees non-discrimination and equality as two sides of the same coin, then also Art 20 CFR (equality before the law) must be named.<sup>478</sup> On a broader scale, non-discrimination also occurs within SDG16.<sup>479</sup>

The Oxford Dictionary **defines discrimination** as “the unjust or prejudicial treatment or different categories of people, especially on the grounds of race, age or sex”,<sup>480</sup> which highlights the link of justice and non-discrimination, and to the societal dimension (‘prejudice’). According to the ECJ, “discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations”.<sup>481</sup> The **definition of equality**

<sup>473</sup> See, ECJ judgement of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492; see also ECJ judgement of 30 April 1996, *P vs. S and Cornwall County Council*, C-13/94, EU:C:1996:170 (on ‘gender reassignment’, non-discrimination based on gender and dignity).

<sup>474</sup> See, for instance, Council of the EU (2016); European Court of Auditors, Special report No 10/2021 Gender mainstreaming in the EU budget: time to turn words into action, OJ 2021 C 219/7.

<sup>475</sup> Cf. already Art 60 and Art 66 ECSC Treaty.

<sup>476</sup> Tridimas (2006), pp. 59–135 on equality and non-discrimination. See also Klamert and Kochenov (2019), p. 25.

<sup>477</sup> “Directive 2000/78 [see note 489] is a specific expression, within the field that it covers, of the general principle of non-discrimination now enshrined in Article 21 of the Charter”; ECJ judgement of 15 July 2021, *WABE*, joined cases C-804/18 and C-341/19, EU:C:2021:594, para 62.

<sup>478</sup> On the relationship between Art 20 CFR and Art 21 CFR, see, *supra*, note 451.

<sup>479</sup> United Nations General Assembly (2015), pp. 25–26, “[p]romote and enforce non-discriminatory laws and policies for sustainable development”.

<sup>480</sup> Stevenson (2010), p. 501.

<sup>481</sup> ECJ judgement of 14 June 2012, *Commission vs. Netherlands [three out of six years’ rule]*, C-542/09, EU:C:2012:346, para 41.

exhibits the above-mentioned picture of two sides of the same coin:<sup>482</sup> “The Court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified”.<sup>483</sup> The tricky question in either case is the **comparability** of the two situations compared. The Court offers the following guidance: “It should be recalled that the requirement relating to the comparability of the situations for the purpose of determining whether there is a breach of the principle of equal treatment must be assessed in the light of all the elements which characterise them”.<sup>484</sup>

**Where** in EU law can we trace this concept?<sup>485</sup> As already exhibited above, non-discrimination can be found (a) in the EU’s provision on the economic fundamental freedoms of the single market, (b) in various harmonisation measures, and (c) in the CFR. Various provisions prohibit discrimination based on different **criteria**.

In case of (**ad a**) the **fundamental freedoms** of the internal market (Art 26 TFEU) discrimination based on the origin of the product (free movement of goods) or based on citizenship (person-related freedoms) is prohibited.<sup>486</sup> As the Court has held, the fundamental freedoms prohibit “not only overt discrimination on grounds of nationality, but also all covert forms of discrimination which, through the application of other criteria of differentiation, lead in fact to the same result”.<sup>487</sup> The shift from a market-based system to one also introducing EU citizenship can be seen in Art 18 (1) TFEU, which prohibits “any discrimination on grounds of nationality” even in case of a lack of an economic activity.<sup>488</sup>

Different and more criteria can be found (**ad b**) in **Art 19(1) TFEU**. According to this article, “the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin,

<sup>482</sup> Likewise, a similar idea has been expressed in ECJ judgement of 15 July 2021, *WABE*, joined cases C-804/18 and C-341/19, EU:C:2021:594, para 47: “for the purposes of the application of Directive 2000/78, the terms ‘religion’ and ‘belief’ must be analysed as two facets of the same single ground of discrimination”.

<sup>483</sup> ECJ judgement of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, para 35.

<sup>484</sup> ECJ judgement of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, para 89.

<sup>485</sup> On Art 157 TFEU, see, *supra*, Sect. 3.2.1.9.

<sup>486</sup> In ECJ judgement of 20 February 1979, *Rewe vs. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, C-120/78, EU:C:1979:42, paras 6, 14, 15 the Court has also covered restrictions (i.e., measures that do not differentiate according to the origin of the product).

<sup>487</sup> ECJ judgement of 14 June 2012, *Commission vs. Netherlands [three out of six years’ rule]*, C-542/09, EU:C:2012:346, para 37. While this statement was given in the context of the free movement of workers (Art 45 TFEU and the relevant EU regulation), these statements can be streamlined also to the other freedoms; cf. Ranacher and Frischhut (2009), p. 147.

<sup>488</sup> See also Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [ . . . ], OJ 2004 L 158/77, as corrected by OJ 2005 L 30/27.

Existing legal framework at European level:

Grounds Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes + Equality body	Yes	Yes	Yes	Yes	Yes +
	2000/43/EC	2000/78/EC				2006/54/EC
Yes + Equality body		No	No	No	No	No
Yes + Equality body		No	No	No	No	Yes +
2004/113/EC						
Goods and services	Yes + Equality body	No	No	No	No	Yes +
Social protection	Yes + Equality body	No	No	No	No	Yes +
					2006/54/EC	

Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final 2.7.2008

**Fig. 3.2** Overview non-discrimination directives [Source: own illustration, based on EC Staff Working Document accompanying the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Summary of the Impact Assessment, SEC(2008) 2181 final 2.7.2008, p. 3]

religion or belief, disability, age or sexual orientation”. Figure 3.2 provides an overview of these existing directives (the numbers referring to these directives),<sup>489</sup> and the one Commission proposal<sup>490</sup> still in the legislative pipeline.<sup>491</sup>

Likewise, also in other fields the same criteria (as just mentioned concerning Art 19[1] TFEU) are mainstreaming via the **horizontal clause** of Art 10 TFEU. According to this provision, in “defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

Finally, (**ad 3**) Art 21(1) CFR extends (in the following, additional ones are printed in *Italics*) this list of criteria by referring to discrimination “on any ground such as sex, race, *colour*, ethnic or *social* origin, *genetic features*, *language*, religion or belief, *political or any other opinion*, *membership of a national minority*,

<sup>489</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16; Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

<sup>490</sup> EC proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final 2.7.2008.

<sup>491</sup> See also Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity [...], OJ 2010 L 180/1.

*property, birth, disability, age or sexual orientation*". It is worth mentioning that, for instance, language can also be a disguised form of discrimination based on nationality. This broader range of criteria can also be found in various **migration-related** directives, such as entry and residence of third-country nationals (TCN) for the purpose of research, etc.,<sup>492</sup> single permit for TCN,<sup>493</sup> long-term resident TCN,<sup>494</sup> on returning illegally staying TCN,<sup>495</sup> and in the field of family reunification.<sup>496</sup>

Non-discrimination is not an absolute right, as there are various reasons that can **justify limitations** to the right not to be discriminated. Reasons of justification can be found in various provisions, (e.g., Art 36 TFEU for the free movement of goods, or Art 6<sup>497</sup> Directive 2000/78,<sup>498</sup> to name but a few).

**To summarise**, non-discrimination is a value (Art 2 TEU), a key (general) principle of EU law, one of the objectives, and figures in the CFR. It cannot only be seen as one side of a coin, where equality is the other, it is also strongly related to another values, namely, justice (see Sect. 3.2.1.7).

### 3.2.1.11 Freedom

As mentioned above, the value of freedom was previously (Treaty of Amsterdam and in some Convention documents) referred to as **liberty**.<sup>499</sup> In *Kadi* the ECJ had referred to the "principles [!] of liberty [!], democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation [!] of the Union".<sup>500</sup> This reference to principles (and not values) is not surprising, as *Kadi*

<sup>492</sup>Directive (EU) 2016/801 of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ 2016 L 132/21, recital 62.

<sup>493</sup>Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343/1, recital 29.

<sup>494</sup>Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44, as amended by OJ 2011 L 132/1, recital 5. N.B. Almost identical wording, however, referring to fortune, not property.

<sup>495</sup>Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98, recital 21.

<sup>496</sup>Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12, recital 5. N.B. Almost identical wording, however, referring to fortune, not property.

<sup>497</sup>Justification of differences of treatments on grounds of age.

<sup>498</sup>Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

<sup>499</sup>See Table 3.1.

<sup>500</sup>ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 303 (on the relationship to Art 351 TFEU and Art 347 TFEU, see paras 301–302).

was rendered roughly 15 months before the entry into force of the Lisbon Treaty. Today, the preamble of the TEU refers both to the universal value of “freedom” in the second recital, and to the “principles of liberty [etc.]” in the fourth recital.<sup>501</sup> Freedom is not defined in the EU treaties.<sup>502</sup>

According to the Oxford Dictionary, freedom can be **defined** as “the power or right to act, speak or think as one wants”, as well as “the state of not being imprisoned or enslaved”. ‘Freedom from’ is defined as “the state of not being subject to or affected by (something undesirable)”, and, although of less importance for our topic, ‘the freedom of’ as “a special privilege or right of access, especially that of full citizenship of a city granted to a public figure as an honour”.<sup>503</sup> **Liberty**, on the other hand, is, amongst others, defined as “the state of being free within society from oppressive restrictions imposed by authority on one’s behaviour or political views”, respectively, “the state of not being imprisoned or enslaved”.<sup>504</sup> In literature, freedom has been referred to as “a sphere of individual decision and responsibility free from regulatory interference”, emphasising the individual<sup>505</sup> element due to the introduction of equality in Art 2 TEU.<sup>506</sup> However, referring to ECJ judgement *Wightman*<sup>507</sup> (i.e. Brexit), freedom can also have a notion of collective self-determination.<sup>508</sup>

**Where** in EU law can we trace this concept? The concept of **freedom** occurs several times in the consolidated version of the EU treaties. Freedom is part of the ‘area of freedom, security and justice’ (AFSJ),<sup>509</sup> of the economic ‘fundamental freedoms’ of the internal market (freedom of movement for workers, freedom of establishment, etc.),<sup>510</sup> as well as part of the ‘human rights and fundamental freedoms’,<sup>511</sup> such as freedom of thought or freedom of assembly. Due to this broad range of freedoms, it is difficult to narrow it down to a single understanding, as various fields (from human rights to economic market rights) are covered.

<sup>501</sup> Liberty can also be found in recital 8 TFEU (“strengthen peace and liberty”), as well as in Art 6 CFR (right to liberty and security).

<sup>502</sup> Cf. Pechstein (2018), p. 14.

<sup>503</sup> Stevenson (2010), p. 696. On the practical implication, of the ‘freedom of’ in Dublin and the right, for instance, of U2 band singer Bono Vox, “to pasture sheep on common ground within the city boundaries”, see Fitzgerald (2017). The author wants to thank his colleague Brian Galvin for this information.

<sup>504</sup> Stevenson (2010), p. 1018.

<sup>505</sup> Likewise, Sommermann (2020), p. 275 also refers to the principle of individual self-determination.

<sup>506</sup> Hilf and Schorkopf (2021), para 25; translated with DeepL.

<sup>507</sup> ECJ judgement of 10 December 2018, *Wightman*, C-621/18, EU:C:2018:999.

<sup>508</sup> Hilf and Schorkopf (2021), para 25.

<sup>509</sup> Cf. Art 3(2) TEU (objectives), Art 67–89 TFEU.

<sup>510</sup> Cf. Art 26(2) TFEU, etc.

<sup>511</sup> Cf. Art 6 TEU (e.g., “rights, freedoms and principles” in para 1), ECHR and CFR (especially title II, but also title I).

Freedom can be seen as both a ‘freedom to’ and a ‘freedom from’.<sup>512</sup> In positive terms, ‘freedom to’ can relate to the individual right to self-determination<sup>513</sup> or autonomy.<sup>514</sup> In negative terms, ‘freedom from’ can relate to the absence of foreign domination, or even tyranny.<sup>515</sup> According to Pechstein, freedom represents the rejection of any form of forced collectivism of communist or fascist character.<sup>516</sup> From this, he also concludes the basic primacy of the individual over the collective.<sup>517</sup> By its very nature, this primacy cannot be unlimited, as otherwise, a conflict with the value of solidarity could arise.<sup>518</sup> Concerning the sovereignty of the states and the Union vis-à-vis individuals, freedom implies the necessity of limiting authority (cf. also ‘the rule of law’<sup>519</sup>), the proof of its necessity for the pursuit of legally recognised objectives and its strict definition in laws or comparable norms.<sup>520</sup> In addition to this **vertical** relationship, freedom can also play an important role on a **horizontal** level between individuals in the sense of ‘private autonomy’.<sup>521</sup> **Private autonomy**, now enshrined in Art 16 CFR,<sup>522</sup> can be seen as a necessary basis for the economic fundamental freedoms, more broadly the internal market, “a highly competitive social market economy” (Art 3[3] TEU), as well as an “open market economy with free competition” (Art 119[1] TFEU).<sup>523</sup> Finally, this Art 119 (1) TFEU can also be seen as the basis for the concept of freedom from an **economic** perspective (“an open market economy with free competition”).

However, as already addressed by **Kant**, the own right<sup>524</sup> respectively, freedom<sup>525</sup> ends, where the right or freedom of another one begins. This statement makes clear that freedom can never be unlimited in a society, as it would impede the freedom of another. This can be seen as a limitation that is inherent to the concept itself and not stemming from the outside. As already mentioned, the relation of

<sup>512</sup>Cf. Hermerén (2006), p. 14.

<sup>513</sup>On self-determination, human rights and democracy see Christiano (2014).

<sup>514</sup>See, for instance, O’Neill (2002).

<sup>515</sup>Hummer and Obwexer (2000), p. 486; Pechstein (2018), p. 14.

<sup>516</sup>Pechstein (2018), p. 14.

<sup>517</sup>Pechstein (2018), p. 14.

<sup>518</sup>See Sect. 5.3.

<sup>519</sup>*Supra*, Sect. 3.2.1.3.

<sup>520</sup>Pechstein (2018), p. 14.

<sup>521</sup>Cf. Obwexer (2020), para 21; Pechstein (2018), p. 14.

<sup>522</sup>According to the CFR explanations (OJ 2007 C 303/23), this includes the freedom to exercise an economic or commercial activity and the freedom of contract.

<sup>523</sup>AG Szpunar opinion of 15 July 2021, *Thelen Technopark Berlin*, C-261/20, EU:C:2021:620, para 76.

<sup>524</sup>“Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann”, Kant (1966), pp. 34–35.

<sup>525</sup>“Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann”, Kant (1966), p. 35.

freedom to other values (of Art 2 TEU) must be addressed,<sup>526</sup> as a too broad understanding of freedom can conflict with solidarity, which is also essential in a society.

**Consequently**, as we have seen, freedom is closely related to fundamental rights and to other values such as democracy and the rule of law. Freedom is a broad and multi-faceted<sup>527</sup> concept. Against this background, some even doubt, whether the value of freedom has an independent normative meaning.<sup>528</sup> In terms of **legal value**, the value of freedom can rather give “guidance for the interpretation and development of EU law”,<sup>529</sup> but has not been qualified as a general principle<sup>530</sup> of EU law. Freedom does not occur in Art 3 TEU (objectives), only its emanation as the ‘area of freedom, security and justice’ (Art 3[2] TEU).

### 3.2.1.12 Pluralism

Pluralism has been referred to as “an important value and a source of strength in Europe”<sup>531</sup> and is reminiscent of the EU’s motto of ‘united in diversity’.<sup>532</sup> Pluralism<sup>533</sup> is another value enshrined in Art 2 TEU that is **not defined**, neither in the treaties, nor in CJEU case-law. Pluralism is neither an official objective of the EU (Art 3 TEU), nor a general principle of EU law.<sup>534</sup> In the CFR, pluralism occurs in Art 11(2) CFR (see below).

Besides Art 2 TEU, the concept of pluralism **occurs** two more times in the EU treaties.

Art 11(2) CFR<sup>535</sup> refers to ‘freedom and **pluralism of the media**’,<sup>536</sup> which “shall be respected”. According to Council conclusions from 2020, “the concept of media pluralism has many aspects and encompasses all measures that ensure access to a variety of information and content sources and allow diverse actors with different opinions to have equal opportunities to reach the public through the

<sup>526</sup> See *infra*, Sect. 4.1.

<sup>527</sup> Hermerén (2006), p. 14.

<sup>528</sup> Obwexer (2020), para 22.

<sup>529</sup> Klamert and Kochenov (2019), p. 25.

<sup>530</sup> Cf. Tridimas (2006).

<sup>531</sup> Hermerén (2006), p. 36.

<sup>532</sup> Cf. Treaty establishing a Constitution for Europe (N.B. not entered into force), OJ 2004 C 310 (recital 4; Art I-8[3]); see also Dec No 52 (N.B. of 16 Member States), annexed to the Treaty of Lisbon, OJ 2007 C 306/267.

<sup>533</sup> For further details on legal pluralism and EU law, see various contributions in Davies and Avbelj (2018).

<sup>534</sup> Tridimas (2006).

<sup>535</sup> Freedom (*supra*, Sect. 3.2.1.11) and pluralism are reflected in the first two titles of the CFR; cf. Klamert and Kochenov (2019), p. 27.

<sup>536</sup> See also Prot No 29 (on the system of public broadcasting in the Member States), OJ 2016 C 202/311.

media”<sup>537</sup> <sup>538</sup> As we have seen, equality (or equal opportunities) also play(s) an important role in democracy and in the field of lobbying.

Pluralism is strongly connected with **democracy**, another value.<sup>539</sup> In the context of enlargement, the Commission has referred to the requirement to “guarantee democratic freedoms, including political pluralism, the freedom of expression and the freedom of religion”.<sup>540</sup> In academia, pluralism has been described as “an element of democracy”.<sup>541</sup> For the interpretation of EU secondary law (the Directive on privacy and electronic communications<sup>542</sup> more precisely), the ECJ has, amongst others,<sup>543</sup> referred to the freedom of expression, which “constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded”.<sup>544</sup> Hence, pluralism can refer to a diversity of views, interests, etc., which may also be publicly expressed.

According to the Oxford Dictionary, pluralism is **defined** as follows: “a form of society in which the members of minority groups maintain their independent cultural traditions”, as “a political theory or system of power-sharing among a number of political parties”, and in philosophy as “a form of society in which the members of minority groups maintain their independent cultural traditions”.<sup>545</sup> In literature, pluralism has been **described** as “a normative framework for an ordered plurality”, which “stands for the right to be different and to do things one’s own way in recognition of equal human dignity”.<sup>546</sup>

Discussing pluralism, Neil Walker has referred to the value of pluralism that allows us “to make sense of how the interconnected legal, political and social diversity of Europe is and might legitimately be addressed through processes that remain conducive to a settled pattern of integration”.<sup>547</sup> Pluralism cannot only affect various **fields** (law, politics, social life), it can also relate to different **levels**. Legal

<sup>537</sup>Council conclusions on safeguarding a free and pluralistic media system, OJ 2020 C 422/8, pt. 16.

<sup>538</sup>See also Commission Recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, OJ 2021 L 331/8.

<sup>539</sup>Walzer (1983), p. 6 has linked pluralism to justice; “I want to argue [. . .]: that the principles [!] of justice are themselves pluralistic in form; that different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents [. . .]”.

<sup>540</sup>EC ‘Agenda 2000. For a stronger and wider Union. Vol. I’, COM (1997) 2000 final 15.7.1997, p. 43.

<sup>541</sup>Klamert and Kochenov (2019), p. 27.

<sup>542</sup>Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ 2002 L 201/37, as amended by OJ 2009 L 337/11.

<sup>543</sup>Art 7 CFR (right to privacy, respectively, private and family life), Art 8 CFR (data protection).

<sup>544</sup>ECJ judgement of 6 October 2020, *Privacy International*, C-623/17, EU:C:2020:790, para 62.

<sup>545</sup>Stevenson (2010), p. 1367.

<sup>546</sup>Avbelj (2018), p. 107.

<sup>547</sup>Walker (2018), p. 410.



and constitutional<sup>548</sup> pluralism “refers to the specific forms of power evolving within these legal orders and their momentary constellations and capacity to influence the other legal orders and social relations constituted by them”.<sup>549</sup> In a nutshell and in a simplified way, this constitutional pluralism is about various (national and inter- or supra-national) legal systems and the question, which of them has the final word in the end.<sup>550</sup>

However, as pluralism occurs as a value “common to the Member States in a society”, it has at least also a societal dimension. This dimension is closely connected to the afore-mentioned value of democracy and the possibility of diverse actors (including especially minorities) to have and to address different opinions.

In terms of **legal value**, the value of pluralism can rather give “guidance for the interpretation and development of EU law”,<sup>551</sup> but is not a general principle<sup>552</sup> of EU law. Pluralism has therefore been described as a ‘descriptive ideal’ and has a purely programmatic character, as its content is undetermined and therefore hardly justiciable.<sup>553</sup>

### 3.2.1.13 Tolerance

In the consolidated version of the EU treaties, tolerance occurs only once as one of the EU’s common values in Art 2 TEU. Tolerance is neither part of the EU’s objectives enshrined in Art 3 TEU, nor a principle. Tolerance cannot be found as a human right in the CFR.

According to the Oxford Dictionary, tolerance is **defined** as “the ability or willingness to tolerate the existence of opinions or behaviour that one dislikes or disagrees with”.<sup>554</sup> Tolerance is practised towards actions and attitudes that are seen as problematic, but which are thought to be tolerable.<sup>555</sup> The Latin word ‘*tolerare*’ can be translated with to suffer or to endure, which reveals a rather negative connotation.<sup>556</sup>

**Rosenfeld** has distinguished between “repressive tolerance”, if “imposed by the strong on the weak”, which can be qualified as “paradoxical to the extent that tolerance of the intolerant may pave the way for the latter to take power and do

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<sup>548</sup> See also various contributions in Komárek and Avbelj (2012) and Walker (2016). See also Canihac (2021), as well as on ‘constitutional identity’ Scholtes (2021).

<sup>549</sup> Příbáň (2018), p. 162.

<sup>550</sup> See also *infra*, note 591.

<sup>551</sup> Klamert and Kochenov (2019), p. 25.

<sup>552</sup> Cf. Tridimas (2006).

<sup>553</sup> Obwexer (2020), paras 48–49.

<sup>554</sup> Stevenson (2010), p. 1870.

<sup>555</sup> Holzleithner (2015), p. 85.

<sup>556</sup> Cf. Stowasser et al. (1987), p. 464.

away with tolerance”.<sup>557</sup> Therefore, he has proposed “tolerance grounded on mutual respect”,<sup>558</sup> which can be linked to both equality (‘mutual’) and human dignity (‘respect’).

In terms of **legal value**, the value of tolerance can rather give “guidance for the interpretation and development of EU law”,<sup>559</sup> but is not a general principle<sup>560</sup> of EU law. Tolerance has been described as a ‘descriptive ideal’ and has a purely programmatic character, as its content is undetermined and therefore hardly justiciable.<sup>561</sup> However, it can be supported by creating favourable framework conditions.<sup>562</sup> The question remains, if tolerance should also be seen as a virtue.<sup>563</sup>

### 3.2.1.14 Lessons Learned

Hence, what are the **lessons learned** from Sect. 3.2.1?

The term of a ‘**concept**’ has been used to have a neutral umbrella term. Such a concept can be qualified as a value, a principle, a general principle of EU law, and/or as an objective. Justice, for instance, can also be seen as a virtue and is even one of the four ‘cardinal virtues’.

Freedom or solidarity have been such **broad concepts** and occurring in different fields that it is difficult to narrow them each down to a single understanding.

In case of solidarity, we have seen various **levels** (horizontal, vertical) and various **tiers**. An interpersonal tier, a group- or community-based one, as well as in a third step, the codification. The question remains, whether these perspectives (levels and tiers) can be transferred to other values.<sup>564</sup>

Various of these concepts have a **horizontal**<sup>565</sup> dimension, as in the case of equality (Art 8 TFEU), non-discrimination (Art 10 TFEU), solidarity and equality between women and men (Art 8 TFEU).<sup>566</sup>

While the questions of **limitations** will be addressed below (Sect. 3.5.2), we have seen that a value such as freedom cannot be unlimited. Based on the Kantian idea that one right or freedom ends, where another right or freedom begins, freedom is not

<sup>557</sup> Rosenfeld (2012), p. 807.

<sup>558</sup> Rosenfeld (2012), p. 808.

<sup>559</sup> Klamert and Kochenov (2019), p. 25.

<sup>560</sup> Cf. Tridimas (2006).

<sup>561</sup> Obwexer (2020), paras 48–49.

<sup>562</sup> Sommermann (2020), p. 283.

<sup>563</sup> *Infra*, Sect. 3.5.1.

<sup>564</sup> See, *infra*, Sect. 5.4.

<sup>565</sup> Horizontal in the sense of so-called ‘cross-cutting’ clauses, affecting more than only one single sectoral EU policy.

<sup>566</sup> Other related articles cover employment, etc. (Art 9 TFEU), environmental protection (Art 11 TFEU), consumer protection (Art 12 TFEU), animal welfare (Art 13 TFEU), etc. For further provisions and further details, see various contributions in Wegener (2021).

unlimited and can conflict, for instance, with solidarity. There is no unlimited freedom of human behaviour in a pandemic and a community will only be able to overcome these challenges if individuals display a sense of solidarity with the vulnerable.<sup>567</sup>

In this context of solidarity, the Court has addressed the relationship between **rights** and obligations stemming from EU membership. The question is whether the same idea can be transferred to human rights, complementing existing rights with human **obligations**.<sup>568</sup>

This leads to the next issue. All values also address the thorny question of putting an emphasis more on the **collective** or on the **individual** perspective. A collective perspective can have the advantage of taking enough care of the common good. This idea of the common good has already been addressed by Plato in the ‘Republic’, stating that “the best guardians are those who care most for their country and her interest”.<sup>569</sup>

Likewise, the **justiciability** (Sect. 3.5.1) of certain values remains to be depicted. Justice has been described as hardly justiciable. The same will apply for pluralism and tolerance. However, one concept (e.g., justice) can be twinned with another one (e.g., rule of law) to become effective, as can be seen in recent case-law. While the distinction between the two sentences of Art 2 TEU clearly matters, at the same time it should not be overestimated, as various values are important for both the EU and for the MS.

This is closely related to the question of how much a concept is or is not **determined content-wise**. Non-discrimination, referred to in this book, as a ‘key principle’ of EU law is much determined, based on EU secondary law and extensive case-law. In case of solidarity, one might assume less clarification, but as we have seen above, we have found quite some elucidation. Tolerance and pluralism figure rather at the end of those concepts whose content is sufficiently determined.

In the Copenhagen criteria,<sup>570</sup> in the Commission’s ‘rule of law’ communication from 2014, as well as in the Brexit deal (TCA) we have seen the ‘**values trinity**’ (or three pillars<sup>571</sup>) of democracy, the rule of law, and human rights. In *Kadi*, roughly 1 year before the entry into force of the Lisbon Treaty, the Court had referred to almost the same three concepts, addressing liberty instead of the rule of law and referring to principles, not values.

A concept like **justice** has a strong philosophical background. However, even a ‘subcategory’ such as ‘social justice’, one of the EU’s objectives and addressed in the 2006 health values conclusions, can be understood quite differently, ranging

<sup>567</sup> On ‘humanitarian solidarity’, see *infra*, note 617.

<sup>568</sup> Section 5.3.

<sup>569</sup> Plato (1963a), p. 189, 412B–414B. See also Plato (1963b).

<sup>570</sup> The Copenhagen criteria also mentioned “respect for and protection of minorities”.

<sup>571</sup> *Supra*, note 248.

from libertarianism to communitarianism. Likewise, various types of justice (distributive, exchange, procedural) can apply to various dimensions.

Unsurprisingly, many values are determined by **Council of Europe** documents, such as the rule of law by the Venice Commission, or democracy and human rights by the ECHR (and its protocols). The same is true for the ECtHR case-law.

The question has been addressed, whether the **content** of one value, for instance, the rule of law, should be different under the ‘general principles of EU law’ and the CFR, as opposed to Art 2 TEU.<sup>572</sup> This should be clearly rejected, as it would run counter to the unity<sup>573</sup> of EU law. This approach is based on AG Bobek’s rejection of different types of ‘judicial independence’ (in the context of the rule of law), in the context of the three provisions of Art 19(1) second sentence TEU (effective legal protection), Art 47 CFR (right to an effective remedy and to a fair trial) and Art 267 TFEU (preliminary ruling proceeding). This approach stressing **uniformity** does of course **not** mean that this same content **necessarily** leads to the **same outcome** in an individual case.

As Calliess rightly mentions, when it comes to concretising the content of a recognised European value, the first step is to compare the content of the corresponding values of the **Member States**.<sup>574</sup> In the field of fundamental rights of the CFR, the commentary of Meyer & Hölscheidt<sup>575</sup> provides a valuable starting point for this legal comparison.<sup>576</sup> This goes into a similar direction as Art 6(3) TEU in the context of fundamental rights referring to the “constitutional traditions common to the Member States”. Insofar as values can also be qualified as fundamental rights, this idea of Art 6(3) TEU applies not only by analogy.

Early on in EU integration, the question was discussed<sup>577</sup> to what extent the structural elements of the Member States and the EU integration process need to be homogenous.<sup>578</sup> A similar question was raised concerning the equivalence of fundamental rights protection between the ECHR and the EU (respectively, the Com-

<sup>572</sup>Hillion (2016), p. 70; this idea has been rejected by the author himself (p. 71).

<sup>573</sup>In ECJ judgement of 5 December 2017, *M.A.S. and M.B. [Taricco II]*, C-42/17, EU:C:2017:936, para 47, the Court has emphasised the ‘trinity-principles’ of “the primacy, unity and effectiveness of EU law”.

<sup>574</sup>Calliess (2004), p. 1042.

<sup>575</sup>For instance, for human dignity see the overview on national constitutional approaches in Borowsky (2019), pp. 103–109.

<sup>576</sup>See also, on the national constitutional law of the Member States, Weber (2019) and Classen (2021).

<sup>577</sup>For further details, see Frischhut (2003a), pp. 22–23.

<sup>578</sup>According to Stevenson (2010), ‘homogenous’ refers to “consisting of parts all of the same kind”. According to Calliess (2016), p. 38 ‘homogeneity’ means “the similarity of certain legal principles” (translated with DeepL), where he refers to both the relationship between the integrated Member States, as well as the relationship with the Union.

munity, at the time).<sup>579</sup> This discussion of **homogeneity**<sup>580</sup> can refer to human rights and related values. Concerning the rule of law, Schroeder has emphasised that the “claim for the rule of law should [. . .] not be understood as a claim for homogeneity”, as there are structural differences and one has to accept the “constitutional pluralism”, enshrined in the EU treaties.<sup>581</sup> Likewise, the ECtHR has also emphasised that ‘equivalent’ does not mean ‘identical’.<sup>582</sup> Hence, we can refer to Art 2 TEU as following only a **minimum approach**,<sup>583</sup> which is reminiscent of ‘minimal ethics’, as described in the open-access book<sup>584</sup> to the first Jean Monnet Chair.

This is because the Union is not a federation but a public authority ‘sui generis’.<sup>585</sup> Hence, there might be a **uniform** approach when it comes to the **core** of a value, but some **diversity** at the **periphery** (see also Table 6.1).

Many of the values (e.g., pluralism) are reminiscent of the EU’s motto ‘**united in diversity**’. This fact can be described with two opposing pools, both of which must be accepted as existing and between which a balance must be struck. On a broader scale, this dichotomy can also be found in the two opposing concepts of the ‘ever closer union’<sup>586</sup> and the Union’s respect of Member States’ ‘national identities’.<sup>587</sup> The first argument goes in the direction of more integration, the second argument is often used for less EU and more national sovereignty. According to Scholtes, ‘constitutional identity’ is a legitimate concept, which however shall not be abused by illiberal tendencies.<sup>588</sup> While there is no unique definition of ‘illiberalism’, it has been described in the context of “the relativization of the rule of law and human

<sup>579</sup> ECtHR judgement of 30 June 2005, *Bosphorus vs. Ireland*, 45036/98, para 155: “State action taken in compliance with such legal obligations is justified as long as [!] the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent [!] to that for which the Convention provides”. For further details, see Haratsch (2006).

<sup>580</sup> In a simplified way, all these concepts of ‘homogeneity’ (see note 578), ‘strukturelle Kongruenz’ (see note 577), or equivalence (see note 579) point into a similar direction. On the related ‘reverse Solange’ doctrine, see Sect. 4.2.2.

<sup>581</sup> Schroeder (2016), p. 11.

<sup>582</sup> ECtHR judgement of 30 June 2005, *Bosphorus vs. Ireland*, 45036/98, para 155: “By ‘equivalent’ the Court means ‘comparable’; any requirement that the organisation’s protection be ‘identical’ could run counter to the interest of international cooperation pursued [. . .]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection”.

<sup>583</sup> Schroeder (2016), p. 11 “minimum standard in terms of the rule of law”; Lenaerts (2017b), p. 640 “*Mindestmaß an normativer Homogenität*”.

<sup>584</sup> Frischhut (2019), pp. 27, 146.

<sup>585</sup> ECJ opinion of 14 December 1991, *Accord EEE - I*, Avis 1/91, EU:C:1991:490, para 21; ECJ opinion of 18 December 2014, *Adhésion de l’Union à la CEDH*, Avis 2/13, EU:C:2014:2454, para 157; cf. also Schroeder (2016), pp. 7, 10.

<sup>586</sup> Recital 13 preamble TEU, Art 1(2) TEU, recital 1 preamble TFEU, recital 1 preamble CFR.

<sup>587</sup> Art 4(2) TEU, recital 3 preamble CFR.

<sup>588</sup> Scholtes (2021).

rights and in the constitutionalization of populist nationalism, identity politics, patrimonialism, clientelism, and corruption”.<sup>589</sup> A similar analysis applies for ‘constitutional pluralism’, which has been described as “neither a purely liberal nor a purely illiberal theory”.<sup>590</sup> Therefore, in the above-mentioned Art 6(3) TEU the element of ‘**common**’ is of utmost importance for these “constitutional traditions common to the Member States”.<sup>591</sup>

While all values have an **equal legal status** as being part of the same legal provision (Art 2 TEU), AG Bobek has referred to the rule of law as “one of the primary values”. As it is the basis of fundamental rights and the first value mentioned in Art 2 TEU, human dignity has a supreme importance and has been referred to as a ‘super-value’.

We have seen various **relations** of values.<sup>592</sup> Democracy as the decision of the majority must respect the rights of minorities and is also related to pluralism. Both justice in relation to solidarity and in relation to non-discrimination can each be seen as two sides of a same coin.

The idea of a **balance** (or an equilibrium) has also been addressed by the Court in the context of solidarity, especially regarding the advantages and obligations of EU membership. The elevation of this idea on a broader scale remains to be seen.<sup>593</sup>

We have also seen some **innovative** elements, for instance, responsibility for future generations, addressed by the German Constitutional Court, or animal welfare, qualified by the ECJ as an EU value outside Art 2 TEU.

Finally, we have also seen some suggestions for **reforming** single values, for instance, Habermas on democracy. This can require Treaty reform, or simply to strengthen existing tools.

While ethics and values are closely related,<sup>594</sup> fairness, justice or national values **cannot** be used by Member States to **circumvent** their existing legal obligations under EU law.

After these findings on Art 2 TEU values, let us now turn to values outside Art 2 TEU, as well as specific values, respectively, values in specific fields.

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<sup>589</sup> Drinóczi and Bień-Kacała (2019), p. 1165, on the situation in Hungary and Poland.

<sup>590</sup> Canihac (2021), p. 504.

<sup>591</sup> See also *supra*, note 550.

<sup>592</sup> See also *infra*, Chap. 4.

<sup>593</sup> See Fig. 4.2.

<sup>594</sup> See recently, EGE (2021).

### 3.2.2 *Other Values, Outside Art 2 TEU*

Besides the common values enshrined in Art 2 TEU, the question arises whether values can also be identified outside this provision. One example is **animal welfare**. As mentioned above, the Court has interpreted the CFR as a ‘living instrument’<sup>595</sup> and, based on an idea addressed in an EU regulation (see below), accepted a new value outside Art 2 TEU.

The Court has held: “as follows from recital 4 of that regulation, the principle of prior stunning provided for in that provision reflects an EU value [!], namely animal welfare, as now enshrined in Article 13 TFEU, according to which the European Union and the Member States must pay full regard to the welfare requirements of animals, when formulating and implementing animal welfare policy”.<sup>596</sup> Hence, “[a]nimal welfare, as a value to which contemporary democratic societies have attached increasing importance for a number of years, may, in the light of changes in society, be taken into account to a greater extent”.<sup>597</sup>

It must be noted for the sake of clarity that the ECJ would be less inclined to create a value outside Art 2 TEU if there were no clear **connecting factors**. In case of animal welfare, the Court has not ‘invented’ the relevant value ‘from scratch’ but has applied what already existed in EU primary and secondary law. In the field of EU **secondary** law, the preamble of the relevant regulation stated that “[a]nimal welfare is a Community value [!] that is enshrined in the Protocol (No 33)”.<sup>598</sup> In the field of EU **primary** law, “since animals are sentient beings”, Art 13 TFEU emphasises animal welfare. These are two anchors that make it easier for the Court to adopt the concept of animal welfare as a value.

The above-mentioned ‘living-instrument’ approach opens the door for other values to be added, while it remains to be seen, which might follow next.

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<sup>595</sup>Section 3.1.2.

<sup>596</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 41.

<sup>597</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 77.

<sup>598</sup>Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, OJ 2009 L 303/1, as amended by OJ 2018 L 122/11, recital 4.

### 3.2.3 *Specific Values, Respectively, Values in Specific Fields*

The EU's common values have been applied to, and further specified in various fields.<sup>599</sup> For reasons of scope, not all possible questions can be dealt with in this section.<sup>600</sup>

Some values addressed in the field of **sports** might **rather** be seen as **virtues**.<sup>601</sup> The EP resolution on integrity, etc. in sports besides referring to some general EU values (pluralism, tolerance, justice, equality [of opportunity], solidarity, tolerance, respect for human rights and the rule of law) refers to respect, friendship, fair play, prosperity, peace, mutual respect, compassion and leadership.<sup>602</sup> The 2018 Council conclusions on promoting the common values of the EU through sport besides referring to some general EU values (fairness,<sup>603</sup> democracy, tolerance, equality and solidarity) mainly referred to teambuilding, discipline, inclusion, perseverance, (mutual) respect, fair play and friendship.<sup>604</sup> Hence, rather virtues than values.

For the following two reasons, the remainder of this section focuses on the area of **health**. On the one hand, in 2006 the EU health ministers have adopted a distinct document on values in the field of health. On the other hand, against the background of the current pandemic, an illustration of these health values seems appropriate.

In light of the increasing cases of EU citizens relying on their rights under the (passive) economic freedom to receive (also healthcare) services, which lead to various ECJ judgements developing the right to **patient mobility**,<sup>605</sup> the Member States wanted to take back the steering wheel. Therefore, they formulated a 'statement on common values and principles' annexed to these 2006 Council conclusions.<sup>606</sup> These conclusions, which qualify as 'soft-law',<sup>607</sup> tasked<sup>608</sup> the Commission to respect these values and principles "when drafting specific proposals

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<sup>599</sup> See Table 2.1.

<sup>600</sup> The field of non-financial reporting does not address specific values, and for the topic of values in digitalisation, see *supra*, Sect. 2.3.3, as well as *infra*, Fig. 4.1. On lobbying see Sect. 2.3.5.

<sup>601</sup> See *supra*, Sect. 1.5.1 (virtues) and Sect. 2.3.2 (sports).

<sup>602</sup> EP resolution of 2 February 2017 on an integrated approach to Sport Policy: good governance, accessibility and integrity, OJ 2018 C 252/2; also mentioning 'understanding among nations and cultures'.

<sup>603</sup> If understood as a synonym for justice. See, *supra*, Sect. 3.2.1.7.

<sup>604</sup> Conclusions of the Council [etc.] on promoting the common values of the EU through sport, OJ 2018 C 196/23. See also, more recently, Resolution of the Council [...] on the key features of a European Sport Model, OJ 2021 C 501/1, pt. 7 ("values, such as solidarity between different levels in sport, in particular between professional and grassroots sport, fairness, integrity, openness, gender equality and good governance"); see also pt. 8.

<sup>605</sup> See, for instance, Frischhut and Stein (2011), or, more recently, on the impact also on the EEA (cf. Sect. 1.5.3), Frischhut (2020c).

<sup>606</sup> Council conclusions on Common values and principles in European Union Health Systems, OJ 2006 C 146/1.

<sup>607</sup> See Sect. 1.5.5.

<sup>608</sup> Officially, the Commission was 'invited'.



concerning health services” (pt. 7), as well as the other institutions (mainly the EP) “to ensure that common values and principles contained in the Statement are respected in their work” (pt. 8). These statements have to be seen against the background of the political decision to remove (pt. 1) health services from the scope of the general services directive<sup>609</sup> (adopted end of 2006), and to draft a distinct (pt. 2) directive on ‘patients’ rights in cross-border healthcare,<sup>610</sup> finally adopted in 2011. The conclusions themselves address “social cohesion and social justice”,<sup>611</sup> to which the health systems “make a major contribution” (pt. 7).

The conclusions seem to be based on a similar assumption as Art 2 TEU referring to values on which the Union “is founded”, by ‘**recalling**’ “the overarching values of universality, access to good quality care, equity and solidarity” (pt. 5).<sup>612</sup> **Solidarity**, as already part of Art 2 TEU, in this context is described to be “closely linked to the financial arrangement of our national health systems and the need to ensure accessibility to all”. As we have seen above,<sup>613</sup> strictly speaking, equality has to be differentiated from equity. **Equity**, according to this statement, “relates to equal access according to need, regardless of ethnicity, gender, age, social status or ability to pay”. This understanding of equity is close to equality, respectively, the flipside of non-discrimination. Hence, we have at least two specific health values: universality and access to good quality care. **Universality** “means that no-one is barred access to health care”. **Access to good quality** care is not defined as a value but is further clarified in one of the principles “[b]eneath these overarching values”.

These **principles**, which are all explained in this statement, are quality, safety, care that is based on evidence and ethics, patient involvement, redress, privacy, and confidentiality. While these values and principles are common to the various health systems, the implementation differs, “and will continue to do so”. This statement is reminiscent of the EU’s motto of ‘united in diversity’.

**To summarise**, compared to Art 2 TEU, here we can identify more clarification, which is obviously easier in this specific field of health. Another take-away is the combination of more abstract values and more concrete principles, as well as a combination of new and the application of existing values, such as equality (or equity) and solidarity.

Besides this elucidation of **solidarity** (accessibility to all), we can also find some interesting clarification in **literature**. In the field of health law and policy, de Ruijter

<sup>609</sup>Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ 2006 L 376/36; cf. Art. 2(2)(f), excluding healthcare services.

<sup>610</sup>Directive 2011/24/EU of 9 March 2011 on the application of patients’ rights in cross-border healthcare, OJ 2011 L 88/45, as amended by OJ 2013 L 353/8.

<sup>611</sup>The promotion of “social justice and protection” is one of the EU’s objectives; Art 3(3)(2) TEU.

<sup>612</sup>The statement makes an important clarification that provision of health care is “patient-centred and responsive to individual need”.

<sup>613</sup>Section 3.2.1.8.

et al. have referred to solidarity as “redistribution and risk pooling” not only within Member States, but also between them.<sup>614</sup>

Meulen defines solidarity as “a preference for collaboration to reach common goals as well as a justification for the subservience of one’s individual interests to the collective interest of the group or of a society”,<sup>615</sup> which “expresses the idea of mutual dependency”.<sup>616</sup> Meulen also refers to ‘**humanitarian solidarity**’, “which reflects the concern and responsibility for individuals who are not able any more to take care of themselves due to debilitating conditions and diseases, like dementia and psychiatric disorders”.<sup>617</sup> As he states elsewhere, “[t]his principle can be defined as a responsibility to protect those persons whose existence is threatened by circumstances beyond their control, particularly natural fate or unfair social structures”.<sup>618</sup> In a simplified way, this concept can be seen as a combination of solidarity and vulnerability.<sup>619</sup> Finally, in terms of the relation of solidarity to another value, namely, **justice**, he emphasises that solidarity does not replace justice. The two should rather be seen as two sides of a coin, where justice concerns “the rights and liberties of autonomous, self-interested individuals”, while solidarity “concerns the mutual recognition and well-being of the members who are connected in the life world”.<sup>620</sup> It will not escape the attentive reader that this image of two sides of a coin has already occurred concerning the relationship between equality and non-discrimination.

After these clarifications on the scope *ratione materiae* of values within and outside Art 2 TEU, let us now turn to the scope *ratione personae*.

### 3.3 Scope *Ratione Personae*

This scope *ratione personae* concerns the two related questions of who is entitled and who is duty bound by these values, respectively, concepts.

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<sup>614</sup> de Ruijter et al. (2020), p. 6.

<sup>615</sup> ter Meulen (2017), p. vii.

<sup>616</sup> ter Meulen (2017), p. viii.

<sup>617</sup> ter Meulen (2017), p. ix.

<sup>618</sup> ter Meulen (2017), p. 185.

<sup>619</sup> On vulnerability, see for instance, Peroni and Timmer (2013), Sedmak (2015a) and Andorno (2016).

<sup>620</sup> ter Meulen (2017), pp. viii–ix.

### 3.3.1 Who Is Entitled?

The TEU preamble refers to the “cultural, religious and humanist inheritance of Europe” (recital 2). According to Calliess, this reference to **Humanism** should be understood as pointing to the values of equality of humans, freedom, and the validity of reason (“*Geltung der Vernunft*”).<sup>621</sup> These references and the already mentioned concepts of human dignity and human rights clearly point to an **anthropocentric** view.

Besides this general analysis, let us now turn to the different values. For various values enshrined in Art 2 TEU it is obvious, whom they entitle. **Human dignity** and **human rights** clearly entitle all human beings. As already mentioned, in the CFR we can only find a few articles that explicitly entitle EU citizens only. In case of ‘rights of persons belonging to **minorities**’, individuals of a minority group are entitled, not minorities as a group.<sup>622</sup> Likewise, ‘**equality between women and men**’ entitles all human beings.<sup>623</sup> However, as mentioned above, based on what can be identified in EU secondary law, this will have to be seen broader in terms of gender.

Broadly speaking, **equality and non-discrimination** entitle human beings. According to Art 20 CFR “[e]veryone is equal before the law”. Just to refer to Art 21 CFR, it depends on the relevant criteria who can be entitled by this provision of primary law, respectively, by the above-mentioned anti-discrimination directives. Equality is, as we have seen, a broad concept. According to Art 4(2) TEU, the Member States are entitled that their equality before the Treaties is respected by the Union. In a similar way, Art 9 TEU entitles EU citizens to “receive equal attention” from EU institutions, etc.

The **rule of law** and its various elements will entitle all human beings, who are subject to the exercise of public authority, of both the EU and the Member States. Various elements of the rule of law (legality, legal certainty, prohibition of arbitrariness, independent and impartial courts and effective judicial review, equality before the law), as depicted above, will entitle individuals (not necessarily only EU citizens, but also TCN) to rely on the different general principles of EU law.

Likewise, **freedom, pluralism and tolerance** will also entitle all human beings.<sup>624</sup> The only challenge here will be that the content, which is not precisely defined, makes the question of who is entitled seem rather theoretical. In case of the

<sup>621</sup> Calliess (2004), p. 1037. Where appropriate, besides natural persons also legal persons can be entitled.

<sup>622</sup> See, *supra*, note 284.

<sup>623</sup> On intersexual people, i.e. whose biological sex is not clearly ‘male’ or ‘female’, see VfGH judgement of 29.06.2018, *Intersexual persons have the right to adequate designation in the civil status register*, G 77/2018, para 18, “Art. 8 ECHR therefore grants persons with a variant of gender development compared to male or female the constitutionally guaranteed right that regulations based on sex recognise their variant of gender development as an independent gender identity, and in particular protects people with an alternative gender identity from an externally determined gender assignment.” (translated with DeepL).

<sup>624</sup> On their justiciability, see *infra*, Sect. 3.5.1.

economic fundamental freedoms of the internal market, EU citizens<sup>625</sup> can be entitled, in case of the free movement of products even TCN.<sup>626</sup> In case of fundamental freedoms as fundamental rights, depending on the relevant rights, all human beings or EU citizens only can be entitled.

The analysis for **justice** is somehow similar, however more nuanced. Justice is another broad concept, mainly determined in philosophy. Justice is about the relationship of human beings, hence it can be seen to entitle all human beings in all different forms (both in its vertical and in its horizontal dimension, as well as in the case of corrective or procedural justice).

**Democracy** can be limited to EU citizens in case of elections, but can obviously be extended to TCN when it comes to good administration, transparency, etc. Art 9 TEU also stresses the principle of equality of citizens in the attention they get from EU institutions, etc.

**Solidarity** is a broad concept, but it may not only entitle individuals, but also addresses solidarity between Member States (e.g., Art 222 TFEU).

All these values can lead to an entitlement in a **direct** way, as well as **indirectly** via a value-conform interpretation<sup>627</sup> of EU secondary or of national law. Based on Art 19 TEU, both the CJEU and national courts and tribunals have a “responsibility for ensuring judicial review in the EU legal order”, which includes the duty “that in the interpretation and application of the Treaties the law is observed”,<sup>628</sup> as well as “the principle that national law must be interpreted in conformity with EU law”.<sup>629</sup>

So far, the above-mentioned **anthropocentric** view has been confirmed. Having defined the ‘ethical spirit of EU law’, there are also examples of a **bio-centric** attitude, emphasising the intrinsic value of animals.<sup>630</sup> A milestone has been the ECJ judgement of December 2020, where animal welfare has been qualified as a ‘value’.<sup>631</sup> An additional step would be to entitle the environment.<sup>632</sup> Before turning to the future direction of travel (Chap. 5), let us turn to the related question of who is bound by these values.

<sup>625</sup>In terms of legal persons, cf. Art 54 TFEU.

<sup>626</sup>Strictly speaking, nationality is no criterion for this market freedom.

<sup>627</sup>Potacs (2016) and von Bogdandy and Spieker (2019, 2020b).

<sup>628</sup>ECJ judgement of 20 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU: C:2018:117, paras 33 and 34.

<sup>629</sup>ECJ judgement of 6 November 2018, *Bauer*, joined cases C-569/16 and C-570/16, EU:C:2018:871, paras 25 and 26 (with further details).

<sup>630</sup>Frischhut (2019), p. 145.

<sup>631</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 77.

<sup>632</sup>See Sect. 5.2.

### 3.3.2 *Who Is Obligated?*

Before we look at the question of which individual values bind whom, we first turn to the binding effect of the values for the EU in general. The first paragraph of Art 3 TEU defining the EU's objectives stipulates that the "Union's aim is to promote peace, its values and the well-being of its peoples". This provision clearly states the obvious, the Union as an addressee of its own values. The same holds true for the external perspective, where Art 3(5) TEU states the same for the Union's 'relations with the wider world'. Besides the Union as an organisation, also its '**elements**' are covered. Art 13(1) TEU states that the "Union shall have an institutional framework which shall aim to promote its values [and] advance its objectives". This is a direct, as well as via the above-mentioned Art 3 TEU in addition an indirect, obligation to respect the values enshrined in Art 2 TEU. The 'elements' of this organisation bound to these values are the EU institutions listed in Art 13 (1) TEU, the two ancillary bodies mentioned in Art 13(4) TEU, i.e., the Economic and Social Committee (EESC) and the Committee of the Regions (CoR), as well as all other 'bodies,<sup>633</sup> offices<sup>634</sup> or agencies<sup>635</sup> of the Union'.<sup>636</sup> Besides these arguments, in enacting EU secondary law and acting under the EU treaties, the hierarchy of EU law makes the values of the EU binding for these 'elements'. Let us now have a closer look at the different individual values.

**Member States** have to comply with EU values at the time of accession (cf. Art 49 TEU) and EU membership (Art 2 TEU). On **individuals**, see below.

Those obliged by fundamental rights are obviously public authorities. This is true for fundamental rights via general principles of EU law and for the ECHR. The question of the obligation of fundamental or **human rights** (including the rights of **minorities**) in terms of the Charter of Fundamental Rights depends on Art 51 (1) CFR. According to this provision, the "provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

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<sup>633</sup>The term 'bodies' refers to the just mentioned CoR and EESC, as well as the European Investment Bank the European Investment Fund, as well as the European Ombuds(w)man; cf. Loewenthal (2019), p. 129.

<sup>634</sup>E.g., the Publications Office of the European Union; cf. Decision 2009/496/EC, Euratom of 26 June 2009 on the organisation and operation of the Publications Office of the European Union, OJ 2009 L 168/41, as amended by OJ 2012 L 179/15.

<sup>635</sup>On the EU agencies see Orator (2017), and various contributions in Scholten and Brenninkmeijer (2020).

<sup>636</sup>"The expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation", OJ 2007 C 303/32. Cf. also the wording in Art 263(1) TFEU (action for annulment).

- In case of the **EU**, the binding character of the CFR does not raise major questions and can be seen in a similar way as just mentioned regarding Art 2 TEU.<sup>637</sup>
- In case of the **Member States**, the crucial question is obviously the limitation of “when they are implementing Union law”. As Lock mentions, this is a major difference between the CFR and the ECHR or national human rights provisions, as the latter two apply without such a restriction; that is why the EU cannot be qualified as a “human rights organization” and the CJEU not as a “human rights court”.<sup>638</sup> Besides the implementation of EU law in a strict sense (e.g., application of an EU regulation or transposition of an EU directive), also derogations from the economic fundamental freedoms<sup>639</sup> are covered.<sup>640</sup> Additionally, in *Åkerberg Fransson*, the ECJ has clarified that the “applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter”.<sup>641</sup> Lenaerts has expressed the essence of this statement as follows: “Metaphorically speaking, this means that the Charter is the ‘shadow’ of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter”.<sup>642</sup> There are also limitations to this broad concept (1. implementation in a strict sense; 2. derogation; 3. applicability of EU law).<sup>643</sup> If EU law does not apply, also CFR rights cannot be invoked against Member States. This can be the case if a certain topic falls outside the scope of the EU’s competences, or if the scope of EU secondary law is not given.<sup>644</sup> Hence, the question of when Member States are bound by the CFR remains tricky.<sup>645</sup> In a **recent** Brexit-related **case** that took place before the end of the transitional period, the Court had to deal with a situation of a (former) Member State having adopted national law that is **more**

<sup>637</sup> Hence, the institutions mentioned in Art 13 TEU and the ‘bodies, offices and agencies’ (cf. note 636).

<sup>638</sup> Lock (2019), p. 2242.

<sup>639</sup> ECJ judgement of 18 June 1991, *ERT vs. DEP*, C-260/89, EU:C:1991:254, para 43.

<sup>640</sup> E.g., Lock (2019), p. 2243, mentioning that these two categories also apply in case of fundamental rights as general principles of EU law.

<sup>641</sup> ECJ judgement of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para 19. As clarified in ECJ judgment of 22 February 2022, *RS (Effet des arrêts d’une cour constitutionnelle)*, C-430/21, EU:C:2022:99, paras 34–36, Art 19(1) TEU does not automatically trigger the scope of EU law; see also Spieker (2022), p. 308.

<sup>642</sup> Lenaerts and Gutiérrez-Fons (2014), pp. 1567–1568.

<sup>643</sup> For further details, see also Ranacher and Frischhut (2009), pp. 197–207.

<sup>644</sup> E.g., ECJ order of 17 July 2014, *Široká*, C-459/13, EU:C:2014:2120, paras 19–26 (vaccination of minors not falling within the EU’s competence); ECJ judgement of 10 July 2014, *Julian Hernández and Others*, C-198/13, EU:C:2014:2055, paras 45–46 (topic outside the scope of a directive). See also the indicators mentioned in the latter case (in para 37): “the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and whether there are specific rules of EU law on the matter or rules which are capable of affecting it”.

<sup>645</sup> For further details, see Lock (2019), pp. 2243–2246.

**favourable** (!) compared to the relevant EU directive on citizens' rights,<sup>646</sup> which consequently cannot be seen as a situation of 'implementing' EU law. However, as such a situation falls under Art 21(1) TFEU (right to move and reside freely within the territory of the Member States), those more favourable national rules can be seen to implement this provision of EU primary law that consequently triggers the obligation "to comply with the provisions of the Charter".<sup>647</sup> The circle to the values of the EU is then closed insofar as this results in the obligation for the member states to enable a life "in dignified conditions", "in accordance with Article 1 of the Charter".<sup>648</sup>

- The same (difficult) analysis applies for the question of an obligation of **individuals**, the so-called question of a possible **horizontal effect** of CFR rights. An **indirect** effect via public authorities, for instance, interpreting national legislation in light of the CFR is less of a problem. However, a **direct** effect is more challenging. In case of a CFR provision<sup>649</sup> (Art 21, non-discrimination) that can also be qualified as a 'a general principle of EU law' and is further defined in an EU directive (Directive 2000/78<sup>650</sup>), the Court has accepted that this situation can "confer on individuals a right which they may rely on as such in disputes between them [i.e., horizontal] in a field covered by EU law".<sup>651</sup> As is often the case, an AG has aptly described this situation metaphorically as follows: "In fact, in this area, the Charter has proved to be of exceptional practical importance, becoming – to use the jargon of alchemists – the philosophers' stone of EU law enabling base norms (directive provisions that do not have a horizontal effect) to be transmuted into precious ones (those that do). It was on such occasions that the rules governing reliance on the Charter in relations between individuals were worked out".<sup>652</sup> Such a situation is obviously only

<sup>646</sup> Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [...], OJ 2004 L 158/77, as corrected by OJ 2007 L 204/28, recital 15.

<sup>647</sup> ECJ judgement of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paras 87–88.

<sup>648</sup> ECJ judgement of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, para 89. The Court also referred to Art 7 CFR (right to respect for private and family life) and Art 24(2) CFR (best interests of the child).

<sup>649</sup> Lock (2019), p. 2247 also mentions Art 23 CFR (equality between women and men) due to its link with Art 157 TFEU (see Sect. 3.2.1.9) and "potentially many of the provisions contained in Title IV". On Art 31(2) CFR (annual period of paid leave), see ECJ judgement of 6 November 2018, *Bauer*, joined cases C-569/16 and C-570/16, EU:C:2018:871. On this case, see Weinkogl (2018).

<sup>650</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

<sup>651</sup> ECJ judgement of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, para 76. See also ECJ judgement of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paras 76–82, respectively, ECJ judgement of 6 November 2018, *Bauer*, joined cases C-569/16 and C-570/16, EU:C:2018:871, para 92 (on Art 31[2] CFR, concerning the annual period of paid leave).

<sup>652</sup> AG Szpunar opinion of 15 July 2021, *Thelen Technopark Berlin*, C-261/20, EU:C:2021:620, para 70.



possible “on the condition that a link exists between that provision of the Charter and the provision of the directive in question”.<sup>653</sup>

- In the following cases of horizontal situation, the Court has allowed the disapplication of provisions of national law that are contrary to a directive, “when general principles of EU law, including those given specific expression in the Charter, so require”:<sup>654</sup> the principle of non-discrimination on grounds of **age**,<sup>655</sup> the principle of non-discrimination on grounds of **religion or belief**,<sup>656</sup> and the right to effective judicial protection,<sup>657</sup> all with regard to **Directive 2000/78/EC**,<sup>658</sup> as well as in the case of **Directive 2003/88/EC**<sup>659</sup> concerning the **annual leave** as guaranteed by Art 31(2) CFR.<sup>660</sup>

After the first value of human rights, let us now turn to the next value. Based on the historic background, **human dignity** can be seen as a reaction to the atrocities of the Second World War. Hence, this value is binding on public authorities, both the EU and the Member States.

The same holds true for the **rule of law** as a broad concept, which also obliges public authorities. The different elements of the rule of law (legality, legal certainty, prohibition of arbitrariness, independent and impartial courts and effective judicial review, equality before the law), as depicted above, make it easier to lead to legal obligations, e.g., via general principles of EU law.

**Democracy** obviously obliges the public authorities of the EU, respectively, the Member States, for instance, organising elections to the European Parliament or at the national level.

**Equality** is, as we have seen, a broad concept. According to Art 4(2) TEU, the Union is obliged to respect the equality of Member States. Art 9 TEU stipulates a similar obligation of the EU institutions, etc. regarding EU citizens, which shall “receive equal attention”. Equality before the law (Art 20 CFR) and

<sup>653</sup> AG Szpunar opinion of 15 July 2021, *Thelen Technopark Berlin*, C-261/20, EU:C:2021:620, para 72.

<sup>654</sup> Cf. AG Szpunar opinion of 15 July 2021, *Thelen Technopark Berlin*, C-261/20, EU:C:2021:620, para 67; see also para 68 for examples, where this was not the case.

<sup>655</sup> ECJ judgement of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, para 76; ECJ judgement of 19 January 2010, *Küçükdeveci*, C-555/07, EU:C:2010:21, paras 50–51; ECJ judgement of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paras 35–38.

<sup>656</sup> ECJ judgement of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paras 76–77, 79; ECJ judgement of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paras 69–71; ECJ judgement of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, para 76.

<sup>657</sup> ECJ judgement of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, para 78.

<sup>658</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

<sup>659</sup> Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003 L 299/9.

<sup>660</sup> ECJ judgement of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paras 74–81; ECJ judgement of 6 November 2018, *Bauer*, joined cases C-569/16 and C-570/16, EU:C:2018:871, paras 80–91.



non-discrimination (Art 21 CFR) will oblige both the EU and the Member States, based on the requirements of Art 51 CFR, as mentioned above.

The same is true for **equality between women and men**. Likewise, here also public authorities will be duty bound. However, here we have one exception, as the ECJ has clarified in *Defrenne I*, that (what is now) Art 154 TFEU, “applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals”.<sup>661</sup> Hence, an exceptional example of a so-called horizontal effect, as discussed above regarding the CFR.<sup>662</sup>

As we have seen, **freedom** is a broad concept and will mainly oblige public authorities. This broad concept can also include the economic fundamental freedoms, which exceptionally can also oblige private individuals.<sup>663</sup> As we have seen, the concept of freedom can also refer to a horizontal level in the sense of ‘private autonomy’, but it will be difficult in this context to argue for direct obligations for individuals stemming from Art 2 TEU. Apart from that, the value of freedom has been seen as only being able to give guidance for the interpretation and development for EU law. Hence, it can have an impact on possible obligations rather in an indirect<sup>664</sup> way, by shaping the content of other legally binding provisions.

Besides freedom, in case of pluralism and tolerance the challenge is that the relevant content is not precisely defined. **Pluralism** of the media is clearly an obligation for public authorities and results from Art 11(2) CFR. The importance of this obligation in the context of democracy has already been mentioned.<sup>665</sup> **Tolerance** can be important for public authorities. However, it can also rather seen as a virtue, which obviously cannot be enforced by legal means. These Art 2 TEU values can rather give ‘guidance’ for the interpretation of EU law.

The analysis for **justice** is somehow similar, however more nuanced. Justice is another broad concept, mainly determined in philosophy. In its vertical dimension, it would oblige public authorities, in its horizontal also individuals.

- In terms of ‘distributive justice’ (*iustitia distributiva*) we would have **public authorities** that are obliged in relation to sub-ordinated individuals (i.e., a vertical situation of unequal entities).
- In terms of ‘exchange justice’ (*iustitia commutativa*) we would have **individuals** being mutually obliged (i.e., a horizontal situation).

<sup>661</sup> ECJ judgement of 8 April 1976, *Defrenne vs. Sabena I*, C-43/75, EU:C:1976:56, para 39.

<sup>662</sup> See note 651.

<sup>663</sup> ECJ judgement of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296, para 36, “the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty [now Art 45 TFEU, freedom of workers] must be regarded as applying to private persons as well”. Confirmed in ECJ judgement of 17 July 2008, *Raccanelli*, C-94/07, EU:C:2008:425, paras 41–46.

<sup>664</sup> All values can have an indirect impact via value-conform interpretation (see note 627) of EU secondary law, or of national law.

<sup>665</sup> As it is debatable, whether the concept of pluralism also comprises ‘constitutional pluralism’, this possible aspect will not be covered at this stage. See also *infra*, Sect. 4.2.3.

- In terms of ‘corrective justice’ (*iustitia regulativa sive correctiva*) we would have those having **caused a damage** (or committed a criminal act) being obliged to compensate for the damage (or to accept the punishment).
- The wording here is ‘**would have**’ because this is a theoretical reasoning, given the reluctance to ‘take justice more seriously’. Hence, this would rather affect public authorities (mainly the EU) and implies accepting these philosophical clarifications in law. Another issue is the combination of justice with other values (e.g., the rule of law), which can result in a different impact.<sup>666</sup>
- The situation might differ if a value (justice) is combined with certain legal principles. This would be conceivable in the case of ‘procedural fairness’. **Public authorities** are bound to CFR rights, such as Art 47 CFR (effective remedy), Art 48 CFR (presumption of innocence), Art 49 CFR (legality and proportionality), Art 50 CFR (*ne bis in idem*), etc. They are also bound to general principles of EU law, such as non-discrimination, proportionality, legal certainty, protection of legitimate expectations, rights of defence, the principle of effectiveness, as well as liability of both the EU and Member States (i.e., state liability).<sup>667</sup>
- As mentioned above, one question is also, whether justice can or should also be seen as a **virtue**, which of course cannot be legally enforced.

**Non-discrimination** is part of the CFR (see above), but also a distinct value and a key principle of EU law. Non-discrimination in terms of the fundamental freedoms binds public authorities, certain entities that can enact collective measures,<sup>668</sup> as well as exceptionally private individuals<sup>669 670</sup>. Once EU directives are implemented into national law, they are also binding for individuals via these national implementation measures. Hence, there is less necessity for discussing a binding effect of non-discrimination as a value of Art 2 TEU only.

Based on the afore-mentioned<sup>671</sup> definition of the Oxford dictionary, **solidarity** would both entitle and bind individuals (with a common interest). The solidarity clause of Art 222 TFEU entitles and binds Member States. The same is true for the other afore-mentioned provisions that also refer to the Member States’ relationship. Likewise, Art 80 TFEU (migration) is legally binding for Member States, as confirmed by the ECJ regarding the ‘relocation decision’. Art 222 TFEU also obliges the EU in relation to Member States (vertical situation). The solidarity between generations, as one of the EU’s objectives (Art 3 [3] [2] TEU) can be of indirect relevance, although we have seen an application of this idea in BVerfG case-law. In the external sphere, Art 21(1) TEU tasks the Union to respect the principle of solidarity.

<sup>666</sup>On the relationship of values, see Chap. 4.

<sup>667</sup>Cf. Tridimas (2006).

<sup>668</sup>E.g., ECJ judgement of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809.

<sup>669</sup>See note 663 (non-discrimination in case of the free movement of workers).

<sup>670</sup>For further details, see Ranacher and Frischhut (2009), pp. 74–75, 156–159.

<sup>671</sup>Note 297.

The binding effect on Member States does **not** require a **cross-border** effect (i.e. two Member States involved) as in the case of the economic fundamental freedoms.<sup>672</sup> Hence, values also apply only if one Member State is concerned.

A binding effect on **individuals** can also take place via EU secondary law, referring to certain EU values. A value that otherwise would not be binding for individuals can become binding if referred to in a legally binding document. This can be an EU regulation that is binding in its entirety and directly applicable, or an EU directive, which must be transposed into national law (Art 288 TFEU). Hence, a similar effect as in the case of soft-law referred to in hard-law.<sup>673</sup>

- Various EU **non-discrimination** directives can lead to legal obligations for individuals via the transposition into national law.<sup>674</sup>
- **Non-financial reporting** can also lead to a situation where some large companies are dealing with certain EU values via the Common Good Balance Sheet.<sup>675</sup>
- In the field of **digitalisation** various EU documents<sup>676</sup> refer to EU values and have also led to individuals dealing with questions of AI etc.<sup>677</sup> The current EC proposal for an AI act refers to the “objective of the Union of being a global leader in the development of secure, trustworthy and ethical artificial intelligence”, by “laying down a uniform legal framework in particular for the development, marketing and use of artificial intelligence in conformity with Union values”.<sup>678</sup>
- Against the backdrop of various challenges arising in the field of **Artificial Intelligence**, various **companies** refer to values that can also be found in Art 2 TEU, although on a voluntary basis.<sup>679</sup>

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<sup>672</sup> See, *infra*, Sect. 3.4.2.

<sup>673</sup> Cf. Sect. 1.5.5.

<sup>674</sup> In case of non-discrimination, this value is also a principle as well as a general principle of EU law.

<sup>675</sup> See Sect. 2.3.4.

<sup>676</sup> High-level Expert Group on Artificial Intelligence (2019a, b, 2020), to name but a few.

<sup>677</sup> Cf. Frischhut (2020a, b, 2021a).

<sup>678</sup> EC proposal for a regulation laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain union legislative acts, COM(2021) 206 final 21.4.2021, recitals 5 and 1. See also EC ‘Fostering a European approach to Artificial Intelligence’, COM(2021) 205 final 21.4.2021.

<sup>679</sup> See, for instance, Pachl and Valenti (2019), Petersen (2020), Wallach and Vaccari (2020) and Wong (2020). For the opposite perspective of the impact of AI on human rights, etc., see Muller (2020).

### 3.4 Scope *Ratione Limitis*

From an **external** perspective and on a timeline, we can address the question of (1) countries joining the EU, (2) the external activities of the Union (during membership, so to say), as well as (3) the topic of a country leaving the EU, which turns previous internal questions into external ones. As (ad 1) a country having joined the EU has to maintain its obligations regarding EU values, we will first turn to the external perspective, and then return to the **internal** one for some additional remarks. Additional, because so far, the previous sections have mainly covered this internal angle.

#### 3.4.1 *The External Perspective*

Hence, let us now turn to the external perspective. For the **first** question of a country joining the EU, the inbound situation so to say, we have already seen the **Copenhagen** criteria as set up by the European Council in June 1993. Besides economic and legal criteria, the following political criteria have been addressed: “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.<sup>680</sup> Nowadays, Art 49(1) TEU<sup>681</sup> states “[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union”. This further clarifies the political category of the Copenhagen criteria and enlarges the values to those mentioned in Art 2 TEU. To verify “compliance with the values referred to in Article 2 TEU [that] constitutes a precondition [!] for the accession to the European Union of any European State applying to become an EU member”,<sup>682</sup> the Commission “undertakes a very profound screening”,<sup>683</sup> based on different chapters.<sup>684</sup> It remains to be seen (the internal perspective; see below) if the same scrutiny takes place, once a country has achieved the status of EU membership.

On a timeline, the **second** aspect relates to the proper external activities of the EU. Some relevant provisions have already been mentioned and shall now be put in context. While one can safely argue that Art 2 TEU itself is already binding for the

<sup>680</sup> European Council in Copenhagen, Conclusions of the Presidency of 21–22 June 1993, p. 13.

<sup>681</sup> Prot No 24 on asylum for nationals of Member States of the European Union (OJ 2016 C 202/304, recital 4) also refers to Art 49 TEU.

<sup>682</sup> ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 161.

<sup>683</sup> Erlbacher (2019), p. 315, with further details.

<sup>684</sup> On the current 35 chapters, see [https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en).

EU's internal and external activities,<sup>685</sup> Art 3(5) TEU (EU objectives) for instance, clarifies this as follows: "In its relations with the wider world, the Union shall uphold and promote its values and interests [...]". These EU external relations can be clustered into the following elements:

Before the Lisbon Treaty, the **European Neighbourhood Policy** (ENP) has been based on soft-law and got "formally constitutionalize[d]" via Art 8 TEU.<sup>686</sup> The idea is to surround the EU "with a ring of friends",<sup>687</sup> although there is not a single approach concerning the different regions.<sup>688</sup> Art 8 TEU tasks the Union to "develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation". Good neighbourliness is not mentioned in Art 2 TEU, in literature it is referred to as "a nascent principle in international law".<sup>689</sup> However, the wording in Art 8 TEU is not enough to qualify it as an additional value.

Within **title V** of the TEU, values are address both in Chapter 1 on general provisions on the Union's **external action** (cf. Art 21 TEU), as well as twice in Chapter 2 on provisions on the common **security and defence** policy. In the latter case, both in Section 1 on common provision (cf. Art 32 TEU) and in Section 2 on the common security and defence policy (cf. Art 42 TEU).

**Art 21(1) TEU** links the internal to the external dimension by requiring that the "Union's action on the international scene shall be guided by the principles [!] which have inspired its own creation [etc.]", "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity [etc.]". Notably some Art 2 TEU values are here referred to as **principles**. As we have seen above,<sup>690</sup> all these values have also been qualified as principles. Besides these principles, Art 21(2) TEU defines the EU's **objectives** for external action. These objectives have been clustered in horizontal and more policy-specific objectives.<sup>691</sup> As part of the first category, the first objective (lit a) mentioned is to "safeguard its values [!], fundamental interests, security, independence and integrity". Hence, some concepts of Art 2 TEU figuring in this article as principles and a general reference to the Union's values.

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<sup>685</sup> ECJ judgement of 22 June 2021, *Venezuela vs. Council*, C-872/19 P, EU:C:2021:507, para 49, "Furthermore, the principle that one of the European Union's founding values is the rule of law follows from both [!] Article 2 TEU, which is included in the common provisions of the EU Treaty, and Article 21 TEU, concerning the European Union's external action, to which Article 23 TEU, relating to the CFSP, refers [...]".

<sup>686</sup> Kochenov (2019), p. 100.

<sup>687</sup> EC 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM(2003) 104 final 11.3.2003, p. 4.

<sup>688</sup> Kochenov (2019), pp. 100–101.

<sup>689</sup> Kochenov (2019), p. 102.

<sup>690</sup> Section 3.2.1.

<sup>691</sup> Ramopoulos (2019a), p. 202.

The **Court** has confirmed the importance of values in the external sphere in a case concerning an EU-Tanzania Agreement regarding “compliance with the principles of the rule of law and human rights, as well as respect for human dignity”.<sup>692</sup> The Court has emphasised that “such compliance is required of all actions of the European Union, including those in the CFSP, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), Article 21(2)(b) and (3) TEU, and Article 23 TEU. That being the case, the Court must also assess that agreement in the light of its aim.”<sup>693</sup>

Art 32 TEU and Art 34 TEU are provisions striving to “strengthen systematic cooperation between Member States in the conduct of policy” (Art 25[c] TEU) as well as to contribute to “an ever-increasing degree of convergence of Member States’ actions” (Art 24[2] TEU).<sup>694</sup> Against this background, **Art 32 TEU** tasks the Member States to consult one another and to ensure “that the Union is able to assert its interests and values [!] on the international scene” (para 1). One value that is explicitly mentioned in this provision is “mutual solidarity”.

The last provisions of the afore-mentioned three articles is **Art 42 TEU**, in Section 2 (common security and defence policy). This article clarifies that the “common security and defence policy shall be an integral part of the common foreign and security policy” (para 1). According to para 5 of the same provision, the Council may entrust the execution of a task to a group of Member States, which “are willing and have the necessary capability for such a task” (Art 44 TEU, with further details). The requirement for executing such a task entrusted to a capable group of Member States is “to protect the Union’s values and serve its interests” (Art 42[5] TEU).<sup>695</sup>

An important clarification has been made by the ECJ recently in a case relating to the question of whether a third country (Venezuela) can be qualified as a ‘legal person’ within the meaning of Art 263(4) TFEU (action for annulment), a question that has been answered in the affirmative. An argument against this solution would have been that allowing “third States to bring such actions before the EU Courts against acts of the European Union would risk compromising the reciprocity [!] between the European Union and those States”, one of “the basic principles of public international law”.<sup>696</sup> As the ECJ has confirmed, the “obligations of the European Union to ensure respect for the rule of law [!] cannot in any way be made subject to a condition of reciprocity as regards relations between the European Union and third States”.<sup>697</sup> Consequently, Venezuela can benefit from this interpretation of EU law

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<sup>692</sup>ECJ judgement of 14 June 2016, *Parliament vs. Council [pirates]*, C-263/14, EU:C:2016:435, para 47.

<sup>693</sup>ECJ judgement of 14 June 2016, *Parliament vs. Council [pirates]*, C-263/14, EU:C:2016:435, para 47.

<sup>694</sup>Cf. Ramopoulos (2019b), p. 248.

<sup>695</sup>On the United Nations’ principles, see Ramopoulos (2019c), p. 278.

<sup>696</sup>ECJ judgement of 22 June 2021, *Venezuela vs. Council*, C-872/19 P, EU:C:2021:507, para 32.

<sup>697</sup>ECJ judgement of 22 June 2021, *Venezuela vs. Council*, C-872/19 P, EU:C:2021:507, para 52.

in Europe, even if a reciprocal situation of EU legal persons in Venezuela would not be the case.

The external dimension of values and especially human rights can also be seen in the ‘restrictive measures against **serious human rights violations** and abuses’,<sup>698</sup> the so-called EU’s “shiny new tools”<sup>699</sup> in its “human rights and foreign policy toolbox”,<sup>700</sup> to address serious human rights violations and abuses worldwide. This includes freezing of funds and economic resources of those involved in serious human rights violations or abuses.

Although the EU is not a member of the **United Nations** (UN), all Member States are. According to Art 42(1) TEU, the Union shall act “in accordance with the principles of the United Nations Charter”.<sup>701</sup> The preamble of the latter refers to fundamental human rights, the dignity and worth of the human person, the equal rights of men and women, justice, freedom, tolerance, living together in peace with one another as good neighbours, as well as to the common interest.<sup>702</sup> In the context of another international organisation in this field, the **North Atlantic Treaty Organization** (NATO), the Heads of State or Government in a recent summit meeting have referred to the values “including individual liberty, human rights, democracy, and the rule of law”.<sup>703</sup> Consequently, in either case we can find many similarities.

As mentioned above, a **third** question to be addressed is about a country that has left<sup>704</sup> the EU, as in the case of the United Kingdom, the outbound perspective, so to say. After the referendum from 23 June 2016, the clarification of the UK Supreme Court that the UK parliament must be involved,<sup>705</sup> and many other steps,<sup>706</sup> the United Kingdom has finally used the possibility to leave the EU, based on Art 50 TEU. This provision, inserted by the Lisbon Treaty, refers to arrangements

<sup>698</sup>Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ 2020 LI 410/1, as amended by OJ 2021 LI 445/10; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ 2020 LI 410/13, as amended by OJ 2021 LI 445/17.

<sup>699</sup>Editorial Comments (2021), p. 621.

<sup>700</sup>EP resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)), [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0215\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html), para 3.

<sup>701</sup>Ramopoulos (2019c), p. 278 mentions that consequently all Member States “have therefore to comply with the UN Charter”.

<sup>702</sup>United Nations (UN) (1945).

<sup>703</sup>NATO (2021), para 2.

<sup>704</sup>On some related questions before the time of departure, see Łazowski (2017).

<sup>705</sup>UK Supreme Court judgement of 24 January 2017, *R (on the application of Miller and another) (Respondents) vs. Secretary of State for Exiting the European Union (Appellant)*, UKSC 2016/0196, <https://www.supremecourt.uk/cases/uksc-2016-0196.html>. See also UK Supreme Court judgement of 24 September 2019, *R (on the application of Miller) (Appellant) vs. The Prime Minister (Respondent)*, UKSC 2019/0192, <https://www.supremecourt.uk/cases/uksc-2019-0192.html>, on the suspension of the UK parliament.

<sup>706</sup>E.g., ECJ judgement of 10 December 2018, *Wightman*, C-621/18, EU:C:2018:999, para 75 on the possibility to revoke the notification under Art 50 TEU.



for the withdrawal<sup>707</sup> and future relations (para 2). The **Trade and Cooperation Agreement** (TCA)<sup>708</sup> on future relations, also referred to as the Brexit deal, comprises three interesting provisions when it comes to values.

The **preamble** starts by reaffirming the commitment “to democratic principles, to the rule of law, to human rights, to countering proliferation of weapons of mass destruction and to the fight against climate change, which constitute essential elements of this and supplementing agreements” (recital 1). Another example of referring to some Art 2 TEU values as principles, respectively, as ‘elements’, but not as ‘values’. Besides the rejection of weapons of mass destruction, addressing climate change in this context is most remarkable.

The three values of democracy, the rule of law and the protection of fundamental rights and freedoms of individuals are also emphasised in the context of **part three** on ‘law enforcement and judicial **cooperation in criminal matters**’. Art 524 TCA bases this cooperation on the “long-standing respect” of these three values, although not labelling them as ‘values’. Fundamental rights and freedoms of individuals are based on the Universal Declaration of Human Rights (UDHR)<sup>709</sup> as well as the ECHR, as more international and ‘neutral’ documents.<sup>710</sup> More reference to EU documents would probably not have been acceptable to the UK.

Finally, within **part six** on ‘**dispute settlement** and horizontal provisions’, with Art 763 TCA entitled ‘democracy, rule of law and human rights’ we find a provision addressing the same three values. This provision tasks the contracting parties to “continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies”. Para 1 continues by reaffirming the TCA parties’ “respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties”. Art 763(2) TCA addresses a ‘double external’ perspective, as the TCA parties “shall promote such shared values and principles in international forums” and “shall cooperate in promoting those values and principles, including with or in third countries”.

**To summarise**, we can find three of the EU’s values, referred to as principles, values, or both. References to other European (ECHR) and international (UDHR)

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<sup>707</sup> Agreement on the **withdrawal** of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2020 L 29/7, which does not refer to EU values (see also the other documents in this OJ). See also from the same day the **Political declaration** setting out the framework for the future relationship between the European Union and the United Kingdom, OJ 2020 C 34/1.

<sup>708</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA), OJ 2020 L 444/14; see now: OJ 2021 L 149 (and L 150).

<sup>709</sup> Universal Declaration of Human Rights, adopted by the United Nations General Assembly of its 183rd meeting, held in Paris on 10 December 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

<sup>710</sup> Para 2 clarifies the parties unchanged obligation regarding the ECHR, respectively, in case of EU Member States also to the CFR.



documents seem to be an attempt to create continuity but on a more ‘neutral’ basis. Looking at the above-mentioned timeline from an *actus contrarius* perspective, one could of course address the question if values must play or have not to play the same role in case of accession and in case of departure. The more the content of the agreement on future relations resembles the content of past EU membership (even if keeping in mind certain opt-outs), the more it is convincing, although not legally binding, to base this relationship on same or similar values. To close the circle, despite the question if the same values should play a role in case of joining and leaving the EU, the same three values of democracy, the rule of law and human rights have been identified both in the Copenhagen criteria<sup>711</sup> as well as in Art 763 TCA.<sup>712</sup>

### 3.4.2 *The Internal Perspective*

As an additional remark on the internal situation in relation to what has been covered so far: Art 2 TEU and all the related provisions of EU primary and secondary law obviously apply **within** the EU and the Member States. As mentioned above, the values do **not** require a **cross-border** situation, as we know it from the economic fundamental freedoms. Hence, the Member States are obliged to respect the values also outside the scope of EU law<sup>713</sup> and as Klamert and Kochenov<sup>714</sup> add even outside the competences of the EU. A different opinion is held by the Council’s Legal Service, according to which “a violation of the values of the Union, including the rule of law, may be invoked against a Member State only [!] when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions”.<sup>715</sup>

A second additional comment ties with the external perspective just discussed. As “compliance with the values referred to in Article 2 TEU [that] constitutes a precondition [!] for the accession to the European Union of any European State applying to become an EU member”,<sup>716</sup> one would expect that to be the end of the

<sup>711</sup>European Council in Copenhagen, Conclusions of the Presidency of 21–22 June 1993, p. 13, also mentioning “respect for and protection of minorities”.

<sup>712</sup>In analysing ‘illiberal constitutionalism’, Drinóczi and Bień-Kacała (2019), p. 1140 have also referred to “the relativization of the rule of law and democracy principles, and human rights protection”.

<sup>713</sup>Obwexer (2020), paras 62 and 80; Hilf and Schorkopf (2021), para 18.

<sup>714</sup>Klamert and Kochenov (2019), pp. 24–25.

<sup>715</sup>Council of the EU, Opinion of the Legal Service of 27.5.2014. Commission’s Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties, 10296/14, p. 5 (pt. 16).

<sup>716</sup>ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 161.

discussion. Certain illiberal<sup>717</sup> tendencies have made clear that EU membership is no guarantee for the **continued commitment** to EU values.

Referring to the requirements to become an EU member, the Court has emphasised the “that the European Union is composed of States which have freely and voluntarily [!] committed themselves to the common values now referred to in Article 2 TEU, which respect those values, and which undertake to promote them”.<sup>718</sup> Based on this *pacta sunt servanda* perspective of obligations committed without coercion (**‘free and voluntarily’**), the Court has addressed a **possible reduction** of the level of protection of EU values compared to the time of accession. The Court has made clear that “compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction [!] in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU. Member States are thus required to ensure that, in the light of that value, any regression [!] of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary”.<sup>719</sup> While it might sound obvious, this statement of the Court (Grand Chamber) is an important contribution in a ‘Community (or Union) of values’. The question that remains to be answered is how possible **violations** of these obligations can be **enforced**. This leads us to the next section.

### 3.5 Implications (Justiciability and Restrictions)

After these four scopes (*ratione temporis, materiae, personae* and *limitis*), let us now turn to the implications of EU values, including their justiciability and possible restrictions.<sup>720</sup>

<sup>717</sup>Cf. Drinóczi and Bień-Kacala (2019).

<sup>718</sup>ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 160. ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 50.

<sup>719</sup>ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 162. ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 51.

<sup>720</sup>For another aspect, i.e. the new ‘Justice, Rights and Values Fund’ in the general budget of the Union, see Regulation (EU) 2021/692 of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme [...], OJ 2021 L 156/1 (see also the related Joint declaration of the European Parliament and the Council on financing the Union values strand in 2021, OJ 2021 CI 168/1).

### 3.5.1 *Justiciability and Other Implications of Values*

*The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.*—Court of Justice (2022)<sup>721</sup>

As we have already seen above,<sup>722</sup> values can be approached from **different angles**. These perspectives comprise, amongst others, social science, political science, and law.

According to **social science**, “values are the basic attitudes of people who stand out due to their special firmness, conviction of correctness and emotional foundation”.<sup>723</sup> Likewise, personal values can also be seen as virtues, inner dispositions, or character traits, which also need to be practised and cultivated. These virtues cannot be enforced in a legal procedure.

Values in the sense of **political science** are “guiding ideas for the activities of political institutions based on political-philosophical value judgements”.<sup>724</sup> As political science and law are closely related, values in this sense can also have a certain impact, but more likely rather an indirect one on the legal justiciability of values.

Finally, in **legal science**, values, or basic values (*valeurs fondamentales*) are described as “assets that a legal system recognizes as predetermined and imposed”.<sup>725</sup> In this latter field, the following question remains: What is the legal value of the EU’s common values? In which way can they be enforced in a legal procedure?

As we have also already seen, values are *per se* rather **abstract**. Unlike principles or fundamental rights, values do **not have** specific legal consequences or addressees.<sup>726</sup> In a court case, a **principle** such as proportionality can lead to a non-justifiable restriction of fundamental freedoms being qualified as incompatible with EU law. Based on the primacy of EU law, the practical impact is then the non-application of this mentioned provision. As mentioned above,<sup>727</sup> **fundamental rights** generally grant subjective rights, unless a provision, for example of the CFR, is to be qualified merely as a ‘CFR principle’. According to Art 52(5) CFR, these ‘CFR principles’ are “judicially cognisable only [!] in the interpretation of such acts

<sup>721</sup> ECJ judgment of 16 February 2022, *Hungary v Parliament and Council [conditionality]*, C-156/21, EU:C:2022:97, para 127.

<sup>722</sup> Section 1.5.2.

<sup>723</sup> Di Fabio (2004), p. 3; translated with DeepL.

<sup>724</sup> Schmitz (2005), p. 80; translated with DeepL (N.B. Italic emphases in original German text).

<sup>725</sup> Reimer (2003), p. 209; translated with DeepL.

<sup>726</sup> Reimer (2003), p. 209; Calliess (2004), p. 1034.

<sup>727</sup> Section 3.2.1.4.

and in the ruling on their legality”.<sup>728</sup> This would again be an indirect impact. In terms of a direct impact, CFR rights have had a huge practical impact on the CJEU case-law, especially since the entry into force of the Lisbon Treaty.

Sommermann<sup>729</sup> has offered the following solution concerning the justiciability of values. According to him, values are open legal concepts in which a distinction can be made between a justiciable hard **conceptual core** (“*Begriffskern*”) and a non-justiciable soft **conceptual periphery** (“*Begriffshof*”). Art 7(1) TEU, for instance, refers to “a clear risk of a serious [!] breach by a Member State of the values referred to in Article 2 [TEU]”. This ‘serious breach’ can be interpreted as referring to the conceptual core of values. Hence, a breach relating only to the periphery of a value cannot lead to an Art 7 TEU proceeding.<sup>730</sup>

This distinction of core and periphery also has to be seen from the perspective of evolution and the relationship between law and ethics.<sup>731</sup> Such a development (**evolution**) will be easier to accept concerning the periphery, but more difficult concerning the core of a value. From a vertical perspective (EU and Member States) and with increasing integration, the conceptual core can grow, while maintaining a certain elasticity due to the changing societal context.<sup>732</sup> At the interface of **law and ethics**, Böckenförde<sup>733</sup> has discussed this distinction of core and periphery concerning human dignity. He has basically accepted a passerelle between law and ethics via opening clauses (“*Schleusenbegriffe*”), such as public policy<sup>734</sup> (“*öffentliche Ordnung*”). Although he accepts that human dignity is an open concept with a certain degree of variation, in his view, this does not apply to the solid core.

The values enshrined in Art 2 TEU can have **various implications**. In a similar way as mentioned above,<sup>735</sup> on a **timeline** we can distinguish (1) the time before joining the EU, (2) EU membership, as well as (3) the timeframe of a country having left the EU.

The most important implications for a country that (**ad 1**) wants to join the EU are the requirements of **Art 49 TEU**, according to which a European State has to respect the values of Art 2 TEU and has to be committed to promote them, to be able to

<sup>728</sup>N.B. the expression ‘of such acts’ refers to “legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and [to] acts of Member States when they are implementing Union law, in the exercise of their respective powers”.

<sup>729</sup>Sommermann (2020), p. 267.

<sup>730</sup>This will be of relevance for first sentence values.

<sup>731</sup>Those two perspectives can obviously also be combined, as ethics (the philosophical approach) was different in ancient Greece (e.g. the permissibility of slavery) than today.

<sup>732</sup>Sommermann (2020), p. 267.

<sup>733</sup>Böckenförde (2004), p. 1225.

<sup>734</sup>While he referred to the German concept of public policy, the same would apply to the EU notion.

<sup>735</sup>Section 3.4.

become a member of the Union.<sup>736</sup> As mentioned above,<sup>737</sup> based on different chapters,<sup>738</sup> the Commission “undertakes a very profound screening of the form and functioning of government, of the exercise of the rule of law with all its different facts and of the observation of fundamental rights”.<sup>739</sup> Jumping to a country (**ad 3**) having left the EU, the values of the EU will be binding insofar as they occur in the agreement “setting out the arrangements for [a country’s] withdrawal”, respectively, in the “framework for its future relationship with the Union”, as foreseen in Art 50 (2) TEU.<sup>740</sup>

Most questions will arise in relation to (**ad 2**) the period of upheld EU membership. In this case, we need to distinguish, **first**, the structural difference of the two sentences of Art 2 TEU,<sup>741</sup> as well as, **second**, the implications for the EU itself, its Member States and individuals. The two issues are to some extent combined, as the first sentence of Art 2 TEU addresses the EU, which is founded on these values, and the second sentence addresses the level of the Member States, more precisely a society (N.B. singular) in these Member States.

*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. (Emphases added.)*

According to Sommermann, the reference to ‘societal values’ is to be understood in the sense that the aim both in the Member States and the Union must be to improve the framework conditions for societal values.<sup>742</sup> According to literature,<sup>743</sup> the values of the **second sentence** cannot be enforced against **Member States** via the Art 7 TEU procedure (see below). This procedure has mainly a political, but also a legal component, where the ECJ has jurisdiction (Art 269 TFEU) to decide on the legality of an act adopted by the European Council or by the Council, however only regarding procedural aspects of Art 7 TEU. Hence, in this procedure, values can be justiciable in the sense of triggering such a procedure, but with a limited ECJ

<sup>736</sup>Prot No 24 on asylum for nationals of Member States of the Union (recital 5, OJ 2016 C 202/304) also refers to Art 49 TEU.

<sup>737</sup>Section 3.4.1.

<sup>738</sup>On the current 35 chapters, see [https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en).

<sup>739</sup>Erlbacher (2019), p. 315.

<sup>740</sup>See also *supra*, Sect. 3.4.1.

<sup>741</sup>The argument that Art 2 TEU would lack the status of law addressed by some, has to be clearly rejected, as also confirmed by von Bogdandy and Spieker (2020a), p. 533; with further details.

<sup>742</sup>Sommermann (2020), p. 270.

<sup>743</sup>Pechstein (2018), p. 15; Obwexer (2020), para 49.

jurisdiction. As this “nuclear option”<sup>744</sup> has never been triggered and at the same time come to an end so far, it remains to be seen, how the ECJ will deal with the distinction between the content-related and the procedural perspectives.

While these concepts of the second sentence are sometimes referred to as “valuing features of society”,<sup>745</sup> Art 2 TEU addresses them as ‘values’.<sup>746</sup> Nevertheless, despite the terminology of this provision (‘values’), the two sentences have different legal meanings. Let us first turn to the second sentence.

- **Pluralism** and **tolerance** are the two values, which can rather give guidance for the interpretation of EU law, and have programmatic character, due to their rather undetermined content. They can neither be invoked at EU level, for instance, in an action for annulment (Art 263 TFEU),<sup>747</sup> nor can they be invoked in an Art 7 TEU procedure against **Member States**. The same will hold true for infringement proceedings, initiated by the Commission (Art 258 TFEU) or another Member State (Art 259 TFEU). The only possibility, although not very likely, in all these cases would be a combination with other Art 2 TEU values. Pluralism (of the media) could be an additional ‘argument’ in case of democracy, a first sentence value. The largely undetermined content of both pluralism and tolerance makes it also difficult to have a direct impact not only in the case of the EU, but also in case of **individuals**. In the latter case, these two values could rather be seen as virtues, which individuals can voluntarily exercise, but cannot be forced to do so.
- A similar analysis applies in case of **justice**, which has been described as hardly justiciable.<sup>748</sup> Arguing in an action for annulment (Art 263 TFEU) that EU secondary law contradicts the concept of justice will be very unlikely to be successful,<sup>749</sup> unless combined with other values, for instance, non-discrimination or the rule of law. This argument also applies in case of **Member States**, both regarding an Art 7 TEU procedure,<sup>750</sup> as well as in the case of infringement proceedings. If at all, justice could again be a supporting argument. In case of **individuals**, justice could also be seen as a virtue.
- **Non-discrimination** and **equality between women and men** are less challenging, as besides being a value (Art 2 TEU), they can also be qualified as general

<sup>744</sup>EC communication ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 2.

<sup>745</sup>Obwexer (2020), para 47, “wertende Merkmale der Gesellschaft”; see also Hilf and Schorkopf (2021), para 43.

<sup>746</sup>A more restrictive approach would be to interpret the wording of ‘values’ in the 2nd sentence only as a reference to the 1st sentence.

<sup>747</sup>Of course, other processes may also be affected.

<sup>748</sup>See, *supra*, note 409.

<sup>749</sup>See, *supra*, note 415.

<sup>750</sup>Obwexer (2020), paras 48–49.

principles of EU law and as fundamental rights.<sup>751</sup> In this capacity, they are closely linked to ‘human rights’ addressed in the first sentence. This affects both the **EU** (e.g., action for annulment), as well as the **Member States**, however rather in case of infringement proceedings. An Art 7 TEU proceeding solely based on a violation of non-discrimination or equality between women and men would not be very likely. In case of **individuals**, these two values can become justiciable not only vertically in relation to public authorities (EU and Member States), but horizontally, especially in case of implemented non-discrimination directives. The ECJ, as mentioned above, has answered the question of the horizontal application of Art 21 CFR (non-discrimination) in the affirmative.<sup>752</sup>

- **Solidarity** can also be qualified as a general principle of EU law and as a fundamental right, besides being a value. This makes it easier in terms of its justiciability. We have seen solidarity as an argument in an action for annulment of the **EU**’s ‘relocation decision’. While the Court has referred to the ‘principle’ of solidarity,<sup>753</sup> I have argued so far for a broader view of ‘concepts’, comprising various elements that can be qualified as a value, as a (general) principle of EU law, as an EU objective, and/or as a fundamental right. The Court seems to have a clear preference to refer to principles, to avoid the thorny discussion of the justiciability of a value as such, respectively, first vs. second sentence values. In the same relocation case, the Court has applied the principle of solidarity and fair burden sharing (Art 80 TFEU) between **Member States**.<sup>754</sup> In the field of energy solidarity, the Court has rejected the German argument that the principle of solidarity is too ‘abstract’, and by referring to its Art 80 TFEU related case-law has confirmed the binding legal effects of Art 194(1) TFEU on both the Member States and institutions of the EU.<sup>755</sup> Solidarity as a principle can also be invoked in case of infringement proceedings.<sup>756</sup> Merely the alleged violation of solidarity cannot be the basis for a procedure under Art 7 TEU.<sup>757</sup> Solidarity between

<sup>751</sup> ECJ judgement of 18 December 2014, *FOA*, C-354/13, EU:C:2014:2463, para 32, “the fundamental rights which form an integral part of the general principles of EU law include the general principle of non-discrimination. That principle is therefore binding on Member States where the national situation at issue in the main proceedings falls within the scope of EU law”.

<sup>752</sup> See, *supra*, Sect. 3.3.2, note 651.

<sup>753</sup> ECJ judgement of 6 September 2017, *Slovakia vs. Council [relocation]*, joined cases C-643/15 and C-647/15, EU:C:2017:631, paras 252 and 253, et passim.

<sup>754</sup> ECJ judgement of 6 September 2017, *Slovakia vs. Council [relocation]*, joined cases C-643/15 and C-647/15, EU:C:2017:631, para 291.

<sup>755</sup> ECJ judgement of 15 July 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:598, paras 42–44, 67.

<sup>756</sup> ECJ judgement of 2 April 2020, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, para 97.

<sup>757</sup> Pechstein (2018), p. 16.

**individuals** would be an important concept especially in the current pandemic. Call it solidarity or the rule ‘that you are to love your neighbour’,<sup>758</sup> a ‘spirit’ of solidarity can lead to behaviour that is considerate of fellow human beings. However, this would again rather be a virtue than a justiciable value.

Let us now address the same question regarding those values addressed in the **first sentence** of Art 2 TEU, on which the EU is founded. As a general observation it can be stated that these first sentence values are binding on the EU in terms of their wording,<sup>759</sup> but are of course also relevant for the Member States.

- As we have seen so far, **human dignity** is a concept that fulfils all elements, except for an EU objective. Hence, a value, a human right, respectively, a fundamental right (besides being the basis of fundamental rights), a general principle of law, as well as a principle. In case of the **EU**, in an action for annulment, human dignity has been an argument to challenge the directive on the legal protection of biotechnological inventions.<sup>760</sup> In case of **Member States**, human dignity has sometimes been encapsulated in the legal ‘reason of justification’ of ‘public policy’, which makes it justiciable. While most cases mentioned above were rendered in preliminary ruling procedures, similar questions would be seen similarly also in infringement proceedings. While it would be legally possible, it is less likely and would require a major infringement to trigger an Art 7 TEU procedure. In case of **individuals**, human dignity can be justiciable as a general principle of EU law (cf. the *Omega* case), or via various directives comprising this concept (in the field of migration, the services directive, the EU citizens’ directive, the Schengen borders code, to name but a few). Questionable tests to prove an asylum seeker’s sexual orientation have been clearly rejected by the Court as an infringement of human dignity. Hence, also an impact on individuals, respectively, a proof for the justiciability of human dignity.
- The ‘**values trinity**’ of democracy, the rule of law, and human rights has prominently figured in various documents covered so far.<sup>761</sup> Human rights and the rule of law “cannot be equated” but are “interdependent” and overlap with

<sup>758</sup>Cf. for instance, UK House of Lords decision of 26 May 1932, *Donoghue vs. Stevenson*, [1932] UKHL 100, “The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”. Müller-Graff (2021), para 102 has referred to the rule ‘that you are to love your neighbour’ in the context of ‘human dignity’.

<sup>759</sup>See also the above-mentioned articles on the EU objectives (Art 3 TEU), the institutional framework (Art 13[1] TEU), and the external relations (Art 21[1] TEU).

<sup>760</sup>ECJ judgement of 9 October 2001, *Netherlands vs. Parliament and Council*, C-377/98, EU: C:2001:523, para 70.

<sup>761</sup>The Copenhagen criteria, the Commission’s rule of law communication from 2014, as well as in the Brexit deal (TCA), to name but a few.



regard to the requirement of effective legal protection.<sup>762</sup> These values play an important role at all three levels. In case of the **EU**, the justiciability is clear from various sources. Early on in *Les Verts*, the ECJ has stated that the Community (now EU) is “based on the rule of law”.<sup>763</sup> Although the EU is sometimes criticised for its democratic deficit, the Court has clearly addressed democracy in terms of the participation of the European Parliament in the legislative process.<sup>764</sup> Human rights are binding for the EU via Art 51(1) CFR, respectively, Art 6 TEU. In the preliminary ruling-based case *Schecke*, the Court has declared provisions of EU secondary law as invalid, because of breaching CFR-based rights (especially Art 8, data protection).<sup>765</sup> The same analysis holds true concerning **Member States**. In the above-mentioned case of *Les Verts*, the ECJ has also addressed the Member States, which are bound by the rule of law. The CFR rights via the same Art 51(1) CFR also bind them, although to a smaller extent.<sup>766</sup> Democracy is binding on the Member States, for instance, in case of municipal elections (Art 20[2] [b] TFEU). Both a directive and Art 40 CFR add up to this concept, making it clearly justiciable.<sup>767</sup> **Individuals** can rely on **democracy**-related rights, for instance, in case of an EU citizens’ initiative (ECI), as further clarified in EU secondary law. As the Court has clarified in *Puppinck*, “the particular added value of the ECI mechanism resides not in certainty of outcome, but in the possibilities and opportunities that it creates for Union citizens to initiate debate on policy within the EU institutions”.<sup>768</sup> **Human rights** are clearly justiciable; the special situation of ‘CFR principles’ has already been mentioned (Art 52[5] CFR). CFR rights can obviously be invoked by individuals in vertical situations in relation to public authorities (EU, Member States). As mentioned above,<sup>769</sup> the Court has accepted that a CFR provision (Art 21, non-discrimination), which can also be qualified as a ‘a general principle of EU law’ and which is further defined in an EU directive’ can “confer on individuals a right which they may rely on as such in disputes between them [i.e., horizontally] in a field covered by EU law”.<sup>770</sup> Art 21 CFR also prohibits

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<sup>762</sup>Schroeder (2016), p. 25.

<sup>763</sup>ECJ judgement of 23 April 1986, *Les Verts vs. Parliament*, C-294/83, EU:C:1986:166, para 23.

<sup>764</sup>ECJ judgement of 14 June 2016, *Parliament vs. Council [pirates]*, C-263/14, EU:C:2016:435, para 70.

<sup>765</sup>ECJ judgement of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09, EU:C:2010:662.

<sup>766</sup>See Sect. 3.3.2, note 638.

<sup>767</sup>See, *supra*, note 167.

<sup>768</sup>ECJ judgement of 19 December 2019, *Puppinck and Others vs. Commission*, C-418/18 P, EU:C:2019:1113, para 70.

<sup>769</sup>See, *supra*, Sect. 3.3.2, note 651.

<sup>770</sup>ECJ judgement of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, para 76. See also ECJ judgement of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paras 76–82, respectively, ECJ judgement of 6 November 2018, *Bauer*, joined cases C-569/16 and C-570/16, EU:C:2018:871, para 92 (on Art 31[2] CFR, concerning the annual period of paid leave).

discrimination due to “membership of a national minority”. Hence, also this value of the first sentence is covered by this analysis. The last value of this trinity, the **rule of law**, also impacts on individuals. Within the rule of law, AG Bobek has recently analysed the relationship of three provisions concerning ‘judicial independence’, as one element of this value. This concept is linked to Art 19(1) second sentence TEU (effective legal protection), Art 47 CFR (right to an effective remedy and to a fair trial), as well as Art 267 TFEU (preliminary ruling proceeding). As Bobek stated, “there is *only one and the same principle* of judicial independence”, which, however, can lead to different outcomes, as these three provisions differ in scope and purpose.<sup>771</sup> While Art 19(1) TEU “contains an extraordinary remedy for extraordinary situations” and requires “breaches of a certain seriousness and/or of a systemic nature”, Art 47 CFR “embodies a subjective right of any party to proceedings” and “requires a detailed assessment of all the circumstances that are specific to the case in question”.<sup>772</sup> In this context, the justiciability of the rule of law and its various elements (legality, legal certainty, prohibition of arbitrariness, effective judicial review, as well as equality before the law), amongst others, takes place via Art 47 CFR.

- As we have seen above,<sup>773</sup> **equality** can be qualified as a value, as a general principle of EU law and a fundamental right (Art 20 CFR). For the relationship between the latter provision and Art 21 CFR (non-discrimination), the author has suggested to see it as two sides of the same coin. This leads to the interesting situation of dealing with a coin that combines two values (respectively, concepts), two (equality and human rights) from the first and one from the second sentence of Art 2 TEU. Following this approach, a similar analysis as mentioned above with regard to non-discrimination (respectively, human rights) applies. Hence, this ‘coin’ affects both the **EU** (e.g., action for annulment) and the **Member States**, however rather in case of infringement proceedings. An Art 7 TEU proceeding solely based on a violation of non-discrimination or equality between women and men would not be very likely. In case of **individuals**, this ‘coin’ can become justiciable not only vertically in relation to public authorities (EU and Member States), but horizontally especially in case of implemented non-discrimination directives, as well as horizontally as confirmed by the ECJ with regard to Art 21 CFR (non-discrimination). The Court’s reluctance to apply Art 20 CFR (equality before the law) to develop new criteria (e.g., obesity) beyond existing EU primary and secondary law has already been mentioned.<sup>774</sup>

<sup>771</sup> AG Bobek opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, joined cases C-748/19 to C-754/19, EU:C:2021:403, paras 162 (no emphases added) and 163. See also AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, paras 35–42.

<sup>772</sup> See also AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, paras 39–40. Briefly to mention that the purpose of Art 267 TFEU in this context is to define “the interlocutors of the Court”, para 50 (no emphasis added).

<sup>773</sup> Section 3.2.1.8.

<sup>774</sup> Section 3.2.1.8, around note 455.

- The last first sentence value of **freedom** proves that a generalising analysis of first vs. second sentence values is not differentiated enough. First, it much depends on which freedom one has in mind, as freedom as a value is not defined. As covered above, one could think about various possible emanations, the AFSJ, or the economic fundamental freedoms of the EU's internal market. In case of the **EU**, it is not likely that a justiciable version of the value of freedom could be successfully invoked in an action for annulment of EU secondary law. If at all, this could only be the case if using freedom as a supporting argument. As mentioned above, freedom can rather give "guidance for the interpretation and development of EU law"<sup>775</sup> and has not been qualified as a general principle of EU law.<sup>776</sup> For the same reasons, freedom on its own cannot be seen as justiciable in case of **Member States**, both with regard to Art 7 TEU, as well as in the case of infringement proceedings. Likewise, freedom could be a supporting argument alongside other justiciable values. Finally, in the case of **individuals**, the same analysis applies, i.e., as a supplementary argument, unless freedom is taken as a fundamental right or as an economic fundamental freedom. In the latter two cases, justiciability can clearly be confirmed.

These key findings can be **summarised** as follows:

According to literature, the second sentence values cannot be enforced via the **political Art 7 TEU** procedure (see below).<sup>777</sup> From the first sentence, one might have to add freedom.

**In law**, justice, pluralism, and tolerance have been described as **hardly justiciable**, hence three second sentence values.<sup>778</sup> The same analysis applies for the first sentence value of freedom, unless seen as an economic fundamental freedom or a fundamental right. However, one concept (e.g., justice) can be twinned with another one (e.g., rule of law) to become effective, as can be seen in recent case-law.<sup>779</sup>

The first sentence values of human dignity, democracy, equality, the rule of law and respect for human rights (including those of minorities) are **justiciable**. Either in themselves, or as concepts, due to the dual or multiple qualification as principles, general principles of law, etc. The second sentence values of non-discrimination, solidarity and equality between women and men are justiciable, as they can also be qualified as (general) principles (of law). As mentioned in an opinion on energy solidarity, "even though the principle of solidarity is multifaceted and deployed at different levels, its importance in primary law as a value and an objective in the

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<sup>775</sup> Klamert and Kochenov (2019), p. 25.

<sup>776</sup> Section 3.2.1.11.

<sup>777</sup> Obwexer (2020), para 49.

<sup>778</sup> See also Heintschel von Heinegg (2018), p. 64.

<sup>779</sup> *Supra*, note 432.

process of European integration<sup>[...]</sup> is such that it may be regarded as significant enough to create legal consequences”.<sup>780</sup>

This question of the justiciability of EU values is closely related to how much a concept is or is not **determined** content-wise. Non-discrimination, referred to in this book as a ‘key principle’ of EU law is much determined, based on EU secondary law and extensive case-law. In case of solidarity, one might assume less clarification, but as we have seen above, we have found quite some elucidation. Tolerance and pluralism figure rather at the end of those concepts whose content is sufficiently determined. In addition to this question of the degree of determination of the content of a certain concept, one can add the approach of a justiciable hard **conceptual core** (“*Begriffskern*”) and a non-justiciable soft **conceptual periphery** (“*Begriffshof*”), as mentioned by Sommermann.<sup>781</sup>

A common phenomenon of enforcing EU values is the approach to draw on their **parallel legal quality** as **principles**. We have seen this in case of **solidarity** in the energy sector,<sup>782</sup> as well as in the case of **democracy** and **equality** in ‘rule of law’-proceedings. In the latter case, Hungary had tried to challenge an EP resolution in an Art 7 TEU proceeding. The main question centred on Art 354 TFEU, which stipulates the voting requirements (not counting abstentions as votes cast when adopting the contested resolution). The ECJ stated that “Article 354 TFEU, read in the light of the principle [!] of democracy and the principle [!] of equal treatment, it should be noted that those two principles are values [!] on which the European Union is founded, in accordance with Article 2 TEU”.<sup>783</sup> In the end, the Court rejected both arguments of Hungary and neither saw an infringement of the principle of democracy, nor of the principle of equality.<sup>784</sup>

Besides these Art 2 TEU values, **soft-law**-based values as in the case of the 2006 Health Conclusions can obviously not be justiciable in a direct way. If considered in the interpretation of legally binding EU documents, they can have an indirect impact. In the context of a sectoral policy (social policy), the Court has argued that the “fact that the objectives of [such a provision] are in the nature of a programme does not mean that they are deprived of any legal effect”, as they “constitute an important aid,

<sup>780</sup> AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218, para 70, “may be regarded as significant enough to create legal consequences”.

<sup>781</sup> Sommermann (2020), p. 267.

<sup>782</sup> AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218; GC judgement of 10 September 2019, *Poland vs. Commission [energy solidarity]*, T-883/16, EU:T:2019:567, para 69.

<sup>783</sup> ECJ judgement of 3 June 2021, *Hungary vs. Parliament [votes cast]*, C-650/18, EU:C:2021:426, para 94.

<sup>784</sup> ECJ judgement of 3 June 2021, *Hungary vs. Parliament [votes cast]*, C-650/18, EU:C:2021:426, paras 95–97 (democracy) and 98–100 (equality).

in particular for the **interpretation** of other provisions of the Treaty and of secondary [...] legislation”.<sup>785</sup>

Two of the elements already mentioned,<sup>786</sup> are to be explored in more detail, the sanctions procedure of Art 7 TEU, as well as the ‘conditionality’ mechanism.

The procedure of **Art 7 TEU** has been a reaction to the Austrian government in 2000,<sup>787</sup> and can be qualified as mainly a political tool, as the key involved EU institutions are the Council (of Ministers) and the European Council.

In a **first step** (**‘risk of a serious breach’**), the **Council** “may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2” (para 1). The initiative can come from several EU institutions<sup>788</sup> and requires a quite high threshold in the Council (“acting by a majority of four fifths of its members”), in addition to the prior “consent” of the European Parliament. In terms of the already mentioned<sup>789</sup> *‘audiatur et altera pars’* principle, before “making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure”. Another procedural safeguard can be found in the last sentence of para 1, according to which the Council “shall regularly verify that the grounds on which such a determination was made continue to apply”.

In a **second step** (**‘existence of a serious and persistent breach’**), the **European Council** “may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2” (para 2). The initiative can come from two EU institutions<sup>790</sup> and requires an even higher threshold, that is to say unanimity (!) in the European Council, besides again the prior “consent” of the European Parliament. In addition to this approval of the EP, in terms of procedural safeguard, again this decision can only be taken “after inviting the Member State in question to submit its observations”. Both this unanimity in the European Council (second step), as well as the “majority of four fifths of its members” in the Council (first step) are the reasons why Art 7 TEU, which has been referred to as a “nuclear option”,<sup>791</sup> is very difficult to trigger. This is especially true if two procedures are

<sup>785</sup> ECJ judgement of 29 September 1987, *Giménez Zaera vs. Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social*, C-126/86, EU:C:1987:395, para 14.

<sup>786</sup> *Supra*, at the end of Sect. 3.2.1.3.

<sup>787</sup> Cf. Hummer and Obwexer (2000) and Hummer and Pelinka (2002).

<sup>788</sup> Notably, “[o]n a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission [...]”.

<sup>789</sup> Section 3.2.1.7.

<sup>790</sup> Notable, “on a proposal by one third of the Member States or by the Commission [...]”.

<sup>791</sup> EC communication ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014, p. 2.

initiated against two countries (e.g., Poland<sup>792</sup> and Hungary<sup>793</sup>), which will mutually block the decision (unanimity<sup>794</sup>) in the European Council concerning the other country. Of course, the same would apply, if there would be only one procedure against one country that is supported by at least one other Member State.

In a **third** step (**‘sanctions’**) and based on<sup>795</sup> the second step of the European Council, the ball is then back in the court of the **Council** (of Ministers). For deciding on the sanctions, only a qualified majority is required in the Council (para 3). A proposed voting in the Council, the latter “may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council”. As always in such a situation, the tricky question is to design tailored sanctions that affect the right and not the wrong addresses. Former ECJ judge Maria Berger mentions that some sanctions against Austria at the time<sup>796</sup> were not only “ridiculous, but also counterproductive in the sense that the Austrian population rallied behind the then ÖVP/FPÖ government and the then Austrian Chancellor could credibly threaten a referendum on Austria’s exit from the EU”.<sup>797</sup> A similar challenge arises in case of sanctions against third countries. Therefore, that is why in this decision on sanctions according to para 3, the Council “shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons”. These possible sanctions do explicitly not comprise the possibility to exclude a Member State from the EU. What is explicitly foreseen is the fact that “obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.”

In a **fourth** step (**‘amend or revoke’**), it is again the Council that can decide according to the same requirement (qualified majority), “subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed” (para 4).

As Art 7(5) TEU clarifies, “[t]he voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in [Art 354 TFEU]”. This essentially means that the **state in question does not vote**. Based on the wording of this article, Griller<sup>798</sup> has concluded that it is not possible to join two proceedings into one, to overcome the above-mentioned blocking situation.

<sup>792</sup>EC proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of **Poland** of the rule of law, COM(2017) 835 final 20.12.2017.

<sup>793</sup>EP resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by **Hungary** of the values on which the Union is founded (2017/2131(INL)), OJ 2019 C 433/66.

<sup>794</sup>On Art 354 TFEU and the exclusion of the Member State concerned, see *infra*, note 798.

<sup>795</sup>“Where a determination under paragraph 2 has been made [. . .].”

<sup>796</sup>I.e., before Art 7 TEU.

<sup>797</sup>Berger (2021), p. 13; translated with DeepL.

<sup>798</sup>Griller (2020), p. 151.

**To summarise**, Art 7 TEU is mainly a political procedure, however also with some legal components, as the ECJ has limited jurisdiction for procedural questions (“solely of the procedural stipulations”, Art 269 TFEU). Likewise, the sanctions (suspension voting or other rights) clearly pertain to the legal<sup>799</sup> sphere. Besides the political vs. legal qualification, one can clearly state that Art 7 TEU so far has not proven successful. Referring to Art 7 TEU as the ‘nuclear option’ can refer both to the idea that it can be seen as the last resort, as well as to these high thresholds for decision making both in the Council (four fifths majority, for the first step), as well as in the European Council (unanimity, for the second step). The relationship between Art 7 TEU and the infringement proceedings of Art 258 TFEU (EC vs. MS) and Art 259 TFEU (MS vs. MS) has been discussed regarding a possible parallel application. Griller has argued convincingly that major (systematic) breaches can be the object of an Art 7 TEU procedure, single elements can be part of an infringement proceeding.<sup>800</sup>

Based on the afore-mentioned idea that the EU is more than a cash machine, this led to the idea of protecting the EU’s budget from rule of law breaches (the so-called ‘**conditionality**’ mechanism of Regulation 2020/2092<sup>801</sup>), which has been viewed quite critically in literature.<sup>802</sup> From the different values of Art 2 TEU, this mechanism only applies for one of them, the ‘**rule of law**’. Despite this focus, Art 2 (a) takes a broader approach by emphasising that the “rule of law shall be understood having regard to the other [!] Union values and principles enshrined in Article 2 TEU”. The **link** of the rule of law to budgetary issues is established via “the principles of sound financial management”, for which the “respect for the rule of law is an essential precondition” (recital 7). This regulation lists various other measures supporting respect for the rule of law (recital 14) and is based on the relevant ECJ case-law (recital 10) and even provides a **definition**<sup>803</sup> of the rule of law, which corresponds to what has been mentioned above.<sup>804</sup> The **procedure**<sup>805</sup> shall be “objective, impartial and fair, and should take into account relevant information

<sup>799</sup> See also von Bogdandy and Spieker (2020a), p. 534.

<sup>800</sup> Griller (2020), p. 161.

<sup>801</sup> Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L1 433/1 (see also the other documents in this OJ edition). See also European Council, Conclusions (10./11.12.2020), EUCO 22/20, part I.

<sup>802</sup> Alemanno and Chamon (2020) and Mader (2021). Less critical, Tridimas (2020).

<sup>803</sup> Art 2 (a): “‘the rule of law’ refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU”. See also Art 3 (breaches of the principles of the rule of law), which can be seen as a negative definition, as well as Art 4, which should also be taken into account in the interpretation.

<sup>804</sup> Section 3.2.1.3.

<sup>805</sup> More precisely, the identification of breaches by the Commission.



from available sources and recognised institutions” (recital 16) and the measures adopted have to respect the principle of proportionality (recital 18). Sanctions must be regularly monitored by the Commission and the situation eventually has to be reassessed (recital 24). It is only consistent, that some concepts of Art 2 TEU are also mentioned in this regulation for the “procedure for adopting and lifting the measures”, namely, “the principles of objectivity, non-discrimination and equal treatment of Member States”, besides a “non-partisan and evidence-based approach” (recital 26). Like in case of Art 7 TEU, the **impact on individuals** (“potential impact on final recipients and beneficiaries”) must be taken into account (recital 19).<sup>806</sup> As Tridimas emphasises, the regulation refers to ‘breaches’ (plural), which “may suggest that a single breach does not suffice”.<sup>807</sup>

According to Art 288(2) TFEU, a regulation has general application, is binding in its entirety, and is directly applicable in all Member States. The Commission has announced to issue **guidelines**, which has been criticised by the European Parliament as not being necessary for the application of this regulation.<sup>808</sup> Besides the more general issue of hard- (EU regulation) vs. soft-law (these guidelines), controversy centres on a **possible delay** of such a procedure. Based on the European Council Conclusion from December 2020<sup>809</sup> the Commission wants to issue the guidelines only after (!) an introduced action for annulment regarding the regulation. Parliament has criticised this delay and had announced<sup>810</sup> an action for failure to act (Art 265 TFEU) against the Commission. Tridimas aptly states that such guidelines can provide more clarity (transparency, foreseeability, consistency), but cannot be seen as a *conditio sine qua non* for the application of the regulation.<sup>811</sup> In its recent rule of law report, the Commission has clarified that the “Regulation applies as of

<sup>806</sup>In two opinions of the same day, AG Sánchez-Bordona has proposed to dismiss two actions brought by Hungary and Poland against the conditionality regime; AG Sánchez-Bordona opinion of 2 December 2021, *Hungary v Parliament and Council*, C-156/21, EU:C:2021:974; AG Sánchez-Bordona opinion of 2 December 2021, *Poland v Parliament and Council*, C-157/21, EU:C:2021:978. In two judgments, both adopted by the ‘full court’, these two complaints were dismissed: ECJ judgment of 16 February 2022, *Hungary v Parliament and Council [conditionality]*, C-156/21, EU:C:2022:97; ECJ judgment of 16 February 2022, *Poland v Parliament and Council [conditionality]*, C-157/21, EU:C:2022:98.

<sup>807</sup>Tridimas (2020), pp. XIII–XIV.

<sup>808</sup>European Parliament (2021b), pt. 1.

<sup>809</sup>European Council, Conclusions of 10–11 December 2020, EUCO 22/20, p. 2: “Should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after [!] the judgement of the Court of Justice so as to incorporate any relevant elements stemming from such judgement. The Commission President will fully inform the European Council. Until such guidelines are finalised, the Commission will not propose measures under the Regulation” (pt. 2c).

<sup>810</sup>European Parliament (2021a). See also EP resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582 (RSP)), OJ 2021 C 494/61.

<sup>811</sup>Tridimas (2020), p. XVII.



1 January 2021” and has committed itself to the fact that “any breach that occurs from that day onwards will be covered”.<sup>812</sup>

Art 2 TEU can become justiciable both in **combination** with other provisions, as well as **indirectly** via a value-conform interpretation of other provisions of EU or of national law. Both questions will be featured (in Chap. 4), after the next question of possible restrictions of values.

### 3.5.2 *Restrictions of Values*

After justiciability, one question that remains is the possibility of restrictions on the values of the EU. A common pattern in law is the two-step approach of a principle, which can be subject to certain exceptions. The fundamental freedoms of the internal market represent principles, from which exceptions may be made given a justifiable reason.

**Human dignity** as a fundamental right (Art 1 CFR) is qualified as “inviolable”. This would imply that no restrictions could take place. However, a too strict understanding could lead to a situation where any impact on human dignity as a possibly absolute right would lead to an infringement. Bührer has qualified human dignity in the context of the patentability of biotechnological inventions as an absolute character,<sup>813</sup> although one must keep in mind the wording of this particular directive in this field. We have also seen human dignity as an argument to qualify Art 4 CFR (no torture) as an absolute right,<sup>814</sup> comparable to ECtHR case-law. While the wording of Art 1 CFR is a strong argument for human dignity as a non-restrictable concept,<sup>815</sup> the preferable solution is to see human dignity as an inalienable right, which is only infringed if a certain **threshold** is reached. Instead of the typical principle and exception solution, the same solution (i.e., possibility to sort out certain cases) can be reached by deciding if a case needs to be classified below (i.e., no infringement) or above (i.e., infringement) the threshold. This approach would be in line with the above-mentioned<sup>816</sup> case where the Court has held that respect for human dignity leads to a **minimum standard**, in case of “a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty”.<sup>817</sup> A minor impact will not affect human dignity, however a situation, which “does not allow [a person] to

<sup>812</sup>EC ‘2021 Rule of Law Report. The rule of law situation in the European Union’, COM(2021) 700 final 20.7.2021, p. 29.

<sup>813</sup>*Supra*, Sect. 3.2.1.1, note 117.

<sup>814</sup>ECJ judgement of 5 April 2016, *Aranyosi and Căldăraru*, joined cases C-404/15 and C-659/15 PPU, EU:C:2016:198, para 85.

<sup>815</sup>See also Hilf and Schorkopf (2021), para 23.

<sup>816</sup>Section 3.2.1.1.

<sup>817</sup>ECJ judgement of 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218, para 92.

meet his most basic (!) needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation [is] incompatible with human dignity”.<sup>818</sup>

Fundamental or **human rights**, including those of *minorities*, can be restricted, unless they are qualified as absolute rights. In the famous *Gäfgen* case, the ECtHR has qualified the right not to be tortured (Art 3 ECHR) as an **absolute** right.<sup>819</sup> Most rights are **relative** rights, which can be restricted in accordance with the requirements of Art 52(1) CFR. According to this provision, “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be [1.] provided for by law and [2.] respect the essence of those rights and freedoms”. Additionally, according to “[3.] the principle of proportionality, limitations may be made only if they are necessary and genuinely meet [4.] objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.

We have seen that a value such as **freedom** cannot be unlimited. Based on the Kantian idea that one right or freedom ends, where another right or freedom begins, freedom is not unlimited and can conflict, for instance, with solidarity. There is no unlimited freedom of human behaviour in a pandemic and a community will only be able to overcome these challenges if individuals display a sense of solidarity with the vulnerable. Freedom in terms of a human right can be limited, as explicitly provided, for instance, in Art 5 ECHR (lawful detention after conviction, etc.). While these exceptions do not figure in Art 6 CFR (right to liberty and security), the CFR explanations do refer to Art 5 ECHR. Likewise, the economic fundamental freedoms can be limited by the well-known ‘reasons of justification’.

**Democracy** has various elements, **representative** and participatory ones. Both can be restricted. Art 3 of Prot No 1 ECHR provides for “free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. As the ECtHR has held, “[a]lthough those rights are important, they are not (!) absolute” and that “there is room for implied limitations”.<sup>820</sup> Hence, a temporary suspension of voting rights can be possible. In case of **participatory** democracy, the high rejection rate<sup>821</sup> of the EU citizens’ initiative clearly shows its limitations.

We have seen above that **equality** and **non-discrimination** are two sides of the same coin. Likewise, we have seen that there can be exceptions to these values. The same applies for equality between women and men, where positive discrimination (or affirmative action<sup>822</sup>) can be seen as one example.

The **rule of law**, **justice** and **solidarity** are ideals that should be attained. As mentioned above,<sup>823</sup> justice and solidarity can also be seen as two sides of a coin. For

<sup>818</sup> ECJ judgement of 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218, para 92.

<sup>819</sup> ECtHR judgement of 1 June 2010, *Gäfgen vs. Germany*, 22978/05, para 87.

<sup>820</sup> ECtHR judgement of 6 April 2000, *Labita vs. Italy*, 26772/95, para 201.

<sup>821</sup> Cf. Müller (2015), p. 192.

<sup>822</sup> Cf., for instance, Feinberg (2003).

<sup>823</sup> *Supra*, note 620.

all three values, the question is rather if these requirements are fulfilled, not if there can be exceptions. A legal system and society should strive for the goal of justice, as well as for solidarity. The legal system shall respect the requirements of the rule of law.

**Pluralism** and **tolerance** are broad concepts. For the same reasons why these values are not justiciable, the question of whether there can be restrictions on these broad concepts is superfluous.

Besides this question of possible restrictions, the other question covered in Sect. 3.5 (justiciability) is also linked to the relationship between Art 2 TEU and other provisions of EU primary or secondary law, including the CFR. This leads us to the **next** topic of relations in Chap. 4.

### 3.6 Lessons Learned

In addition to summaries of parts of this chapter (see Sect. 3.2.1.14 for the scope *ratione materiae*, and within Sect. 3.5.1), in the following the key ideas of the whole chapter shall be shortly highlighted and linked to the next chapters.

In terms of the scope *ratione temporis* we have seen the ‘**living instrument**’ character of both the CFR and EU values and the corresponding necessity to take into account changes in terms of both society and legislation. We have also seen a shift from a mainly anthropocentric to a more bio-centric approach (see *infra* Sects. 4.3.2.4 and 5.2). This ‘living instrument’ character is essential if abstract values shall be able to provide answers to new challenges, such as the pandemic, climate change (on the idea of precaution, see Sect. 4.3.2.3), or digitalisation (see Sect. 4.3.2).

An analysis of the various values (scope *ratione materiae*) has revealed the various **relations** between the values and other provisions of EU law. Human dignity has been qualified as the real basis of fundamental (or human) rights. In case of human rights (on vulnerable persons, see Sect. 4.3.2.1), we have seen the close connection between Art 2 TEU and the CFR, both in terms of structure and content. We have also seen the relations between justice and the rule of law, where the conditionality mechanism is an important reaction to the inadequate procedure of Art 7 TEU. Two values that are also closely related are equality and non-discrimination, which can be seen as two sides of the same coin.

From solidarity we can take-away the idea of going to a meta-level by referring to ‘**concepts**’, due to the manifold elements. For instance, solidarity can have a political, legal, ethical and social dimension. It can apply at various levels, i.e. between Member States, between institutions, between peoples or generations, etc. Underneath the meta-level notion of a ‘concept’ we can accommodate different elements of different legal quality, namely rather abstract values, more concrete legal principles,<sup>824</sup> and finally ‘CFR principles’ that can be qualified as less in the sense of

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<sup>824</sup>N.B. Besides EU objectives and general principles of EU law.

‘legal value’. Both EU values and ‘CFR principles’ can have an indirect impact in terms of contributing to the interpretation of other provisions of EU law.

In the context of solidarity, we have also seen the idea of addressing the necessity of **balance** (see Sect. 4.3.2.5). Likewise, another take-away is the combination of rights and obligations, where it remains to be seen, if this idea can also be transferred to human rights, complementing existing human rights with human obligations (see Sects. 4.3.2.2 and 5.3). We have also seen that values **cannot** be **unlimited**, as in case of freedom that necessarily has to be limited in a community (see Sect. 5.3) and therefore has to end, where the freedom of the next person begins.

Within the values of Art 2 TEU, we have also seen the idea of a **minimum approach**. In the spirit of the EU’s motto (‘united in diversity’), this means a more unified approach at the core, as well as more diversity at the periphery of a concept.

Outside Art 2 TEU, we have seen animal welfare as a new value. Besides those general values of Art 2 TEU, we have also seen these values in **specific** fields, as well as specific values. While sometimes not legally binding, this approach has the advantage of providing more clarification in a certain sector.

The scope *ratione personae* can briefly be summarised as entitling human beings (only rarely EU citizens only), and binding public authorities (EU and Member States). Individuals can be affected (in terms of both rights and obligations) via interpretation of other norms, especially EU Secondary law (on values and virtues, see Sect. 5.4).

The **implications** of EU values have to be seen in a differentiated manner with regard to the first vs. the second sentence of Art 2 TEU, as the values of the second sentence and freedom cannot be enforced via Art 7 TEU. In this context of enforcement, the above-mentioned parallel legal quality as values and principles can also be of relevance, as seen in the case of solidarity, democracy and equality. Justice, pluralism and tolerance are hardly **justiciable**; however, one concept (e.g., justice) can be linked to another one (e.g., the rule of law) to become effective. The justiciability of values is also related to the extent of determination of their content. Values can also be **restricted** (e.g., freedom, non-discrimination) in case of human dignity, it is advisable to qualify an infringement only above a certain threshold.

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# Chapter 4

## Relations



We have already seen so far that values (e.g., those of Art 2 TEU) cannot be seen in an isolated way. Various relations have already been identified, which shall be further elaborated in the following. These relations concern **first** the relationship of the values to each other (Sect. 4.1), including the ranking of values, **second** the relation to other provisions of EU law (Sect. 4.2), covering both primary and secondary EU law, as well as **third** the relation to other concepts (Sect 4.3).

This section is strongly **based on** the previous one (Chap. 3), having covered the four scopes (*ratione temporis, materiae, personae* and *limitis*) and the implications of EU values (including justiciability and restrictions). For this reason, there will be less cross-references as it should be clear, where the relevant information can be found.

### 4.1 Relation Values to Each Other

#### 4.1.1 General Observations

The relationship of values,<sup>1</sup> including possible conflicts, can be examined on various **levels**. At (1) **EU** level, these values may conflict with each other, as their application can lead to mutually exclusive outcomes. A value conflict can also occur from (2) a **vertical** perspective between the EU and the national level. Values might be interpreted differently at EU level compared to a certain Member State. Finally,

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<sup>1</sup>On a broader scale, one would have to distinguish both various **areas** (law, ethics, policy, religion, aesthetics, etc.), as well as various **kinds** of values (personal, impersonal, intrinsic or extrinsic). The author wants to thank Göran Hermerén for valuable feedback in this regard; for further details, see Hermerén (2015). Concerning areas, the following will mainly focus on law (and ethics), on extrinsic vs. intrinsic values, see *infra* Sect. 5.2. For reasons of space, more detailed explanations must be refrained from.



(3) from a **horizontal** perspective, there might be a conflict of values, for instance, again a different interpretation, between two or more Member States. The cases mentioned so-far (**ad 2**) regarding the ‘rule of law’ often displayed a different understanding or interpretation of various values between the EU (e.g., the Commission as a ‘guardian of the treaties’, or in the end the CJEU), and single Member States, such as Poland or Hungary. Different understanding of values also occurred (**ad 3**) between different Member States relating to the concept of ‘mutual trust’, which is jeopardised if values are not respected or interpreted differently around Europe. In the following, the focus will be (**ad 1**) on the general relation of values.

Besides these different levels, values can either mutually strengthen or weaken each other, eventually leading to an above-mentioned situation of conflict. The ‘values trinity’ of democracy, the rule of law,<sup>2</sup> and human rights would basically be an example of values mutually **strengthening** each other.<sup>3</sup>

Two other values potentially strengthening each other would be **human dignity**, the corner-stone of the EU’s values and the basis for fundamental rights, and **equality**. The combination of these two values has been referred to as “*égale dignité*”.<sup>4</sup> This concept is also known from ECtHR case-law, where the ECtHR has stated that “tolerance and respect for the equal dignity [!] of all human beings constitute the foundations of a democratic, pluralistic society”.<sup>5</sup> This relationship between dignity and equality, embodied in this concept of ‘*égale dignité*’, was also addressed by AG Stix-Hackl in case *Omega*. As she mentioned, “the concept of the legal equality of all is also inherent in the idea of human rights in general and human dignity in particular, so that reference is also often made of the phrase ‘*égale dignité*’ which embraces both concepts”.<sup>6</sup> Berka mentions a possible consequence of this concept: “the personal equality of all human beings, which is based on human dignity, and with which certain forms of discrimination are absolutely incompatible”.<sup>7</sup> Both values of human dignity and equality can be seen as self-standing values, which however can also be combined and eventually strengthen each other. Human dignity, as a ‘super-value’ can also strengthen other values, emphasising the inherent value of a human being.

Another relationship of two values **strengthening** each other, is the one of **justice**<sup>8</sup> in relation to the **rule of law**. In recent case-law concerning the rule of law and the independence of the (national) judiciary branch of power, the ECJ, when referring to the values of Art 2 TEU, has also referred to **justice**, most likely to

<sup>2</sup>As Berger (2021), p. 11 mentions, an illiberal democracy will most likely fall short on both democracy and the rule of law.

<sup>3</sup>Calliess (2016), p. 39 refers to a ‘values quadriga’, also covering freedom. See also Sommermann (2020), p. 261.

<sup>4</sup>Bührer (2020), p. 167.

<sup>5</sup>ECtHR judgement of 4 December 2003, *Gündüz vs. Turkey*, 35071/97, para 40.

<sup>6</sup>AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 80.

<sup>7</sup>Berka (2019), p. 668, translated with DeepL.

<sup>8</sup>On justice and equality, see Walzer (1983).



emphasise the importance of the rule of law: “it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice [!] prevails”.<sup>9</sup> Justice would basically also support equality, including gender equality, and (the other side of the same coin of) non-discrimination.

While **democracy**, as part of the values trinity’ besides the rule of law and human rights, can strengthen other values, a democratic process can also lead to a **weakening** of other values. Democracy can be described as a system where people take decisions based on a majority principle, as opposed to an oligarchy or dictatorship, where only a small minority decides, or one person only. Democracy can conflict with **fundamental or human rights**, if these rights are not respected. A possible solution will often be found in the hierarchical structure of a legal system, if fundamental rights are part of constitutional law that must be respected by ordinary law. Of course, a democratic process can also lead to a change of constitutional law (e.g., a two-thirds majority or a referendum), which can lead to a formal amendment of fundamental rights. However, as aptly stated by the Commission’s First Vice-President Timmermans: “you cannot use the argument of a democratic majority – even if it is a two-thirds majority – to weaken the rules based on the rule of law or human rights”.<sup>10</sup> One human right that is particularly vulnerable to decisions of a majority are the rights of **minorities**. This example shows the need for a balancing of those two values to safeguard both the value of decisions taken by majority (democracy), as well as the value of legitimate rights of minorities. Pluralism and tolerance would be two values that can be seen to support the rights of minorities. A democratic process can also lead to problems regarding the **rule of law**, as in the case of Poland.<sup>11</sup> The same is true with regard to **human dignity** and (other) human rights, which are not negotiable, as AG Stix-Hackl stated in *Omega*. “The right to respect for human rights runs counter in this respect to the idea that human regard is negotiable by the State, the people and the majority – and therefore counter to the idea that the individual is identified according to the community and considered to be a function thereof”.<sup>12</sup> Democracy obviously can also lead to a conflict with freedom, (gender) equality, pluralism, non-discrimination, tolerance, justice, and solidarity.

<sup>9</sup>ECJ judgement of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, para 62. See also ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 160; ECJ judgement of 22 June 2021, *Venezuela vs. Council*, C-872/19 P, EU:C:2021:507, para 48; ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 50.

<sup>10</sup>Timmermans (2015).

<sup>11</sup>Berger (2021), pp. 11–12.

<sup>12</sup>AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 77.

Another value that can weaken other values is **freedom**. According to **Kant**, the own right<sup>13</sup> respectively, freedom<sup>14</sup> ends, where the right or the freedom of another one begins. This statement makes clear that freedom can never be unlimited in a society, as it would impede the freedom of another.<sup>15</sup> The freedom of one person cannot be interpreted as including freedom to breach the **freedom of another** person, as this is an inherent limitation of this concept of freedom. There cannot be a so-called freedom not to wear facemask during a pandemic, without infringing the rights and freedoms of other persons, which might be exposed to a communicable disease. Freedom can clash with **justice**, where Hermerén mentions the ‘freedom to gain wealth’<sup>16</sup> vs. distributive justice.<sup>17</sup> Freedom can also conflict with **solidarity**. To return to the example of the coronavirus pandemic, even if a person is male, healthy and economically well off, (a virtue of) solidarity can lead to a behaviour of taking certain precautions, such as wearing facemask, getting vaccinated, etc., knowing that the pandemic is a serious threat to vulnerable persons. **Vulnerability** in this regard can refer to women, who are economically and socially more affected by the related measures taken in this pandemic (lockdowns, insecure job situation, home schooling, etc.). Likewise, other people can be economically vulnerable (the poor, or again people with insecure jobs), as well as people who are vulnerable regarding their health (elderly people, or those with an immunosuppression). A very emotional topic is the one of mandatory vaccination, knowing that vaccination is one effective measure in this pandemic. In the context of compulsory vaccination, the ECtHR has emphasised “the value of social solidarity [!], the purpose of the duty being to protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination”.<sup>18</sup> Especially, the latter situation of the relationship of freedom vs. (social) solidarity leads us to the raking of values.

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<sup>13</sup>“Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann”, Kant (1966), pp. 34–35.

<sup>14</sup>“Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann”, Kant (1966), p. 35.

<sup>15</sup>See also Hermerén (2006), p. 21.

<sup>16</sup>In other terms, this could be seen as the above-mentioned ‘private autonomy’, also enshrined in Art 16 CFR.

<sup>17</sup>Hermerén (2006), p. 21.

<sup>18</sup>ECtHR judgement of 8 April 2021, *Vavříčka and Others v. The Czech Republic*, 47621/13 and 5 others, para 279 (see also para 306).

### 4.1.2 Ranking of Values

*Suppose there is a society where economic growth and freedom of research is put on the top of the ranking list and human dignity, integrity, safety and individual autonomy at the bottom. This ranking order characterizes one type of society. But if the order is reversed, and integrity, human dignity, safety and autonomy are placed on top and freedom of research and economic growth at the bottom, a different society is characterized.—Hermerén (2006, p. 21).*

As stated in the ‘conditionality regulation’, “there is no hierarchy among Union values”.<sup>19</sup> Likewise, Habermas points out that “no value can inherently claim an unconditional primacy over other values”.<sup>20</sup> While this **formal** analysis is to be agreed with, there is also a **substantive** perspective. As mentioned above,<sup>21</sup> human dignity a ‘super-value’ can be seen as of supreme importance. Human dignity describes the **anthropocentric** approach, also linked to the “humanist inheritance of Europe” (recital 2 TEU) and can be qualified as “the real basis [!] of fundamental rights”.<sup>22</sup>

Hermerén mentions that many of the values found in Europe also play an important role elsewhere in the world. However, “[i]f indeed there is a distinctive European (approach to) ethics, it has to do with the *ranking order* of the values”.<sup>23</sup> The relationship of values is also **complex** because it is “dynamic and not static”.<sup>24</sup> Likewise, a ranking of values can **differ** “between cultures”.<sup>25</sup> This is reminiscent of morality, which also differs regarding time, location and culture. Another question is whether there is only **one** ranking order in Europe, **or** whether there are **several** ones. According to Hermerén, this “depends also on what level of precision is chosen and on how the values are interpreted”.<sup>26</sup> Hermerén provides a good example for this **precision of values** from the field of bioethics. “For example, in the Member States of the EU there is probably common [!] agreement that the human embryo deserves protection with reference to the value of human dignity. But ‘embryo’ is defined somewhat differently [!] in the legislations of various Member States, and the protection offered also differs. So the more precisely the key terms are defined and the more clearly the values are stated, the more likely it is that differences between

<sup>19</sup>Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L1 433/1, recital 6. See also Berger (2021), p. 11.

<sup>20</sup>Habermas (1992), p. 310; translated with DeepL.

<sup>21</sup>Section 3.2.1.1.

<sup>22</sup>OJ 2007 C 303/17. See also AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU: C:2004:162, para 76, “the underlying basis and starting point for all human rights distinguishable from it”.

<sup>23</sup>Hermerén (2006), p. 24; no emphasis added. On this topic, see also Hermerén (2008).

<sup>24</sup>Hermerén (2006), p. 23.

<sup>25</sup>Hermerén (2006), p. 25.

<sup>26</sup>Hermerén (2006), p. 28.

ranking orders in Europe will be found. But these differences could be localised in a spectrum that still is different from what is to be found in the ranking orders of other cultures.”<sup>27</sup> Thus, in some countries the protection of the embryo might be ranked higher (he mentions Malta, Austria or Germany), while other countries might rank medical research higher (here he mentions, the UK, Sweden Belgium and the Netherlands).

However, even in the **same country** different ranking orders might exist. He refers to autonomy (which can be linked to freedom), which might be ranked higher in case of the autonomy of women and the issue of abortion, as opposed to patients refusing to inform their partners about their HIV/AIDS situation. Consequently, one value can be ranked differently even in one country, given the concrete background, respectively, the different challenges faced.<sup>28</sup>

Hermerén concludes that it is **difficult** to provide a final **answer** to this question of one (or more) ranking order(s).<sup>29</sup> Such a ranking order can either be established for the EU values in **general**, that is to say, without considering the specific field of application, or for a specific field. In the **specific** situation of regenerative medicine, Hermerén has suggested the principles of precaution and proportionality as to ‘guide the decision-making’ in case of a possible clash of values.<sup>30</sup> Nevertheless, as he aptly states, the way, how values are ranked has to be open and transparent.<sup>31</sup> He is also right in suggesting an “enlightened and informed debate [!] about the interpretation, ranking order and implementation of what we take to be the essential European values and how they are to be protected”.<sup>32</sup> Hermerén himself does not offer a “particular European ranking order of values”, although he admits, “solidarity would be one of the top values in such a hierarchy”.<sup>33</sup>

The ranking of values is one issue, and as we have seen, it makes a difference if you place (individual) freedom, or justice and solidarity higher in this **hierarchy**. However, another approach is to see two values as **equal** in hierarchy and try to balance them. This approach is well-known from potential **conflicts of fundamental rights**. The ECJ has referred to the “need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance [!] between them”.<sup>34</sup> The same approach was chosen for a conflict of an **economic fundamental freedom** (free movement of products) and two **fundamental rights**

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<sup>27</sup> Hermerén (2006), p. 28.

<sup>28</sup> Hermerén (2006), p. 28.

<sup>29</sup> Hermerén (2006), p. 30.

<sup>30</sup> Hermerén (2021).

<sup>31</sup> Hermerén (2006), p. 25.

<sup>32</sup> Hermerén (2006), p. 35.

<sup>33</sup> Hermerén (2006), p. 38.

<sup>34</sup> ECJ judgement of 15 July 2021, *WABE*, joined cases C-804/18 and C-341/19, EU:C:2021:594, para 84. In this case of religious signs at work, the balancing referred to the following CFR rights: Art 21 CFR (non-discrimination), Art 10 CFR (right to freedom of thought, conscience and religion), Art 14(3) CFR (right of education), and Art 16 CFR (freedom to conduct a business).

(the freedom of speech and assembly), in the famous *Schmidberger* case. In this Austrian case, locals demonstrated on a motorway against increasing traffic and transit, leading to health and environmental damages. Both the free movement of products (Art 34 TFEU), as well as the fundamental rights (formerly general principles of EU law, now also CFR) are primary EU law. Therefore, the Court opted for a **balancing** approach, according to which “the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance [!] was struck between those interests”.<sup>35</sup>

Are there **limitations** to such a balancing approach? Yes, there are. According to Art 52(1) CFR, “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be [1.] provided for by law and [2.] respect the essence of those rights and freedoms. Subject to [3.] the principle of proportionality, limitations may be made only if they are necessary and genuinely meet [4.] objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.<sup>36</sup> Consequently, such a balancing approach has to respect the essence (ad 2) of these values.

**In summary**, the **abstract** character of values that is often seen as a disadvantage can conversely offer the possibility of various ranking orders that can be combined in case of less precise values. Hermerén offers another example of the Oviedo Convention,<sup>37</sup> where in the drafting process “it was deliberately left open when human life begins”,<sup>38</sup> knowing that no consensus exists in this regard. Neither between countries, nor in a single country. Human dignity, as the ‘super-value’, is also quite abstract. Maybe this is precisely the reason, why this reason can be applied to a numerous different situations. From a formal perspective, all values of Art 2 TEU are of equal value. One difference (although not a formal ranking) that can be derived from Art 2 TEU is first sentence vs. second sentence value, as second sentence values (and freedom) cannot be enforced via Art 7 TEU. A ranking of values should not be seen in a formal, but in a substantive way. Additionally, on a horizontal level, such a preference should be seen as a force that then pulls in one direction rather than the other, not as a primacy as we know it between EU law and national law. As Sommermann, has emphasised “one value must not [!] be systematically given primacy over another value, but a solution must be sought on a case-by-case basis, taking into account the varying intensity of the affectedness of the values involved”.<sup>39</sup> This goes in a similar direction as expressed by Habermas, according to whom “values must be brought into a transitive order with other values on a

<sup>35</sup> ECJ judgement of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, para 81.

<sup>36</sup> The absolute right not to be tortured (Art 3 ECHR) has already been mentioned; ECtHR judgement of 1 June 2010, *Güfgen vs. Germany*, 22978/05, para 87.

<sup>37</sup> Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (adopted 4 April 1997, entered into force 1 December 1999), ETS No 164.

<sup>38</sup> Hermerén (2006), p. 11.

<sup>39</sup> Sommermann (2020), p. 268; translated with DeepL.

case-by-case basis”.<sup>40</sup> Hence, the preferred approach should be such a combination of a ranking order to be elaborated on the basis of a dialogue, as well as the Court’s balancing<sup>41</sup> approach. The first can also be subject to the current ‘Conference on the Future of Europe’. The latter can take place at EU level, mainly in CJEU case-law. However, such a balancing can also occur at national level.

### 4.1.3 *Partially at National Level*

In the first Jean Monnet book, I have argued to also “embrace some ideas of ‘**minimal ethics**’”, an approach that can also be found in Art 6 of the directive<sup>42</sup> on the legal protection of biotechnological inventions.<sup>43</sup> While the EU should clearly strive for uniformity also in the case of the ‘common values’, following its motto of ‘united in diversity’, a certain diversity must be accepted.<sup>44</sup> Amongst others, this diversity approach can relate to a reconciliation, taking place at national level.

In one of the many cases decided by the Court since 2017 at the interface of EU law and religion, the Court recently had to decide on the third case concerning the **slaughtering of animals**.<sup>45</sup> As the Court has held, “the principle of prior stunning [...] reflects an EU value [...], namely animal welfare, as now enshrined in Article 13 TFEU, according to which the European Union and the Member States must pay full regard to the welfare requirements of animals, when formulating and implementing animal welfare policy”.<sup>46</sup> Based on the EU regulation<sup>47</sup> in this field, the Court has stated that “the regulation does not itself effect the necessary reconciliation [...] between animal welfare and the freedom to manifest religion, but merely provides a framework for the reconciliation which Member States [...] must achieve between those two values”.<sup>48</sup>

<sup>40</sup>Habermas (1992), p. 315; translated with DeepL.

<sup>41</sup>See also Sommermann (2020), p. 264.

<sup>42</sup>Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, OJ 1998 L 213/13.

<sup>43</sup>Frischhut (2019), p. 146, in thesis No 26.

<sup>44</sup>According to Scharfbillig et al. (2021) “the EU slogan ‘United in diversity’ [...] can be understood mostly through the lens of values diversity within Member States and less so between them”.

<sup>45</sup>Following these two cases: ECJ judgement of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335; ECJ judgement of 26 February 2019, *Oeuvre d’assistance aux bêtes d’abattoirs*, C-497/17, EU:C:2019:137.

<sup>46</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 41.

<sup>47</sup>Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, OJ 2009 L 303/1, as amended by OJ 2018 L 122/11.

<sup>48</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 47.

What does this quote mean for our topic? **First**, based on the EU regulation in this field, this is an example of some **diversity** in case of conflicting values. **Second**, the above-mentioned approach of **balancing** fundamental rights amongst each other, as well as in the case of economic fundamental freedoms vs. fundamental rights, has also been applied to two values, animal welfare on the one side, and the freedom of religion as another value, via the value of human rights as mentioned in the first sentence of Art 2 TEU. **Third**, an analysis of the relevant EU secondary law will answer the question if the balancing can take place at **national** level (more diversity) or should rather take place at **EU** level (more uniformity). In the most recent case of religious signs at work, the Court has referred to Directive 2000/78,<sup>49</sup> which shows that “the EU legislature did not itself effect the necessary reconciliation between the freedom of thought, conscience and religion and the legitimate aims that may be invoked in order to justify unequal treatment, [. . .] but left it to the Member States [!] and their courts to achieve that reconciliation”.<sup>50</sup> Taking EU (secondary) law as an indication for where value conflicts need to be resolved goes in a similar direction as the first Jean Monnet book. There I have argued that “[b]ased 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”.<sup>51</sup>

More broadly, at the interface of EU law and the national level, one must differentiate different scenarios. First, a situation (a) of **referral**, second a situation (b) of **mutual influence**, as well as a situation (c) of **conflict**.

These examples of EU (secondary) law referring for the reconciliation of different values to the national level pertain (**ad a**) to the first category. Besides such a more or less explicit reference, values at EU and at national level will always (**ad b**) mutually influence each other (second category). EU values did not come out of nowhere, but were influenced by national constitutional law. On the other hand, EU values as stated in Art 2 TEU and as further enriched by CJEU case-law have an influence on national law via the primacy of EU law (see also below). As Calliess aptly points out, despite their linkage (“*Rückkoppelung*”) to national values, European values have their own and independent content.<sup>52</sup> Highlighting the interconnectedness and mutual influence of values at the European and national level, this corresponds to what Tridimas has described as the ‘dialectical relationship’ between national law contributing to the shaping of general principles of EU law, which then again feed back into national law via national courts.<sup>53</sup> A **mutually fertilising** relationship, so to speak, in this **vertical** relationship.

<sup>49</sup>Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

<sup>50</sup>ECJ judgement of 15 July 2021, *WABE*, joined cases C-804/18 and C-341/19, EU:C:2021:594, para 87.

<sup>51</sup>Frischhut (2019), p. 144, in thesis No 9.

<sup>52</sup>Calliess (2004), p. 1042.

<sup>53</sup>Tridimas (2006), p. 553, with further references.

Turning to the third category (**ad c**), as mentioned above,<sup>54</sup> value **conflicts** can occur at different levels, i.e., at (1) **EU** level, from (2) a **vertical** perspective between the EU and the national level, or (3) at a **horizontal** level between two or more Member States.<sup>55</sup> Calliess argues that a vertical conflict of values may be resolved in the sense of the primacy of EU law, only if the proper functioning (“*Funktionsfähigkeit*”) of the EU is put in question. This is the case if the core of values (“*Wertekern*”) is violated, but not only if the periphery of this concept (“*Wertehof*”) is affected (cf. the above-mentioned ‘essence’ mentioned in Art 52 [1] CFR). In the latter situation, the principle of seeking concordance (“*Konkordanzsuche*”)—or one could also say ‘balancing’—applies.<sup>56</sup> In the context of the rule of law, Schroeder has emphasised that the “claim for the rule of law should [...] not be understood as a claim for homogeneity”, as there are structural differences and one has to accept the “constitutional pluralism”, enshrined in the EU treaties.<sup>57</sup> Therefore, one can refer to Art 2 TEU as following only a **minimum approach**,<sup>58</sup> which is reminiscent the above-mentioned approach of ‘minimal ethics’.<sup>59</sup>

**To summarise**, more uniformity (defined at EU level) in case of the core (or essence) of EU values, more flexibility (or diversity at national level) at the periphery.

## 4.2 Relation Art 2 TEU and Other Provisions of EU Law, Etc.

The broadest relation of Art 2 TEU and other provisions of EU law has been established in a case concerning the Polish disciplinary regime applicable to judges. As the Court has held, “compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all [!] of the rights deriving from the application of the Treaties to that Member State”.<sup>60</sup> This is the broadest link possible, which, at the same time, proves the importance of common values for the European integration process.

<sup>54</sup>I.e., at the beginning of Sect. 4.1.1.

<sup>55</sup>See also Calliess (2004), p. 1042.

<sup>56</sup>Calliess (2004), p. 1042.

<sup>57</sup>Schroeder (2016), p. 11.

<sup>58</sup>Schroeder (2016), p. 11, “minimum standard in terms of the rule of law”; Lenaerts (2017), p. 640 “*Mindestmaß an normativer Homogenität*”.

<sup>59</sup>Frischhut (2019), pp. 27, 146.

<sup>60</sup>ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 51; see also ECJ judgment of 21 December 2021, *Euro Box Promotion and Others*, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para 162.



### 4.2.1 Art 2 TEU and Other TEU and TFEU Articles

Various provisions of the EU treaties are closely connected to the values enshrined in Art 2 TEU. Most provisions **strengthen** these common values, on the other side there is one provision where this is **not** necessarily the case.

To start with the latter category (**not strengthening**), according to Art 4(2) TEU, the EU shall not only respect the equality of Member States before the Treaties, but also their '**national identities**'.

- This concept of national identities of Member States is further clarified in **Art 4 (2) TEU** as an identity "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government". Additionally, the Union shall respect the Member States' "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security". National security is explicitly named as one example that "remains the sole responsibility of each Member State".
- The national identity of Member States is also addressed in **recital 3 CFR**, according to which the "Union contributes to the preservation and to the development of these **common values while respecting** the diversity of the cultures and traditions of the peoples of Europe as well as the **national identities** of the Member States and the organisation of their public authorities at national, regional and local levels" (emphases added).
- Besides this identity of Member States, the identity of the **EU** is addressed in the context of the CFSP (recital 11 TEU<sup>61</sup>) and can be seen as implicitly covered in Art 2 TEU, as also mentioned in the aforementioned recital 3 CFR. In CJEU case-law, the EU identity has been emphasised via the concept of the '**autonomy** of EU law'. This must be seen "with respect both to the law of the Member States and to international law", and which "is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law".<sup>62</sup> Besides autonomy, also the **uniform application** of EU law is characteristic of the EU's identity. In *Melloni*, the Court has referred to the "primacy, unity and effectiveness of EU law", which may not be compromised.<sup>63</sup>
- The motto of the EU, 'united in diversity', is very well reflected in all these provisions, according to which the **values** of the EU, on the one hand, and this **national identity** of the Member States, on the other, can be seen as two different forces, each tending in **opposite directions**.
- Obviously, who has the final word differs at EU and at the national level. The **German Constitutional Court** has held that the in Germany "the constitutional

<sup>61</sup>"[...] reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world".

<sup>62</sup>ECJ judgement of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, para 33.

<sup>63</sup>ECJ judgement of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, para 60.

organs must counter acts of institutions, bodies, offices and agencies of the European Union that violate the constitutional identity [!] or constitute an *ultra vires* act”.<sup>64</sup>

- The argument of safeguarding the ‘national identity’, as nowadays enshrined in Art 4(2) TEU, has already early on been an argument against ‘more EU’.<sup>65</sup> Turning back to the above-mentioned wording of Art 4(2) TEU, the Member States’ “fundamental structures, political and constitutional, inclusive of regional and local self-government” already existed at the time of becoming an EU Member State at a certain point in time, where this country also committed itself to these common values. Likewise, the “essential State functions”, including “the territorial integrity of the State”, as well as “maintaining law and order and safeguarding national security” do not obviously conflict with the EU’s common values. **Consequently**, Hillion is right in stating that “national specificities, safeguarded under Article 4(2) TEU, however cannot (!) permit a member’s disrespect of the values of Article 2 TEU”.<sup>66, 67</sup>

On the other side, there are various provisions **strengthening** the common values.

**Art 4(3) TEU** makes an important contribution in terms of the ‘**principle of sincere cooperation**’, according to which “the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”. As the Grand Chamber has recently held, the principle of **solidarity** “is closely linked to the principle of sincere cooperation”.<sup>68</sup> As mentioned by the European Commission, Art 4(3) TEU also plays an important role in the phase before **Art 7 TEU**.<sup>69</sup> More broadly, according to Art 4(3) TEU, “Member States shall take [!] any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”. For our topic, the obligations arising (already) out of Art 2 TEU are further strengthened by this ‘principle of sincere cooperation’. This ‘mutual respect’ of sincere cooperation, if linked to the common values of Art 2 TEU, can then lead to ‘mutual trust’. Conversely, “Member States shall facilitate the achievement of the

<sup>64</sup> BVerfG judgement of 21 June 2016, *OMT programme*, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, headnote 3 (no emphasis added).

<sup>65</sup> Concerning human rights, see von Bogdandy (2000), p. 1317.

<sup>66</sup> Hillion (2016), p. 63.

<sup>67</sup> See also Helsinki Rule of Law Forum (2022), p. 2, whereas “[c]onstitutional identity cannot serve as a pretext for departing from the fundamental principles of the rule of law”. AG Collins opinion of 20 January 2022, *RS (Effet des arrêts d’une cour constitutionnelle)*, C-430/21, EU:C:2022:44, para 62 has emphasised that “[v]ague, general and abstract assertions” of Member States in this regard are not enough. He also made clear that “assertions of national identity must respect the common values referred to in Article 2 TEU” (para 64).

<sup>68</sup> ECJ judgement of 15 July 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:598, para 41.

<sup>69</sup> EC communication ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014.

Union’s tasks and refrain [!] from any measure which could jeopardise the attainment of the Union’s objectives“.

This leads us to the next provision, **Art 3 TEU** on the EU’s **objectives**, where the first paragraph defines the “Union’s aim”, which “is to promote peace, its values [!] and the well-being of its peoples”. As the Court has held in its ECHR Avis, the “pursuit of the EU’s objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions”, such as the economic fundamental freedoms, etc., “which are part of the framework of a system that is specific to the EU”.<sup>70</sup> They “are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d’être* of the EU itself”.<sup>71</sup> The common values certainly contribute to the EU’s *raison d’être*. Objectives neither impose legal obligations on the Member States, nor confer rights on individuals,<sup>72</sup> but are relevant for the interpretation<sup>73</sup> of EU primary law provisions “that are intended to give effect to them”.<sup>74</sup> For instance, for the justiciability of Art 2 TEU, Art 3 TEU will not contribute much. For the above-mentioned opposing situation of common values vs. national identities, objectives that “express”<sup>75</sup> the “common European interest”<sup>76</sup> can be seen as another argument for tipping the scale towards the ‘common’ values.

Another provision that strengthens the EU’s common values is **Art 13(1) TEU** that tasks the EU’s institutions, as well as ‘bodies, offices or agencies of the Union’,<sup>77</sup> to “promote” the EU’s values. While they are obviously already bound by Art 2 TEU itself, this provision on the **institutional framework** can be seen as kind of a ‘mission letter’, as we know it from the Commission president to the single Commissioners.

Apart from EU institutions etc., **Art 49 TEU** on the prerequisites of **EU accession** has a similar effect on Member States, at least at the time of joining the EU. A key requirement is to ‘respect’ the values referred to in Art 2 TEU and to be ‘committed to promote’ them. As the continuous adherence to these values is a key challenge, the

<sup>70</sup>ECJ opinion of 18 December 2014, *Adhésion de l’Union à la CEDH*, Avis 2/13, EU:C:2014:2454, para 172.

<sup>71</sup>ECJ opinion of 18 December 2014, *Adhésion de l’Union à la CEDH*, Avis 2/13, EU:C:2014:2454, para 172; no emphasis added.

<sup>72</sup>ECJ judgement of 24 January 1991, *Alsthom vs. Sulzer*, C-339/89, EU:C:1991:28, para 9. See also ECJ judgement of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paras 46–47.

<sup>73</sup>ECJ judgement of 9 February 1982, *Polydor and Others vs. Harlequin and Others*, C-270/80, EU:C:1982:43, para 16; ECJ judgement of 3 October 2000, *Échirrolles Distribution*, C-9/99, EU:C:2000:532, para 24.

<sup>74</sup>Klamert (2019), p. 32.

<sup>75</sup>Klamert (2019), p. 32.

<sup>76</sup>AG Kokott opinion of 4 May 2016, *Poland vs. Parliament and Council*, C-358/14, EU:C:2015:848, para 163.

<sup>77</sup>Cf. Sect. 3.3.2.

ECJ emphasises “that the European Union is composed of States which have freely [!] and voluntarily [!] committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them”.<sup>78</sup>

If these obligations are not met during existing EU membership, the following provisions come into play. The relationship between **Art 7 TEU** and the infringement proceedings of **Art 258 TFEU**<sup>79</sup> (EC vs. MS) and **Art 259 TFEU** (MS vs. MS), together with **Art 260 TFEU**<sup>80</sup> (lump sum or penalty payment), has been discussed concerning a possible parallel application. The Council’s Legal Service sees no other possible procedure for the supervision of the application of the rule of law besides Art 7 TEU.<sup>81</sup> However, Art 7 TEU does not exclude the Commission’s possibility to deploy Art 258 TFEU to safeguard compliance with the EU’s common values, as enshrined in Art 2 TEU.<sup>82</sup> Likewise, Griller has argued convincingly that major (systematic) breaches can be the object of an Art 7 TEU procedure, single elements can be part of an infringement proceeding.<sup>83</sup>

The value that has been and continues to be most in the spotlight is the **rule of law**. The rule of law is also the value that has many links to other provisions of the EU treaties.

According to the European Commission, the **rule of law** “includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review<sup>[...] including respect for fundamental rights; separation of powers; and equality before the law”.</sup><sup>84</sup> Within this **bouquet** of ‘rule of law’ principles, two in particular have been the subject of intense discussion in recent ECJ jurisprudence, which are also closely related. The **effective judicial protection by independent and impartial courts**, and effective judicial review.

As mentioned above, the question has occurred if there are different types of ‘judicial independence’, as this concept is linked to **Art 19(1)** second sentence TEU (effective legal protection<sup>85</sup>), **Art 47 CFR** (right to an effective remedy and to a fair trial) and **Art 267 TFEU** (preliminary ruling proceeding). As AG Bobek has recently confirmed, “there is *only one and the same principle* of judicial

<sup>78</sup> ECJ judgement of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, para 61.

<sup>79</sup> Cf. Closa and Kochenov (2016), p. 185.

<sup>80</sup> On the challenges of invoking this provision, see Closa and Kochenov (2016), pp. 185–186.

<sup>81</sup> Council of the EU, Opinion of the Legal Service of 27.5.2014. Commission’s Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties, 10296/14, p. 5 (pt. 17).

<sup>82</sup> Editorial Comments (2015), p. 622; Hillion (2016), p. 66.

<sup>83</sup> Griller (2020), p. 161.

<sup>84</sup> EC ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final/2 19.3.2014 and EC ‘Further strengthening the Rule of Law within the Union’, COM(2019) 163 final 3.4.2019.

<sup>85</sup> “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.

independence”.<sup>86</sup> However, this “same content does not necessarily mean the same outcome in an individual case”, as these “three provisions are different as to their scope and purpose within the structure of the Treaties” and this “difference means that a slightly different type of examination must be carried out under each of the three provisions”.<sup>87</sup>

- **Art 19(1) TEU** “contains an extraordinary remedy for **extraordinary** situations” and requires “breaches of a certain **seriousness** and/or of a **systemic** nature”.<sup>88</sup> The “main elements for the Court’s analysis are those concerning the **overall institutional and constitutional structure** of the national judiciary”.<sup>89</sup> Hence, the “**threshold** for a breach of this provision is **rather high**”.<sup>90</sup> Art 19(1) TEU is linked to the next one via a “constitutional passerelle”.<sup>91</sup>
- **Art 47 CFR** “embodies a **subjective** right of any party to proceedings” and “requires a detailed assessment of all the circumstances that are specific to the **case in question**”.<sup>92</sup> In this context, the justiciability of the rule of law and its various elements (legality, legal certainty, prohibition of arbitrariness, effective judicial review, as well as equality before the law), amongst others, takes place via Art 47 CFR. Here, the “**intensity** of the Court’s review in relation to the independence of the judicial body in question is, in this context, **moderate**”, as “not all breaches of law amount to an infringement of Article 47 of the Charter”.<sup>93</sup>
- In case of **Art 267 TFEU**, the independence of the body making a reference is one criterion to determine whether it is a ‘court or tribunal’ in the sense of this article. A key objective in this context is to define “the *interlocutors* of the Court”.<sup>94</sup>

In the words of AG Bobek, “[t]his ‘**multiplication**’ of legal bases with respect to the principle of judicial independence reflects its **constitutional significance** and its

<sup>86</sup> AG Bobek opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, joined cases C-748/19 to C-754/19, EU:C:2021:403, para 162 (no emphases added).

<sup>87</sup> AG Bobek opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, joined cases C-748/19 to C-754/19, EU:C:2021:403, para 163.

<sup>88</sup> AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, para 39; emphases added.

<sup>89</sup> AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, para 37; emphases added.

<sup>90</sup> AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, para 38; emphases added.

<sup>91</sup> AG Tanchev opinion of 6 May 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:366, para 69.

<sup>92</sup> AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, para 40; emphases added.

<sup>93</sup> AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, para 41; emphases added.

<sup>94</sup> AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, para 60; no emphasis added.

transversal nature in a community based on the rule of law”.<sup>95</sup> Focussing on the ‘rule of law’ and not on single components (i.e., judicial independence), “Article 47 of the Charter, as well as the second subparagraph of Article 19(1) TEU, **give** therefore more precise **expression to** that dimension of **the value of the rule of law** affirmed in Article 2 TEU”.<sup>96</sup>

For our topic, this again proves the close interrelation and ‘lattice’<sup>97</sup> of various provisions. Therefore, it is a matter of several legal provisions, which then add up to the greater whole.

Of these three provisions that play a special role in the rule of law, or more precisely for the independence of the courts, **Art 19 TEU** is of particular importance. This provision is mainly about the CJEU.<sup>98</sup> However, the second subparagraph of Art 19(1) TEU states that the “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. Because of the already mentioned limitations of the Charter, as provided in Art 51(1) CFR, the Court therefore seems to prefer focussing its attention on Art 19 TEU. In one of the ‘rule of law’ cases concerning Poland, the Court has stated that as regards “the material scope of the second subparagraph of Article 19(1) TEU, that provision moreover refers to ‘the fields covered by Union law’, **irrespective of whether the Member States are implementing** Union law within the meaning of Article 51 (1) of the Charter”.<sup>99</sup> On this question, see also the following Sect. 4.2.2. The ECJ justifies the focus on this provision by stating as follows: “the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU”.<sup>100</sup> Art 19 TEU has a broad field of application because **even if** “the **organisation of justice** in principle falls within the **competences** of the Member States, they must, in the exercise of that competence, **respect the obligations** arising from Union law, in particular the second subparagraph of Article 19 (1) TEU”.<sup>101</sup>

Besides the above-mentioned procedural provisions of infringement proceedings and Art 7 TEU, also Art 263 TFEU (action for annulment) has played a role in the

<sup>95</sup> AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557, para 35; emphases added.

<sup>96</sup> AG Bobek opinion of 4 March 2021, *Euro Box Promotion and Others*, joined cases C-357/19 and C-547/19, EU:C:2021:170, para 74; emphases added. See also AG Bobek opinion of 4 March 2021, *DNA- Serviciul Teritorial Oradea*, C-379/19, EU:C:2021:174, para 47, and AG Bobek opinion of 4 March 2021, *FQ and Others*, joined cases C-811/19 and C-840/19, EU:C:2021:175, para 51.

<sup>97</sup> Cf. Frischhut (2019), p. 90, originally taken from Dratwa (2014), p. 113 et passim.

<sup>98</sup> As further complemented, by Art 251 to Art 281 TFEU.

<sup>99</sup> ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 53; emphases added. See also ECJ judgement of 18 May 2021, *Asociația “Forumul Judecătorilor Din România”*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 192.

<sup>100</sup> ECJ judgement of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, para 63.

<sup>101</sup> AG Tanchev opinion of 6 May 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:366, para 63, emphases added.

context of the rule of law, more precisely the fourth paragraph on the legal standing of natural and legal persons. In the latter case of legal persons, as mentioned above, the Court has held that an interpretation of Art 263(4) TFEU “**in the light** of the principles of effective judicial review and the **rule of law** militates in favour of finding that a third State [here: Venezuela] should have standing to bring proceedings, as a ‘legal person’, within the meaning of [this provision]”.<sup>102</sup> This case can be seen as an example of the impact of the rule of law for the **interpretation** of other provisions of the EU treaties, in this case also with an external dimension (Venezuela benefiting from this ‘rule of law’ inspired interpretation).

**Finally**, there are many provisions on fundamental (or human) rights, which also display a close relationship to the values of Art 2 TEU, and even more so the human rights mentioned as a value in this provision. They are part of Sect. 4.2.3, including Table 4.1, which also covers provisions of EU law, surpassing those related to human rights. Before turning to this topic, the following excursus digs deeper on the just mentioned limitation of Art 51(1) CFR (“Member States only [!] when they are implementing Union law”) and how to get around it.

## 4.2.2 *Reverse Solange*

At a meta level,<sup>103</sup> both the *Solange* and the ‘reverse *Solange*’ doctrines deal with the **cooperation** of two separate but interconnected legal systems. The Karlsruhe based German Constitutional Court’s *Solange* doctrine was developed to ensure compliance of the supra-national level with some national requirements. These requirements, in *Solange* stemming from the German constitution, articulate and protect ‘essential conditions’ for such a cooperation. According to this doctrine formulated by Karlsruhe, such a cooperation can take place, ‘as long as’ (*Solange*) these requirements are fulfilled. In *Solange I* these requirements related to a catalogue of fundamental rights.<sup>104</sup> Hence, a bottom-up requirement, stemming from one Member State (Germany) and targeting the EU (more precisely, the European Community at the time). As the name already indicates, the ‘**reverse Solange**’ doctrine follows a similar idea but works in the **opposite** direction. Hence, it also relates to the same **vertical** situation, but in a top-down approach, thus a ‘reversed’ situation.

Briefly to mention that such essential requirements for cooperation between different systems have also been argued for a horizontal situation (between Member States),<sup>105</sup> as well as in a ‘diagonal relationship’ between the supra-national EU and international organisations.<sup>106</sup> For all these various emanations (vertical bottom-up,

<sup>102</sup> ECJ judgement of 22 June 2021, *Venezuela vs. Council*, C-872/19 P, EU:C:2021:507, para 50.

<sup>103</sup> The following is essentially based on von Bogdandy and Spieker (2020a).

<sup>104</sup> BVerfG order of 29 May 1974, *Solange I*, BvL 52/71, BVerfGE 37, 271, para 56.

<sup>105</sup> Canor (2013).

<sup>106</sup> von Bogdandy and Spieker (2020a), p. 530, with further details.



**Table 4.1** Comparison values Art 2 TEU, CFR and other provisions of EU primary law

Values	CFR rights (and articles)	Other provisions of EU primary <sup>a</sup> law
Human dignity	Title I (human dignity), Art 1, Art 25 (elderly), Art 31 (working conditions)	<i>Corner-stone of values, a fundamental right and basis of fundamental right</i>
Freedom	Title II (freedom)	<i>Fundamental freedoms; area of freedom, security and justice (Art 67–89-TFEU), etc.</i>
Democracy	Title V (citizens' rights)	Title II TEU (provisions on democratic principles; Art 9–12 TEU), Art 15 TFEU (transparency)
Equality	Title III (equality), especially Art 20, likewise Art 21 as the other side of the same coin	Art 4(2) TEU (equality of MS), Art 9 TEU (cross-sectional clause, citizens), Art 8 TFEU (cross-sectional clause, women and men); <i>see also: non-discrimination, equality woman &amp; men</i>
Rule of law	Art 47, as well as (rest of) Title VI (justice), Title V (citizens' rights)	Art 19 TEU, <i>CJEU case-law (especially recently)</i>
Human rights, etc.	<i>Most articles of CFR</i>	Art 6 TEU (fundamental rights), <i>CJEU case-law (since 1969), or general principles of EU law</i>
Minorities	Title III (equality), Art 21, Art 22	<i>Not further addressed in other provisions</i>
Pluralism	Art 10 (religion), Art 11 (media), Art 22 (cultural, religious & linguistic diversity), rest of Title III (equality)	Prot No 29 (public broadcasting and democracy)
Non-discrimination	Art 21, rest of Title III (equality), likewise Art 20 as the other side of the same coin	Art 10 TFEU (cross-sectional clause), Art 18–19 TFEU, fundamental freedoms, etc.
Tolerance	<i>None explicit, cf. also Title III (equality)</i>	<i>None (N.B. only one hit, i.e., Art 2 TEU)</i>
Justice	Title VI (justice), especially Art 47, also Art 48 (innocence), Art 50 ( <i>ne bis in idem</i> ), etc.	<i>Approx. 276 times in EU treaties; e.g., Court of Justice, area of freedom, security and justice (Art 67–89 TFEU)</i>
Solidarity	Title IV (solidarity)	CFSP: Art 21(1) TEU, Art 24(2) & (3) TEU, Art 31(1)(2) TEU, Art 32 (1) TEU; AFSJ: Art 67(2) TFEU, Art 80 TFEU; Art 122(1) TFEU (economic policy), Art 194(1) TFEU (energy), Art 222 TFEU and Dec No 37 (solidarity clause) <i>Also closely linked to Art 4(3) TEU</i>
Gender equality	Art 23, rest of Title III (equality)	Art 8 TFEU, Art 10 TFEU, Art 157 TFEU

<sup>a</sup> On various examples of EU secondary law, see *supra*, Sect. 3.2.1



vertical top-down, horizontal, diagonal) it is worth emphasising the core element of a **presumption**<sup>107</sup> that those essential requirements are fulfilled. However, this presumption is not absolute and can be **rebutted**.<sup>108</sup>

It is important to clarify that the **CFR** fulfils **different functions** in relation to the EU, compared to the Member States.<sup>109</sup> In case of the **EU**, due to the competences increasing over time, the Charter can be seen as the primary ‘bill of rights’ and its main function relates to legitimacy. In case of the **Member States**, already bound by their national provisions, the function is a different one. In their case, the concern is rather a possibly diverging application of the CFR in the 27 Member States, endangering the **autonomy and uniform application** of EU law. In *Melloni*, the Court has referred to the “primacy, unity and effectiveness of EU law”, which may not be compromised.<sup>110</sup>

To understand this theory, it is important to remember **Art 51(1) CFR** and the limited applicability it implies in case of Member States, as the CFR “provisions [...] are addressed [...] to the Member States only [...] when they are implementing Union law”. As a reminder, not only does the CFR have a different function in case of the EU, also the CFR poses less challenges in terms of its applicability to the EU. The ‘reverse Solange’ doctrine of von Bogdandy et al.<sup>111</sup> has been developed, to overcome this limitation of Art 51(1) CFR regarding **Member States**.

- At the **beginning**, the ‘reverse Solange’ doctrine was linked to the ‘**substance of rights**’ doctrine developed by the Court in *Ruiz Zambrano*. The particularity of this doctrine becomes clear only when compared with the ‘normal’ situation under EU law. Normally a cross-border element (i.e. two Member States) is required to enjoy the rights conferred by the EU’s economic fundamental freedoms or EU citizenship-related rights (Art 20 to Art 25 TFEU). However, according to this doctrine this is not the case, if national measures “have the effect of depriving citizens of the Union of the genuine enjoyment of the substance [...] of the rights conferred by virtue of their status as citizens of the

<sup>107</sup>Likewise, “mutual trust between the Member States [...] is based on the fundamental premiss that Member States share a set of common values”, ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 50.

<sup>108</sup>von Bogdandy and Spieker (2020a), p. 530. On ‘homogeneity’, ‘strukturelle Kongruenz’, or ‘equivalence’, all pointing into a similar direction, see Sect. 3.2.1.14. See also ECtHR judgement of 30 June 2005, *Bosphorus vs. Ireland*, 45036/98, para 156: “However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient”, on the equivalence between the ECHR and fundamental rights in what today is the EU.

<sup>109</sup>This paragraph draws on von Bogdandy and Spieker (2020a), p. 527.

<sup>110</sup>ECJ judgement of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, para 60. Meanwhile, see also Art 54 CFR (level of protection).

<sup>111</sup>von Bogdandy et al. (2012, 2017) and von Bogdandy and Spieker (2019, 2020a, b).

Union”<sup>112</sup> <sup>113</sup> To cut it short, von Bogdandy et al. had expected a certain future development of this ‘substance of rights’ doctrine, which did not take place.<sup>114</sup> Therefore, they have later on taken a slightly different approach.

- Instead of *Ruiz Zambrano*, they **now** rely on ECJ case-law focussing on our topic of the EU’s **values**. Art 2 TEU is intended to help overcome the limitations emanating from Art 51(1) CFR. von Bogdandy et al. have taken the related case-law “one step further and propose[d] to basically define this ‘substance’ with reference to the essence of fundamental rights enshrined in Article 2 TEU”.<sup>115</sup> Hence, they have adopted the two elements of a high threshold and the willingness of the Court to apply a different rationale in this exceptional field, and have **transferred** this approach **from** EU **citizenship** rights **to** the task of filling the EU’s **values** with life. At the same time, this shall ensue the enforceability of these concepts. As will be depicted in the following, the ‘vigilance of individuals’ is one ingredient to this doctrine, besides the application to purely internal (i.e., no cross-border situation between two Member States) situations.

In 2012, von Bogdandy et al. have **summarised** their doctrine as follows: “beyond the scope of Article 51(1) CFREU Member States remain autonomous in fundamental rights protection *as long as* it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2. However, should it come to the extreme constellation that a violation is to be seen as *systemic*, this presumption is rebutted. In such a case, individuals can rely on their status as Union citizens to seek redress before national courts”.<sup>116</sup> Taking the *Ruiz Zambrano* case-law to the next level does however not mean to replace it, as their doctrine applies to “both citizenship and fundamental rights protection”.<sup>117</sup> Consequently, **in essence**, this doctrine argues, that any court in the EU (including the CJEU) can scrutinise any national measure if the essence (!) of the EU’s values of Art 2 TEU, as further substantiated by EU law (e.g., CFR) is affected.

This **bottom-up** approach (any court in the EU) builds on a longstanding and successful approach that was developed early on by the ECJ. Already in the seminal *Van Gend en Loos* case, the Court has referred to the “vigilance of individuals concerned to protect their rights”.<sup>118</sup> This was a clever move to supplement the top-down approach of infringement proceedings (now Art 258 TFEU) via bottom-up enforcement of EU law via individuals, acting both in their, as well as in the interest

<sup>112</sup>ECJ judgement of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, para 42.

<sup>113</sup>See Sect. 1.5.4 and the threshold in case of mutual confidence, as mentioned in ECJ judgement of 21 December 2011, *N. S. and Others*, joined cases C-411/10 and C-493/10, EU:C:2011:865.

<sup>114</sup>von Bogdandy and Spieker (2020a), p. 533.

<sup>115</sup>von Bogdandy et al. (2012), p. 491.

<sup>116</sup>von Bogdandy et al. (2012), p. 491; no emphases added.

<sup>117</sup>von Bogdandy et al. (2012), p. 491.

<sup>118</sup>ECJ judgement of 5 February 1963, *Van Gend en Loos*, C-26/62, EU:C:1963:1, p. 13.

of the EU.<sup>119</sup> This clever decentralised approach also applies for this ‘reverse Solange’ doctrine.

The **advantage** of Art 2 TEU, compared to Art 51(1) CFR, is that it applies in all situations, as “it applies to *any* Member State act irrespective of *any* other link to EU law”.<sup>120</sup> One **challenge** of this approach could be seen in the fact that values are *per se* rather abstract. From ECJ case-law we know the requirements of a provision so that it can produce a direct effect. The Court has emphasised the requirements “of unconditionality and sufficient precision required in order to produce a direct effect”.<sup>121</sup> However, in this respect, von Bogdandy et al. do not see a problem, as the ECJ now takes a broader view of these criteria.<sup>122</sup> They also do not claim that all Art 2 TEU values are directly applicable. The above-mentioned analysis on the justiciability of these Art 2 TEU values can be seen as complementary to this theory and to feed into it.

They also go into a similar direction, arguing for a **combination** of Art 2 TEU with other Treaty provisions and argue for a **value-based interpretation**.<sup>123</sup> This is not only true for provisions of EU law (based on the hierarchy of EU law), but also for national law<sup>124</sup> (based on the primacy of EU law). As they aptly state, this “value-oriented interpretation has a twofold effect: while it operationalises Article 2 TEU through a specific provision, it simultaneously justifies a broader reading of the specific provision in light of the values at stake. This ‘mutual amplification’ of the combined provisions leads to a much more predictable but still powerful effect against illiberal tendencies”.<sup>125</sup>

One prominent **combination** of Art 2 TEU with another provision of EU law is the already-mentioned **Art 19 TEU** concretising the ‘rule of law’.<sup>126</sup> The importance of Art 19 TEU and the preliminary ruling proceeding (Art 267 TFEU) has to be seen against the background of the high barriers of Art 264(4) TFEU (action for annulment in case of natural or legal persons).<sup>127</sup> In their words, Art 19 TEU leads to a

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<sup>119</sup> Important to note that the bottom-up vs. top-down perspective mentioned at the beginning of this section (relating to one level setting up requirements for this **presumption**) should not be confused with the aspect addressed here, that is to say **enforcement** in a bottom-up (via individuals) or top-down (via the Commission) way.

<sup>120</sup> von Bogdandy and Spieker (2020a), p. 531; no emphases added.

<sup>121</sup> ECJ judgement of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, para 68 (here, in the context of a directive).

<sup>122</sup> von Bogdandy and Spieker (2020a), p. 534.

<sup>123</sup> von Bogdandy and Spieker (2020a), p. 534.

<sup>124</sup> ECJ judgement of 5 October 2004, *Pfeiffer and Others*, joined cases C-397/01 to C-403/01, EU:C:2004:584, para 114, the “requirement for national law to be interpreted in conformity with [EU] law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it”.

<sup>125</sup> von Bogdandy and Spieker (2020a), p. 534.

<sup>126</sup> See von Bogdandy and Spieker (2020a), p. 535; as well as Sects. 3.2.1.3 and 4.2.1.

<sup>127</sup> von Bogdandy and Spieker (2020a), p. 536.

situation where “the entire national judiciary has to be in line with the EU value of the rule of law”.<sup>128</sup>

Having depicted this doctrine that perfectly feeds into this book’s approach of giving a key role to the values of the EU, it is worth addressing what would have been **alternatives** to this doctrine. One idea addressed by former Commission Vice-President Reding of “abolishing Article 51 of the [...] Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States”<sup>129</sup> is challenging due to legal character of EU primary law and the necessity of all Member States having to agree to modifications. A second approach of a “creative reinterpretation”<sup>130</sup> to interpret Art 51 CFR ‘away’ has aptly been criticised as an approach that can “hardly convince”.<sup>131</sup>

### 4.2.3 *Art 2 TEU and Human Rights-Related Provisions*

The statements made so far, where mainly on provisions of EU **primary** law, however excluding **human rights**-related provisions, to address them **collectively at this point**. Located at the bottom of the hierarchy of EU law, EU **secondary** law will be covered below in Sect. 4.2.4.

Human rights are covered in **Art 2 TEU** as a value of the first sentence. As Calliess mentions, “fundamental rights are subjectifying and concretising the fundamental values of the EU”.<sup>132</sup> Human rights are also prominently addressed in **Art 6 TEU**. Paragraph 1 of this provision refers to the **CFR** (“same legal value as the Treaties”), para 2 to the **ECHR** (accession of the EU to the ECHR), and para 3 to the **general principles** of EU law, “as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States”. The relationship between Art 2 TEU and selected CFR articles has already been covered, as well as the general principles of EU law. The relation of Art 2 TEU to the **general principles** of EU law and the CFR was described as a “thorny question”.<sup>133</sup> This statement essentially referred to whether the concepts should be uniform or different, depending on whether the Member States are implementing EU law (see also above Sect 4.1.2). Other concepts, such as selected ethical (but also some legal) principles will be covered in Sect. 4.3.

This chapter will focus on the relationship between values and human rights-related provisions, illustrated by three tables. The values of Art 2 TEU are compared to the **CFR** and further provisions of EU law in Table 4.1. Likewise, the values of the

<sup>128</sup> von Bogdandy and Spieker (2020a), p. 535.

<sup>129</sup> Reding (2013).

<sup>130</sup> Jakab (2017), p. 255.

<sup>131</sup> von Bogdandy and Spieker (2020a), p. 528.

<sup>132</sup> Calliess (2004), p. 1040; translated with DeepL.

<sup>133</sup> Hillion (2016), p. 70.

first (Table 4.2) and of the second (Table 4.3) sentence of Art 2 TEU will be linked to the **ECHR**.

Turning first to Table 4.1<sup>134</sup> (see above) it must be emphasised that this overview is an **excerpt** of the most relevant provisions. In the case of democracy, one could also mention Art 1(2) TEU on transparency, Art 21(1) TEU on democracy in the external dimension, as well as other CFR articles (freedom of assembly, freedom of information, etc.) as covered above in Sect. 3.2.1.2. In case of the rule of law, one could also name Art 20 CFR (equality before the law) and Art 21 CFR (non-discrimination), as one element of this concept.

Table 4.1 displays a close connection between Art 2 TEU and the **structure** of the **CFR**, of both first and second sentence values. **First** sentence values cover dignity (title I), freedom(s) (title II) and equality (title III). Citizens' rights (title V) can be seen to be closely related to democracy in terms of elections to the EP (Art 39 CFR) and at municipal elections (Art 40 CFR). Likewise, other articles are also closely connected to democracy, such as the right to good administration (Art 41 CFR), etc. **Second** sentence values cover solidarity (title IV) and justice (title VI), where the latter is also closely related to first sentence 'rule of law'. Non-discrimination and equality between women and men, also mentioned in the second sentence, are also closely related to equality (title III). Tolerance and pluralism are not explicitly covered in the CFR structure, they can rather be seen as underlying values, and implicitly covered.

Finally, the column on the right-hand side shall also emphasise the relationship to other provisions of EU **primary law**, as explained above in the presentation of the individual values. Table 4.1 will not be further explained and is only intended to give an impression regarding values, CFR rights and other provisions.

The relationship between human rights and values also requires consideration of the **ECHR**. As all EU Member States are at the same time contracting parties of the Council of Europe, they are also bound to the ECHR.<sup>135</sup> Furthermore, Art 6(3) TEU addresses the fundamental rights, as guaranteed by the ECHR and as resulting from the "constitutional traditions common to the Member States", as "general principles of the Union's law". Hence, the values now enshrined in Art 2 TEU were able to draw inspiration from the **pre-existing** concepts stemming from the Member States' constitutional traditions, as they themselves have been inspired by the ECHR, as well as directly from the ECHR. Reference to the **ECHR** obviously also comprises the **ECtHR** case-law, as the Strasbourg court has shaped the ECHR enshrined fundamental rights in a similar way, as the Luxembourg court did in the EU.<sup>136</sup>

For the reason of size, the two sentences of Art 2 TEU have been split up into **two tables** (Tables 4.2 and 4.3). Nevertheless, it must be emphasised that especially the

<sup>134</sup>This table does not cover those values addressed in Art 3 TEU on the EU's objectives.

<sup>135</sup>The UK is an example of a country not being bound to the CFR anymore (due to Brexit), but to the ECHR.

<sup>136</sup>First, referring to general principles of law, later also interpreting the CFR.

**Table 4.2** Comparison values Art 2 TEU (first sentence) and ECHR

Values	ECHR, etc.	Selection of ECtHR case-law
Human dignity	<i>Not explicitly mentioned in ECHR</i>	“Tolerance and respect for the equal <b>dignity</b> of all human beings is the foundation of a democratic and pluralist society” <sup>a</sup>
Freedom	“Common heritage of political traditions, ideals, freedom” (ECHR preamble, recital 5)   Title of Section I ECHR   Art 5 ECHR   Art 9 ECHR   Art 10 ECHR   Art 11 ECHR	“ <b>Freedom</b> of thought, conscience and religion is <b>one of the foundations</b> of a ‘democratic society’ within the meaning of the Convention” <sup>b</sup>
Democracy	“Effective political democracy” (ECHR preamble, recital 4)   Art 10 ECHR   Art 11 ECHR   Art 17 ECHR   “in a democratic society” (passim)   Art 3 Prot No 1	<ul style="list-style-type: none"> <li>• “One of the principal characteristics of <b>democracy</b> is the possibility it offers of resolving a country’s problems through <b>dialogue</b>, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. It is of the <b>essence</b> of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself” <sup>c</sup></li> <li>• “Referring to the hallmarks of a ‘<b>democratic society</b>’, the Court has attached particular importance to pluralism, tolerance and broadmindedness.” <sup>d</sup></li> <li>• “Tolerance and respect for the equal dignity of all human beings is the foundation of a <b>democratic</b> and pluralist society” <sup>e</sup></li> </ul>
Equality	Art 14 ECHR (no discrimination)	“Tolerance and respect for the <b>equal</b> dignity of all human beings is the foundation of a democratic and pluralist society” <sup>f</sup>
Rule of law	“Rule of law” (ECHR preamble, recital 5)   cf. Art 6 ECHR	“Furthermore, the Court recalls that the right to a fair trial before a court, guaranteed by Article 6 § 1 of the Convention, must be interpreted in the light of the preamble to the Convention, which sets out the <b>rule of law</b> as an element of the common heritage of the Contracting States. One of the <b>fundamental elements</b> of the rule of law is the principle of certainty in legal relations, which requires, inter alia, that the definitive solution of any dispute by the courts should no longer be called into question” <sup>g</sup> <i>Not defined in the ECHR</i> <sup>h</sup>

(continued)

**Table 4.2** (continued)

Values	ECHR, etc.	Selection of ECtHR case-law
Human rights, etc.	<i>ECHR as such</i>	<i>ECHR as such and related ECtHR case-law</i>
Minorities	Cf. Art 14 ECHR (no “discrimination on any ground such as [...] association with a national minority”)	<ul style="list-style-type: none"> <li>• “<b>emerging international consensus</b> amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle [...], <b>not only</b> for the purpose of safeguarding the interests of the <b>minorities themselves</b> but to preserve a cultural <b>diversity of value</b> to the <b>whole community</b>”<sup>i</sup></li> <li>• “although the fact of belonging to a <b>minority</b> with a traditional <b>lifestyle different from</b> that of the <b>majority</b> does <b>not</b> confer an <b>immunity</b> from general laws intended to safeguard the assets of the community as a whole, such as the environment, it may have an incidence on the manner in which such laws are to be implemented. [...] the <b>vulnerable position</b> of Gypsies as a minority means that some <b>special consideration</b> should be given to their <b>needs</b> and their different lifestyle”<sup>j</sup></li> </ul>

<sup>a</sup> ECtHR judgement of 16 July 2009, *Feret vs. Belgium*, 15615/07, para 64 (own translation, emphasis added)

<sup>b</sup> ECtHR judgement of 25 May 1993, *Kokkinakis vs. Greece*, 14307/88, para 31 (emphases added)

<sup>c</sup> ECtHR judgement of 17 September 2009, *Manole and Others vs. Moldova*, 13936/02, para 95 (emphases added)

<sup>d</sup> ECtHR judgement of 14 February 2006, *Christian Democratic People’s Party vs. Moldova*, 28793/02, para 64 (emphasis added)

<sup>e</sup> ECtHR judgement of 16 July 2009, *Feret vs. Belgium*, 15615/07, para 64 (own translation, emphasis added)

<sup>f</sup> ECtHR judgement of 16 July 2009, *Feret vs. Belgium*, 15615/07, para 64 (own translation, emphasis added)

<sup>g</sup> ECtHR judgement of 3 September 2013, *M.C. and Others vs. Italy*, 5376/11, para 60 (translated with DeepL, emphases added)

<sup>h</sup> Schroeder (2016), p. 24; on the rule of law in the Council of Europe, see also Polakiewicz and Sandvig (2016); on the rule of law in ECtHR case-law, see also Steiner (2016)

<sup>i</sup> ECtHR judgement of 18 January 2001, *Beard vs. the United Kingdom*, 24882/94, para 104 (emphases added)

<sup>j</sup> ECtHR judgement of 18 January 2001, *Chapman vs. the United Kingdom*, 27238/95, para 96 (emphases added)

columns on the right-hand side are only an excerpt, referring to selected ECtHR case-law.

**Table 4.3** Comparison values Art 2 TEU (second sentence) and ECHR

Values	ECHR, etc.	Selection of ECtHR case-law
Pluralism	Cf. Art 9 ECHR   cf. Art 17 ECHR	<ul style="list-style-type: none"> <li>• “freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. [...] The <b>plur</b>alism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”<sup>a</sup></li> <li>• “Tolerance and respect for the equal dignity of all human beings is the foundation of a democratic and <b>plur</b>alist society”<sup>b</sup></li> <li>• “<b>plur</b>alism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts”<sup>c</sup></li> <li>• “Referring to the hallmarks of a ‘democratic society’, the Court has attached particular importance to <b>plur</b>alism, tolerance and broadmindedness.”<sup>d</sup></li> </ul>
Non-discrimination	Art 14 ECHR   Prot 12	<i>Comprehensive ECtHR case-law</i> <sup>e</sup>
Tolerance	Cf. Art 9 ECHR   cf. Art 10 ECHR	<ul style="list-style-type: none"> <li>• “Referring to the hallmarks of a ‘democratic society’, the Court has attached particular importance to pluralism, <b>tolerance</b> and broadmindedness.”<sup>f</sup></li> <li>• “<b>Tolerance</b> and respect for the equal dignity of all human beings is the foundation of a democratic and pluralist society”<sup>g</sup></li> <li>• “The role of the authorities in a situation of conflict between or within religious groups is <b>not to remove</b> the cause of tension by eliminating pluralism, <b>but</b> to ensure that the competing groups <b>tolerate each other</b>.”<sup>h</sup></li> </ul>
Justice <sup>1</sup>	“Fundamental freedoms which are the foundation of justice and peace in the world” (ECHR preamble, recital 4)   “interests of justice” (Art 6 ECHR); cf. Art 13 ECHR (effective remedy)	<ul style="list-style-type: none"> <li>• “procedural rules are designed to ensure the proper administration of <b>justice</b> and compliance with the principle of <b>legal certainty</b>”<sup>j</sup></li> <li>• “even <b>appearances</b> may be of a certain importance or, in other words, ‘<b>justice must not only be done</b>, it must <b>also be seen</b> to be done’ [...]. What is at stake is the <b>confidence</b> which the</li> </ul>

(continued)



**Table 4.3** (continued)

Values	ECHR, etc.	Selection of ECtHR case-law
		courts in a democratic society must inspire in the public” <sup>k</sup> • “As the guarantor of <b>justice</b> , a <b>fundamental value</b> in a State governed by the <b>rule of law</b> , it must enjoy <b>public confidence</b> if it is to be successful in carrying out its duties” <sup>l</sup>
Solidarity	<i>Not explicitly mentioned in ECHR</i>	“The <b>value of social solidarity</b> , the purpose of the duty being to protect the health of all members of society, particularly those who are especially <b>vulnerable</b> with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination” <sup>m</sup>
Gender equality	See Art 14 ECHR	<i>Comprehensive ECtHR case-law</i> <sup>n</sup>

<sup>a</sup> ECtHR judgement of 25 May 1993, *Kokkinakis vs. Greece*, 14307/88, para 31 (emphasis added)<sup>b</sup> ECtHR judgement of 16 July 2009, *Feret vs. Belgium*, 15615/07, para 64 (own translation, emphasis added)<sup>c</sup> ECtHR judgement of 3 May 2007, *Bączkowski and Others vs. Poland*, 1543/06, para 62 (emphasis added)<sup>d</sup> ECtHR judgement of 14 February 2006, *Christian Democratic People’s Party vs. Moldova*, 28793/02, para 64 (emphasis added)<sup>e</sup> See, for instance, Grabenwarter and Pabel (2021), pp. 652–681<sup>f</sup> ECtHR judgement of 14 February 2006, *Christian Democratic People’s Party vs. Moldova*, 28793/02, para 64 (emphasis added)<sup>g</sup> ECtHR judgement of 16 July 2009, *Feret vs. Belgium*, 15615/07, para 64 (own translation, emphasis added)<sup>h</sup> ECtHR judgement of 16 December 2004, *Supreme Holy Council of the Muslim Community vs. Bulgaria*, 39023/97, para 96 (emphases added)<sup>i</sup> For further details on justice in the ECHR and in ECtHR case-law (also covering the EU perspective), see European Union Agency for Fundamental Rights (FRA) and Council of Europe (2016)<sup>j</sup> ECtHR judgement of 9 January 2013, *Oleksandr Volkov vs. Ukraine*, 21722/11, para 143 (emphases added)<sup>k</sup> ECtHR judgement of 23 April 2015, *Morice vs. France*, 29369/10, para 78 (emphases added)<sup>l</sup> ECtHR judgement of 23 April 2015, *Morice vs. France*, 29369/10, para 128 (emphases added)<sup>m</sup> ECtHR judgement of 8 April 2021, *Vavříčka and Others v. The Czech Republic*, 47621/13 and 5 others, para 279<sup>n</sup> See, for instance, Grabenwarter and Pabel (2021), pp. 665–667

- Good evidence of the **close connection** between these **values** can be found in the following quote, comprising five of them: “**Tolerance** and respect for the **equal**

**dignity** of all human beings is the foundation of a **democratic** and **pluralist** society”.<sup>137</sup>

- Equal dignity (or in the French original version: “*respect de l’égalité*”), as also mentioned by AG Stix-Hackl in *Omega*,<sup>138</sup> displays the relationship between equality<sup>139</sup> and human dignity. **Human dignity** stands out as a famous example of an Art 2 TEU value, that is not explicitly mentioned in the ECHR, but has found its place in ECtHR case-law. The same is true for **solidarity**, recently covered by the ECtHR in the context of the permissibility of mandatory vaccination and Art 8 ECHR. This is remarkable, as solidarity as such cannot be found in the ECHR. However, in this situation of a communicable disease<sup>140</sup> behaviour of one person affects not only the person itself, plus those in close contact, but likewise society at large.
- This topic can be linked to the value of **democracy**. One question that currently divides man people (and sometime even society at large) can mainly be solved via dialogue. As the ECtHR has held, “[o]ne of the principal characteristics of democracy is the possibility it offers of resolving a country’s problems through dialogue [. . .]”.<sup>141</sup> The Strasbourg Court has mentioned some other ingredients for “a ‘democratic society’”, as “the Court has attached particular importance to pluralism, tolerance and broadmindedness”.<sup>142</sup>
- The **mutual relationship** of the different levels (Member States, ECHR, and finally also EU) can be seen from the ECtHR’s quotation of the “**rule of law** as an element of the common heritage of the Contracting States”.<sup>143</sup>
- The EU’s motto of ‘**united in diversity**’ can be seen to be reflected in the ECtHR’s quotation on **pluralism**, which “is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts”.<sup>144</sup> In the field of **minorities**, besides the “purpose of safeguarding the interests of the minorities themselves” the ECtHR has emphasised the aim “to preserve a cultural diversity of value to the whole community”.<sup>145</sup> These quotations reveal the constructive elements of pluralism or diversity, not possibly destructive ones. While the ECtHR quotations rather refer to societal issues, in

<sup>137</sup> ECtHR judgement of 16 July 2009, *Feret vs. Belgium*, 15615/07, para 64 (own translation, emphasis added).

<sup>138</sup> AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162, para 80.

<sup>139</sup> Due to the broad case-law, other elements of (gender) equality, respectively, non-discrimination are not further covered in this analysis.

<sup>140</sup> Cf. Frischhut (2021).

<sup>141</sup> ECtHR judgement of 17 September 2009, *Manole and Others vs. Moldova*, 13936/02, para 95.

<sup>142</sup> ECtHR judgement of 14 February 2006, *Christian Democratic People’s Party vs. Moldova*, 28793/02, para 64.

<sup>143</sup> ECtHR judgement of 3 September 2013, *M.C. and Others vs. Italy*, 5376/11, para 60 (translated with DeepL, emphasis added).

<sup>144</sup> ECtHR judgement of 3 May 2007, *Bączkowski and Others vs. Poland*, 1543/06, para 62.

<sup>145</sup> ECtHR judgement of 18 January 2001, *Beard vs. the United Kingdom*, 24882/94, para 104.

law we have already seen that sometimes ‘constitutional pluralism’ can tend towards an illiberal approach. However, this is not necessarily the case, as ‘constitutional pluralism’ is “neither a purely liberal nor a purely illiberal theory”.<sup>146</sup> Hence, as mentioned in Art 6(3) TEU, the element of “constitutional traditions **common** to the Member States” is key (emphasis added).

- Finally, “justice must not only be done, it must also be seen to be done”.<sup>147</sup> This quotation and the link of **justice** to **confidence** goes in a similar direction as for the function of ethics in EU law, as I have argued elsewhere.<sup>148</sup>

Like Table 4.1, Tables 4.2 and 4.3 will not be further explained and are only intended to give an impression of the relationship between the values of the EU and the ECHR, respectively selected ECtHR case-law.

#### 4.2.4 Art 2 TEU and Secondary Law

After the focus on provisions of EU primary law, let us now turn to the relationship between Art 2 TEU values and secondary law. We know this relationship from the CFR, where the ECJ took the approach of secondary law filling CFR provisions ‘with life’, as in the case of Art 31 (2) CFR<sup>149</sup> (fair and just working conditions) and Directive 2003/88/EC<sup>150</sup> on working time. As the Court stated, “Directive 2003/88 gives specific form to the fundamental right expressly enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union and must, therefore be interpreted in the light of that Article 31(2)”.<sup>151</sup> Due to the hierarchy of EU law, EU secondary law can obviously give “specific form” to EU primary law, if it does not contradict the latter. Another consequence of the hierarchy of EU law is the requirement to interpret EU secondary law in the light of EU primary law, as also emphasised by the ECJ in this judgement.

This relationship between CFR provisions and EU secondary law can also be applied to another provision of EU primary law, i.e., the values enshrined in Art 2 TEU. This **value-conform interpretation** has also been stressed in literature.<sup>152</sup>

<sup>146</sup>Canihac (2021), p. 504.

<sup>147</sup>ECtHR judgement of 23 April 2015, *Morice vs. France*, 29369/10, para 78.

<sup>148</sup>Frischhut (2015, 2019, 2020c).

<sup>149</sup>“Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.”

<sup>150</sup>Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003 L 299/9.

<sup>151</sup>ECJ judgement of 9 March 2021, *Radiotelevizija Slovenija (Période d’astreinte dans un lieu reculé)*, C-344/19, EU:C:2021:182, para 27; see also ECJ judgement of 9 March 2021, *Stadt Offenbach am Main (Période d’astreinte d’un pompier)*, C-580/19, EU:C:2021:183, para 28.

<sup>152</sup>Potacs (2016).

- We have seen some EU directives referring to **human dignity**, for instance, in the field of migration ('mass influx' directive,<sup>153</sup> 'return directive',<sup>154</sup> 'asylum reception',<sup>155</sup> 'common procedures',<sup>156</sup> as well as 'asylum qualification',<sup>157</sup>), in the field of economic services,<sup>158</sup> citizens' rights,<sup>159</sup> in case of combatting terrorism,<sup>160</sup> in the 'Schengen Borders Code', as well as in the field of the legal protection of biotechnological inventions.<sup>161</sup>
- One value, which has been shaped in EU secondary law, as well as CJEU case-law, is **non-discrimination**, including **equality**<sup>162</sup> between women and men. Several non-discrimination directives have been mentioned above in Fig. 3.2 and in Sect. 3.2.1.10.
- In case of **democracy**, we can find EU secondary law for both representative democracy,<sup>163</sup> as well as for participatory democracy. In the latter case via the European citizens' initiative, as further clarified in the corresponding

<sup>153</sup>Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12, Art 21 (voluntary return) and Art 22 (enforced return).

<sup>154</sup>Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98, recital 2, recital 17, Art 8(4).

<sup>155</sup>Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180/96, Art 20(5) "dignified standard of living", see also recitals 11, 18, 25, and 35.

<sup>156</sup>Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180/60, Art 13(2)(d) and recital 60.

<sup>157</sup>Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337/9, recital 16 ("Directive seeks to ensure full respect for human dignity and the right to asylum"). See on this provision, ECJ judgement of 14 May 2019, *M*, joined cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403, para 82.

<sup>158</sup>Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ 2006 L 376/36, recitals 27 and 41.

<sup>159</sup>Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [...], OJ 2004 L 158/77, as corrected by OJ 2007 L 204/28, recital 15.

<sup>160</sup>Directive (EU) 2017/541 of 15 March 2017 on combating terrorism [...], OJ 2017 L 88/6, Art 25 and recitals 1 and 2.

<sup>161</sup>Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, OJ 1998 L 213/13.

<sup>162</sup>On equality, see for instance, EC recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, OJ 2018 L 167/28.

<sup>163</sup>Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, OJ 1994 L 368/38, as amended by OJ 2013 L 158/231. See also Art 40 CFR.

regulation.<sup>164</sup> Indirectly, democracy also benefits from transparency, as, for instance, enshrined in case of the regulation on access to documents,<sup>165</sup> to name but one example.

- One important example in the field of the ‘**rule of law**’ is the so-called ‘conditionality’ regulation,<sup>166</sup> which most likely might have more impact in terms of enforcing compliance in the Member States compared to the blocked Art 7 TEU procedure.
- **Pluralism** has been further clarified in the soft-law Council conclusions from 2020 in the field of the media.<sup>167</sup> **Justice** is another value with further clarification in a recent soft-law document.<sup>168</sup>
- **Solidarity** as a value, for instance, in the field of financial support, can be found in the regulation on the ‘European Union Solidarity Fund’. While it initially was about natural disasters, it now also covers major public health emergencies.<sup>169</sup> While at the beginning of the COVID-19 crisis, there was a clear lack of solidarity, the Commission in its soft-law document on cross-border cooperation in healthcare stressed the “encouraging and important signal of European solidarity”.<sup>170</sup> ‘The European Solidarity Corps Programme’ covers ‘participation of young people in (humanitarian aid-related) solidarity activities’.<sup>171</sup>

There are **various advantages** of linking EU primary law-based values with EU secondary law. First, one does not have to worry about **justiciability**, as an EU regulation is directly applicable, and an EU directive binding via the national implementation measures. Second, the document at the lower end of the legal hierarchy can benefit from the **authority** of a provision enshrined in EU primary law. Third, this approach also enhances the uniformity and **systematic** interpretation of EU law as such. Finally, the advantage of placing a value of EU primary law in a certain document of EU secondary law is that a rather abstract value can be **specified** in a concrete field as necessary and reasonable under the respective conditions. Based on the clear hierarchy of EU law, such a specification obviously must respect

<sup>164</sup> Regulation (EU) 2019/788 of 17 April 2019 on the European citizens’ initiative, OJ 2019 L 130/55, as amended by OJ 2019 L 257/1.

<sup>165</sup> Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43. See also Art 15(3) TFEU, Art 42 CFR.

<sup>166</sup> Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L1 433/1. See also, *supra*, Sect. 3.5.1.

<sup>167</sup> Council conclusions on safeguarding a free and pluralistic media system, OJ 2020 C 422/8, pt. 16.

<sup>168</sup> Council conclusions ‘Access to justice – seizing the opportunities of digitalisation’, OJ 2020 C1 342/1.

<sup>169</sup> Council Regulation (EC) No 1024/2002 of 11 November 2002 establishing the European Union Solidarity Fund, OJ 2002 L 311/3, as amended by OJ 2020 L 99/9.

<sup>170</sup> EC communication ‘Guidelines on EU Emergency Assistance on Cross-Border Cooperation in Healthcare related to the COVID-19 crisis’, OJ 2020 C1 111/1.

<sup>171</sup> Regulation (EU) 2021/888 of the European Parliament and of the Council of 20 May 2021 establishing the European Solidarity Corps Programme [...], OJ 2021 L 202/32.

the value of EU primary law. This question had been covered by the Court concerning the above-mentioned directive<sup>172</sup> of 1998 on the legal protection of biotechnological inventions. In the end, the Court dismissed the action, as the directive has guaranteed human dignity.<sup>173</sup>

### 4.3 Relation Values to Other Concepts

So far, we have seen the relationship of values amongst each other (Sect. 4.1), values in relation to other provisions of EU primary law (Sect. 4.2.1), with a special emphasis on human rights-related provisions (Sect. 4.2.3), as well as EU secondary law (Sect. 4.2.4). Before then turning to a possible ‘future direction of travel’ and some ideas *de lege ferenda* in Chap. 5, it is now time to take a **broader perspective**, a “view from ten thousand feet”<sup>174</sup> so to say.

As we have seen above, (see Fig. 3.1) the **historic process** of European integration started with integration in the **economic** field (1st step). As a new (supra-national) authority can also impact on fundamental rights, the next step consisted of the CJEU developing **fundamental rights** as general principles of law (2nd step). Having now covered various relations, another relation consisted of the spill-over<sup>175</sup> effect from economic to **political** integration via the Maastricht Treaty (3rd step). Finally, the Lisbon Treaty made the CFR legally binding and enshrined the common values in Art 2 TEU, turning EU integration also<sup>176</sup> into a ‘union of **values**’ (4th step).

#### 4.3.1 Relation Values and Economic or Political Objectives

As human rights (2nd step) are also mentioned as values (4th step) in Art 2 TEU, let us look at the relationship of values towards economic (1st step) and political (3rd step) objectives.

In two of its landmark cases, the ECJ had to deal with the **economic** fundamental freedoms (part of the 1st step) and other concepts.

<sup>172</sup>Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, OJ 1998 L 213/13.

<sup>173</sup>ECJ judgement of 9 October 2001, *Netherlands vs. Parliament and Council*, C-377/98, EU: C:2001:523, para 71; besides other reasons.

<sup>174</sup>Taken from the title of Cohen (2010).

<sup>175</sup>For further details, see Frischhut (2003), pp. 33–34.

<sup>176</sup>It is important to emphasise that the respective following steps do not replace but supplement the previous ones.

In *Schmidberger* the ECJ had to resolve a conflict of an **economic** fundamental freedom (free movement of products) **and** two **fundamental rights** (the freedom of speech and assembly), which arose as some Austrians demonstrated on a motorway against increasing traffic and transit, because of health and environmental concerns. As both the free movement of products (Art 34 TFEU), as well as the fundamental rights (formerly general principles of EU law, now also CFR) are EU primary law, the Court opted for a **balancing** approach. According to this, “the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance [!] was struck between those interests”.<sup>177</sup> Hence, a relationship of the economic perspective (1st step) and fundamental rights (2nd step), where none of them enjoys primacy over the other, but where a ‘fair balance’ must be achieved.

One year after *Schmidberger* (i.e. in 2004), the ECJ has held in the famous *Omega* case that “the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law”.<sup>178</sup> In this case on laserdromes and ‘playing at killing’, the Court has held that the economic fundamental freedoms (here, of services) are not unlimited and that they can be restricted in case of proportional national measures, with regard to accepted ‘reasons of justification’. What later become an EU value with the Lisbon treaty (signed 2007, entered into force 2009) and in this case occurred as a German ‘constitutional principle’, was accepted by the ECJ as a ‘general principle of law’, which can feed into ‘public policy’ as a so-called reason of justification.<sup>179</sup> This allowed Germany to prohibit these laser games, but also put this German ‘constitutional principle’ of human dignity on the European agenda. As in the case of *Omega*, neither values (4th step) nor economic fundamental freedoms (1st step) are absolute.

As Tridimas has aptly analysed, judgements such as *Schmidberger* and *Omega* “show that the Court promotes an integration model based on **value diversity** which views national constitutional standards **not** as being in a **competitive** relationship with the economic objectives of the Union but as forming part of its policy”.<sup>180</sup>

In terms of a historic process, human rights (2nd step) and values (4th step) must be **differentiated**, although Art 2 TEU establishes a **link** between them by naming human rights as one<sup>181</sup> value.

Let us now turn to their relationship with the **political** level (3rd step). The relationship of the economic perspective (1st step) to the political one (3rd one) is well displayed in the spill-over effect, not only covering one economic field (e.g., coal and steel) to spill-over to other economic fields, but eventually also from the economic to the political field.

<sup>177</sup> ECJ judgement of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, para 81.

<sup>178</sup> ECJ judgement of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, para 34.

<sup>179</sup> ECJ judgement of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, para 41.

<sup>180</sup> Tridimas (2006), p. 556, emphases added.

<sup>181</sup> On the other hand, two, if “the rights of persons belonging to minorities” are counted separately.

The example of taking **sanctions** against governments of third countries, companies, groups, or organisations (e.g., terrorist groups) and individuals supporting the targeted policies (e.g., involved in terrorist activities, etc.), shows the close relationship between the economic (1st step) and the political (3rd step) field.<sup>182</sup> Sanctions are mostly economic in nature. However, the imposition of sanctions is a political decision. The above-mentioned *Kadi* case on the CFSP and restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban illustrated the close link between those two fields.<sup>183</sup> In this case, Art 1 of the relevant Council document issued a flight ban, and Art 2 declared “[f]unds and other financial resources held abroad by the Taliban [to] be frozen”.<sup>184</sup>

Obviously, sanctions must be **targeted** in order “to minimise adverse consequences for those not responsible for the policies or actions leading to the adoption of sanctions”, especially concerning “local civilian population and on legitimate activities in or with the country concerned”.<sup>185</sup> Additionally, the imposed measures “must always be proportionate to their objective”.<sup>186</sup> This goes in a similar direction as the imperative to respect **human rights** and **EU values** when imposing sanctions. In *Kadi*, the Court has linked this economic, respectively, political perspective to the requirement to consider fundamental rights and principles, respectively, values. As already mentioned, *Kadi* was decided roughly one year before the entry into force of the Lisbon Treaty, that is why the Court did not refer to ‘values’, but to the “principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union”.<sup>187</sup>

This topic of sanctions has recently been supplemented by ‘restrictive measures against **serious human rights violations** and abuses’,<sup>188</sup> the EU’s so-called “shiny

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<sup>182</sup> Source and further details: Council of the EU (2020).

<sup>183</sup> ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461.

<sup>184</sup> Council common position 1999/727/CFSP of 15 November 1999 concerning restrictive measures against the Taliban, OJ 1999 L 294/1; N.B. No longer in force.

<sup>185</sup> Council of the EU (2020).

<sup>186</sup> General Secretariat of the Council (2018), p. 7.

<sup>187</sup> ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 303.

<sup>188</sup> Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ 2020 LI 410/1, as amended by OJ 2021 LI 445/10; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ 2020 LI 410/13, as amended by OJ 2021 LI 445/17.



new tools”<sup>189</sup> in its “human rights and foreign policy toolbox”,<sup>190</sup> to address serious human rights violations and abuses worldwide.

As already mentioned earlier, **Art 21** TEU tasks the Union also on the international scene to adhere to the ‘principles’ of “democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity” (para 1), as well as to “safeguard its values” (para 2 lit a). This reference to values and principles leads us to the next relationship.

### 4.3.2 *Relation Values and Selected (Legal and Ethical) Principles*

Already in the first Jean Monnet book, I have argued to embrace **principlism**<sup>191</sup> and **moral disunitarianism**.<sup>192</sup> According to the latter, “moral generalities, to the extent that they exist, are at best domain-specific”.<sup>193</sup>

As we have seen above,<sup>194</sup> **values** are described as “assets that a legal system recognizes as predetermined and imposed”.<sup>195</sup> They can serve as both guidelines for **interpretation** as well as standard of judicial review, and they can “develop a legitimizing meaning”.<sup>196</sup> **Principles** have been referred to as “legal norms laying down essential elements of a legal order”,<sup>197</sup> or as “a basic, fundamental rule, which is – albeit broad – binding”.<sup>198</sup> Yet another definition describes a principle as “a general proposition of law of some importance from which concrete rules derive”.<sup>199</sup> Contrasting principles from values, the former have **legal consequences and addressees**.

For instance, in EU law the principle of **proportionality** can have legal consequences, rendering non-proportional restrictions imposed by Member States against

<sup>189</sup>Editorial Comments (2021), p. 621.

<sup>190</sup>EP resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)), para 3.

<sup>191</sup>Frischhut (2019), p. 142, cf. also thesis No 25 on p. 146.

<sup>192</sup>Frischhut (2019), p. 143.

<sup>193</sup>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 (2019), p. 10.

<sup>194</sup>*Supra*, Sect. 1.5.3.

<sup>195</sup>Reimer (2003), p. 209; translated with DeepL.

<sup>196</sup>Calliess (2004), p. 1034; translated with DeepL.

<sup>197</sup>von Bogdandy (2003), p. 10; see also Williams (2009), p. 559.

<sup>198</sup>Streinz (2018), p. 10.

<sup>199</sup>Tridimas (2006), p. 1.

the EU's economic fundamental freedoms inapplicable. The approach of Beauchamp & Childress in biomedical **ethics**, referred to as 'principlism', has the advantage of being more determined (i.e., less abstract) and therefore more 'user-friendly'.<sup>200</sup>

While it is important to distinguish values from principles, we seen that they are **not mutually exclusive**. As we have seen regarding 'solidarity', this concept can be found in Art 2 TEU as one of the EU's common values, as well as a legal principle.<sup>201</sup>

Consequently, values are more **abstract**, nonetheless important, but can benefit from **more concrete** principles, as principles can have legal consequences and certain addressees. Those legal principles can be supplemented<sup>202</sup> by ethical principles, which often might be overlapping, as in case of Beauchamp & Childress' principlism, comprising autonomy, non-maleficence, beneficence, and justice. Such clarification in philosophy in general, respectively, in a certain field (e.g., biomedical ethics) cannot be *per se* binding in law but can offer valuable clarification. We have seen the fruitful relationship between more abstract values and more concrete principles in the 2006 **health values**, where "[b]eneath [!] these overarching values, there is also a set of operating principles".<sup>203</sup>

Three issues are currently preoccupying our society: **climate change, the pandemic, and digitalisation**. In the latter field, the Commission's '2030 Digital Compass'<sup>204</sup> from March 2021 mentions the necessity to set up "a comprehensive set of digital principles" for, amongst others, a "secure and trusted online environment". In the same document, the Commission proposes to draft a document comprising these "digital principles and rights", which should be adopted as an "an inter-institutional solemn declaration between the European Commission, the European Parliament and the Council".

In two of my recent papers, I have taken this approach of the '2006 health values conclusions' of combining (see Fig. 4.1) more abstract values and more concrete principles (vertical level) to provide a **road map of values and principles** that can be used to help address some challenges in the field of digitalisation. On the horizontal level, the general values (left column) have been complemented by these 2006 health values (right column). This overview was developed covering the topic of robotic medicine; hence, the general values have been **complemented** by health values and principles, thereby also covering the document from where the

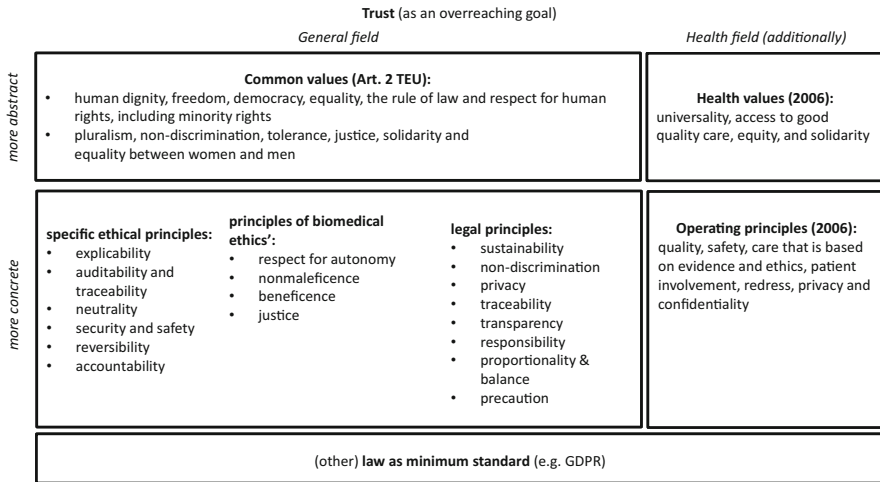
<sup>200</sup> Beauchamp and Childress (2019), p. 13.

<sup>201</sup> See *supra*, Sect. 3.2.1.6.

<sup>202</sup> The author wants to thank Göran Hermerén for his feedback emphasising that principles can also promote and protect values.

<sup>203</sup> Council conclusions on Common values and principles in European Union Health Systems, OJ 2006 C 146/1; see *supra*, Sect. 2.3.1.

<sup>204</sup> EC '2030 Digital Compass: the European way for the Digital Decade', COM(2021) 118 final 9.3.2021, p. 13.



**Fig. 4.1** Values and (ethical and legal) principles [See Frischhut (2020a), p. 264, respectively, Frischhut (2020b), p. 308]

idea for this combination was taken from. As can be seen from Fig. 4.1, **law**<sup>205</sup> in the sense of legal provisions other than values and legal principles will always remain the **minimum standard**. The selection of these legal and ethical principles obviously depends based on the challenge at hand. Again, this overview was developed for challenges at the interface of digitalisation and health.

In the following, five of these concepts pertaining to the legal and/or the ethical realm shall be **briefly depicted**, as they can be of relevance for all three challenges (i.e., climate change, the pandemic, and digitalisation), currently preoccupying our society: **vulnerability, responsibility, precaution, sustainability, as well as proportionality and balance.**

### 4.3.2.1 Vulnerability

Vulnerability is a concept, which can be found both in **ethics** and in **human rights**.<sup>206</sup> Vulnerability refers “to the human capability of being wounded, either physically or mentally”, which consequently can affect all (!) human beings.<sup>207</sup> While there is **no official definition** of people considered to be vulnerable, we have already seen this concept regarding minorities, women (both in general, but also in

<sup>205</sup> E.g. Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [...] (General Data Protection Regulation), OJ 2016 L 119/1 [GDPR].

<sup>206</sup> On vulnerability, see for instance, Peroni and Timmer (2013), Sedmak (2015) and Andorno (2016).

<sup>207</sup> Andorno (2016), p. 257.

the pandemic), the elderly, children, people with disabilities, or migrants.<sup>208</sup> Several of the already mentioned directives in the field of migration put special emphasis on vulnerable persons. For instance, Directive 2013/33/EU on asylum reception<sup>209</sup> refers to “minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation” (Art 21) and provides various distinct rules<sup>210</sup> for the relevant vulnerable group.

Vulnerable people are more likely to be discriminated and to face violations of **human rights**. While vulnerability is closely related to human dignity and human rights, Andorno has convincingly argued that vulnerability is a condition, not the foundation of human rights.<sup>211</sup> **Human dignity** is the foundation of human rights, where vulnerability is an important argument for enhanced vigilance and protection. Going into a similar direction as affirmative action,<sup>212</sup> considering vulnerability in the end can lead to an equal situation, as also envisaged by the principle of **non-discrimination**.

We have seen vulnerability in ter Meulen’s ‘**humanitarian solidarity**’, “which reflects the concern and responsibility for individuals who are not able any more to take care of themselves due to debilitating conditions and diseases, like dementia and psychiatric disorders”.<sup>213</sup> As he states elsewhere, “[t]his principle can be defined as a responsibility to protect those persons whose existence is threatened by circumstances beyond their control, particularly natural fate or unfair social structures”.<sup>214</sup> In a simplified way, this concept can be seen as a combination of solidarity and vulnerability.

Solidarity, or more precisely ‘**social solidarity**’, was a key argument for the ECtHR in case *Vavříčka* on compulsory vaccination. As the ECtHR has emphasised, “the value of social solidarity [!], the purpose of the duty being to protect the health of all members of society, particularly those who are especially vulnerable with

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<sup>208</sup> Emphasising the responsibility towards vulnerable persons: VfGH judgement of 11.12.2020, *Prohibiting any form of assisted suicide without exception is unconstitutional*, G 139/2019, para 69. On vulnerability and justice, see Sajó (2015).

<sup>209</sup> Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180/96.

<sup>210</sup> E.g., in case of detention (Art 11), in the field of healthcare (Art 17), and in a distinct chapter IV on vulnerable persons, also regarding minors (Art 23), unaccompanied minors (Art 24), victims of torture and violence (Art 25), etc.

<sup>211</sup> Andorno (2016).

<sup>212</sup> Feinberg (2003); Boxill (2010); Sandel (2010), pp. 167–183; Burri (2015).

<sup>213</sup> ter Meulen (2017), p. ix.

<sup>214</sup> ter Meulen (2017), p. 185.

respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination”.<sup>215</sup>

Protecting the vulnerable will be important for all three mentioned challenges, climate change, the pandemic<sup>216</sup> (as just mentioned), and digitalisation. In the latter field, we can observe a lot of power and information asymmetries, where vulnerability is an important concept to be kept in mind.

#### 4.3.2.2 Responsibility (Human Rights and Human Obligations)

**So far**, we have seen responsibility in case of ‘corporate social responsibility’ (CSR) in the field of ‘non-financial reporting’, or in Bieber’s statement<sup>217</sup> on **solidarity** as a manifestation of the comprehensive principle of ‘mutual responsibility’. On a timeline, the BVerfG has referred to the obligation of Germany “to protect the natural foundations of life, also in **responsibility for future generations**”.<sup>218</sup> The idea of **burden sharing** has also been addressed in the field of migration, where Art 80 TFEU refers to the “the principle of solidarity and **fair sharing of responsibility**, including its financial implications, between the Member State”, as also confirmed by ECJ.<sup>219</sup>

Human rights (and values) have been declared as a bridge between law and philosophy (cf. Fig. 1.1). **Human rights**, in a simplified way, strive to protect individuals in relation to public authorities, as the latter can take binding decisions on these individuals. Human rights, without wanting to sound pejorative, can sometimes display a rather consumerist attitude. Either individuals demand non-interference (negative rights), or they expect certain active services (positive rights). In either case, they are beneficiaries, not the obliged ones. This is where the idea of **human obligations** comes into play.

While various authors have addressed this idea, it shall briefly be depicted drawing on **Onora O’Neill**, famous British philosopher and crossbench member

<sup>215</sup> ECtHR judgement of 8 April 2021, *Vavřička and Others v. The Czech Republic*, 47621/13 and 5 others, para 279 (see also para 306).

<sup>216</sup> See also Shafik (2021), pp. 163, 186–187.

<sup>217</sup> Bieber (2021), p. 226. In the context of mutual responsibility, he refers (pp. 226–227) to the principle of sincere cooperation (see at note 68), to infringement proceedings initiated by another Member State (Art 259 TFEU), and to the ‘mutual trust’ (see *supra*, Sect. 1.5.4) case-law.

<sup>218</sup> BVerfG order of 24 March 2021, *Constitutional complaints against the Climate Protection Act partially successful*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, para 193 (translation, emphases added).

<sup>219</sup> ECJ judgement of 6 September 2017, *Slovakia vs. Council [relocation]*, joined cases C-643/15 and C-647/15, EU:C:2017:631 [*relocation*], para 291, see also paras 253, 293. Confirmed in ECJ judgement of 2 April 2020, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, para 80 (emphasis added).

of the House of Lords.<sup>220</sup> As she mentioned, “we are likely to reach a convincing account of human rights more directly by way of an account of human obligations” (p. 77), as “[a]ny human right must have as its counterpart some obligation” (p. 78). Referring to the example of black and white squares on a chessboard, she concluded that “rights and claimable obligations cannot be separated” (p. 80).

Human rights are important at a vertical level (individuals in relation to public authorities) and shall not be replaced. **Human obligations** should rather be seen to **supplement** human rights, especially at a **horizontal** level in relation to fellow individuals. Apart from not interfering (negative rights), public authorities should not be the only ones making a contribution (positive rights) to society. On the long run, a society will be more successful if also individuals contribute, where such **contributions** should not only relate to taxes and the like.

Similar ideas have also been voiced by Aleida Assmann<sup>221</sup> and others. German philosopher Richard David **Precht** has addressed similar claims, especially in the context of the COVID-19<sup>222</sup> pandemic. As one suggestion for a human obligation, he has suggested a voluntary year (15 h a week) after retirement, to make a contribution to society.<sup>223</sup> In a similar way as it is unsustainable (see below, Sect. 4.3.2.4) to always consume and not to contribute, a society cannot persist if citizens turn into consumers<sup>224</sup> and only demand but are not willing to contribute to the ‘common good’.<sup>225</sup>

### 4.3.2.3 Precaution

As mentioned above, Hermerén has suggested the principles of **precaution** and **proportionality** (see below) as to ‘guide the decision-making’ in case of a possible clash of values.<sup>226</sup> The precautionary principle is addressed in the context of environmental policy, although not further defined (Art 191[2] TFEU).

According to case-law, the “precautionary principle constitutes a general principle of EU law”.<sup>227</sup> Based on “the precautionary principle, it must be accepted that, where there is **uncertainty** as to the existence or extent of risks to human health, the institutions may take **protective** measures **without having to wait** until the reality

<sup>220</sup> O’Neill (2002). See also O’Neill (2016, 2019).

<sup>221</sup> Assmann (2018).

<sup>222</sup> For a good take on freedom and responsibility in the current pandemic, see Chadwick (2021).

<sup>223</sup> Precht (2021), p. 145. On this book, see also Frischhut (2022).

<sup>224</sup> Precht (2021), p. 131.

<sup>225</sup> See, *infra*, Sect. 5.3.

<sup>226</sup> Hermerén (2021).

<sup>227</sup> GC judgement of 16 September 2013, *ATC and Others vs. Commission*, T-333/10, EU:T:2013:451, para 79.

and seriousness of those risks become fully apparent”.<sup>228</sup> In other words, when applying the precautionary principle, there is no requirement to provide “conclusive scientific evidence of the reality of the risk and the seriousness of the potential adverse effects were that risk to become a reality”.<sup>229</sup> The precautionary principle has to be seen in the context of a high level of protection in the fields of human health,<sup>230</sup> consumer protection<sup>231</sup> and the environment,<sup>232</sup> as well as in the context of sustainable development (see below).

Precaution is advisable if consequences are intensive, irreversible, and/or affect, especially the vulnerable. Precaution should apply in case of **climate change**, as some consequences might be irreversible, or only hardly reversible. Likewise, climate change also often strongly affects the vulnerable. Finally, in **digitalisation**, certain algorithms and collected data can have huge impact and a certain precaution is therefore advisable. In case of a communicable disease<sup>233</sup> that spreads into a **pandemic** disease, as in the case of COVID-19, certain consequences have been intensive (social, economic, mental health, etc.) and often affected the vulnerable (poorer countries, the poor even in richer countries, women, children, etc.). Hence, a certain precaution is advisable, knowing that these waves are easier to be stopped if action is not delayed. As mentioned above, precaution shall go hand-in-hand with **proportionality** (see below Sect. 4.3.2.5), as also suggested by others in the field of quarantines<sup>234</sup> or vaccination policies.<sup>235</sup>

#### 4.3.2.4 Sustainability

Sustainability as an idea occurs in a threefold way in EU law. In (1) a more general way (not strictly related to the environment), (2) in relation to the environment, and finally (3) in the external sphere.

In (**ad 1**) a more **general** way, in promoting “economic and social progress for their peoples”, the EU shall take “into account the principle of sustainable development” (recital 9 TEU) and according to Art 3(3) TEU “shall work for the sustainable development of Europe”, as one of the EU’s objectives. Likewise, the CFR (recital 3) also requires the Union to “promote balanced and sustainable development”.

<sup>228</sup>GC order of 28 September 2007, *France vs. Commission*, T-257/07 R, EU:T:2007:300, para 61 (emphases added).

<sup>229</sup>GC judgement of 11 September 2002, *Alpharma vs. Council*, T-70/99, EU:T:2002:210, para 155.

<sup>230</sup>Art 9, Art 114(3), and Art 168(1) TFEU.

<sup>231</sup>Art 114(3), Art 169(1) TFEU.

<sup>232</sup>Art 3(3), Art 114(3), Art 191(2) TFEU. The latter provision explicitly mentions “the precautionary principle”.

<sup>233</sup>Cf. Frischhut and Greer (2017) and Frischhut (2021).

<sup>234</sup>Raposo (2021).

<sup>235</sup>Pierik (2020).

Art 11 TFEU, the cross-sectional clause (**ad 2**) in the field of the **environmental** states that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”. This is complemented by Art 37 CFR, according to which a “high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”. In (**ad 3**) the external sphere, Art 3(5) TEU on the EU’s objectives tasks the Union to “contribute to peace, security, the sustainable development of the Earth”. More precisely, Art 21(2) TEU (general provisions on the Union’s external action) shall “foster the sustainable economic” (lit d) and “help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development” (lit f).

Besides EU primary law, in the field of EU **secondary law**, a former regulation (on tropical forests) had provided a definition of ‘sustainable development’: this “means the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity [!] of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations”.<sup>236</sup>

This is reminiscent of what **Hans Jonas** had already defined as an ‘ecological imperative’ in his 1979 book on responsibility. A categorical imperative (Kant) for the environment, so to say. “Act so that the effects of your action are compatible with the permanence of real human life on earth” (translation).<sup>237</sup>

‘Future generations’ have also been addressed by the BVerfG in terms of ‘**solidarity between generations**’ and climate change. The BVerfG has emphasised the obligation of Germany “to protect the natural foundations of life, also in responsibility for future generations”, which “also concerns the distribution of environmental burdens between the generations”.<sup>238</sup> This is even more remarkable considering how difficult it sometimes is already for currently living people to bring their case before a court.

Sustainable decisions do not only matter in the field of climate change, but likewise in a **pandemic**. Opening up a country too early cannot only be an issue of precaution (see above), but in the end can also be unsustainable. Even if it is not obvious at first glance, sustainable solutions are particularly relevant in the field of **digitalisation**, as this area is growing more and more and requires important resources such as rare-earth elements, as well as the huge energy consumption.

<sup>236</sup> Council Regulation (EC) No 3062/95 of 20 December 1995 on operations to promote tropical forests, OJ 1995 L 327/9; N.B. No longer in force (Art 2 [4]).

<sup>237</sup> Jonas (1979), p. 36.

<sup>238</sup> BVerfG order of 24 March 2021, *Constitutional complaints against the Climate Protection Act partially successful*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, para 193 (translation). This “includes the need to treat the natural foundations of life with such care and to leave them to posterity in such a state that subsequent generations could not continue to preserve them only at the price of radical abstinence of their own [...]”.



#### 4.3.2.5 Proportionality & Balance

Proportionality is the decisive element at the end of the analysis of a case within the economic **fundamental freedoms**, is also an element of the limitation of relative **fundamental rights**, as we have seen above,<sup>239</sup> and applies elsewhere.<sup>240</sup> Art 51 (1) CFR explains the relational element of proportionality: “Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”. A certain measure must be put in relation with an accepted reason of justification, or as mentioned here, a recognised objective of general interest.

The principle of proportionality then consists of **three elements**, suitability, necessity and ‘proportionality *stricto sensu*’, where the latter one is not always applied by the CJEU. According to the **first** element of **suitability**, “the measure at issue must indeed contribute to achieving the aim pursued”, and the question “is whether the measure has any benefits at all for the legitimate interests on which the Member State relies”.<sup>241</sup> If the objective is to avoid the spreading of a communicable disease (e.g., BSE), making importers of potentially contaminated meat to simply pay money, then this measure will not be suitable to achieve this objective (public health). The **second** element on the **necessity** of the measure “concerns the question whether an alternative [!] measure is realistically available that would protect the Member State’s legitimate interests just as effectively, but would be less restrictive [!] of [e.g., the fundamental freedoms]”.<sup>242</sup> In the case of the import of potentially contaminated meat, strict controls on meat coming from clearly not affected areas (i.e., the measure) might go beyond what is necessary, in order to protect public health (i.e., the objective). Finally, the **third** element of ‘proportionality *stricto sensu*’ can be expressed as follows. “[T]he greater the degree of detriment to the principle of [the fundamental freedoms], the greater must be the importance of satisfying the public interest on which the Member State relies”, hence “the Member State must demonstrate that the **level of protection** it decides to afford to its legitimate interests is **commensurate** with the degree of interference this causes in intra-Community trade”.<sup>243</sup> As AG Maduro further clarifies, the difference in relation to the second element “is that, as a result of the third test, a Member State may be required to adopt a measure that is less restrictive of intra-Community trade, even if

<sup>239</sup> Section 3.5.2.

<sup>240</sup> Cf. Directive (EU) 2018/958 on a proportionality test before adoption of new regulation of professions, OJ 2018 L 173/25.

<sup>241</sup> AG Maduro opinion of 13 July 2006, *Ahokainen und Leppik*, C-434/04, EU:C:2006:462, para 24.

<sup>242</sup> AG Maduro opinion of 13 July 2006, *Ahokainen und Leppik*, C-434/04, EU:C:2006:462, para 25.

<sup>243</sup> AG Maduro opinion of 13 July 2006, *Ahokainen und Leppik*, C-434/04, EU:C:2006:462, para 26 (emphases added).

this would lead to a lower [!] level of protection of its legitimate interests”.<sup>244</sup> Here, in a similar way as the above-mentioned margin of appreciation doctrine of the ECtHR, the CJEU “usually allows the Member State a certain amount of discretion in choosing the desired level of protection to be afforded to the public interest at issue”.<sup>245</sup> Consequently, “different Member States may **attribute different values** to the legitimate interests they consider worth protecting”, unless EU law “already clearly identifies a common level of protection of the legitimate interest under consideration”.<sup>246</sup>

Proportionality is not only a **legal** principle applied by both the CJEU and the ECtHR,<sup>247</sup> but it can also be found in **ethical** literature.<sup>248</sup> As Kirste has aptly stated, a proportionality review is also related to values.<sup>249</sup> In either case, proportionality is about finding a **balance** between two competing elements, for instance, the economic fundamental freedoms on the one side, and legitimate reasons (accepted by the CJEU) of the Member States to restrict these freedoms. In the field of **energy solidarity**, the ECJ has emphasised the balance between various **interests**: “the EU institutions and the Member States are required to take into account, in the context of the implementation of that policy, the interests both of the European Union and of the various Member States that are liable to be affected and to balance [!] those interests where there is a conflict”.<sup>250</sup> In a recent case on the Islamic veil, the ECJ has also stressed the necessity to strike “a fair balance” between various CFR rights.<sup>251</sup>

<sup>244</sup> AG Maduro opinion of 13 July 2006, *Ahokainen und Leppik*, C-434/04, EU:C:2006:462, para 26.

<sup>245</sup> AG Maduro opinion of 13 July 2006, *Ahokainen und Leppik*, C-434/04, EU:C:2006:462, para 26.

<sup>246</sup> AG Maduro opinion of 13 July 2006, *Ahokainen und Leppik*, C-434/04, EU:C:2006:462, para 26 (emphasis added).

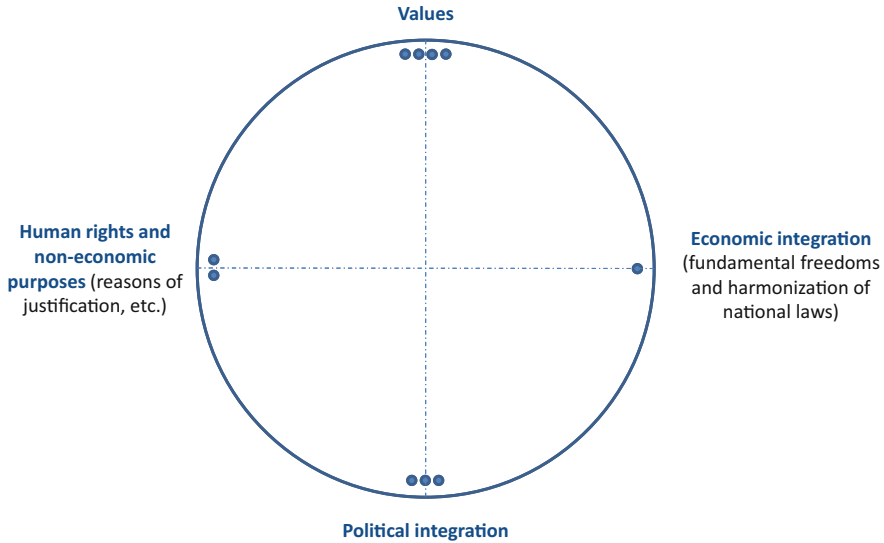
<sup>247</sup> ECtHR judgement of 23 September 1998, *Lehideux and Isorni vs. France*, 24662/94, concurring opinion of judge Jambrek, para 3; referring to ECtHR judgement of 23 July 1968, *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” vs. Belgium*, 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, para 5: “The Court recognised quite early in its jurisprudence that both the historical context in which the Convention was concluded and new developments require ‘a just balance between the protection of the general interest of the community and the respect due to fundamental human rights, while attaching particular importance to the latter’”.

<sup>248</sup> E.g., in case of mandatory vaccination: Pierik (2020) and Savulescu (2020).

<sup>249</sup> Kirste (2020), p. 181.

<sup>250</sup> ECJ judgement of 15 July 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:598, para 73.

<sup>251</sup> ECJ judgement of 15 July 2021, *WABE*, joined cases C-804/18 and C-341/19, EU:C:2021:594, para 84: “It must therefore be observed that the interpretation of Directive 2000/78 thus adopted is in accordance with the case-law of the Court and that it ensures that, when several fundamental rights and principles enshrined in the Treaties are at issue, such as, in the present case, the principle of non-discrimination enshrined in **Article 21 of the Charter** and the right to freedom of thought, conscience and religion guaranteed in **Article 10 of the Charter**, on the one hand, and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions recognised in **Article 14(3) of the Charter** and the



**Fig. 4.2** Circle of balance (own illustration)

To bring things full circle, let us again turn to where we started in this chapter ('Relation values to other concepts', Sect. 4.3). Concerning the **four major historic steps** (1st step: economic integration; 2nd step: economic fundamental rights; 3rd step: political integration; 4th step: values) of European integration, we have seen the necessity to balance these sometimes-competing elements.

The following figure (Fig. 4.2) is not meant to diminish the importance of **values**, which are in the spotlight of this book. Nor shall it be seen to weaken **fundamental (or human) rights**, which have luckily seen an increasing importance in EU law. It is rather meant to acknowledge the fact that in everyday decisions, values will not be the only concern of decision-makers. On the one hand, we have **economic** integration, the starting point of EU integration, comprising both the economic fundamental freedoms and harmonisation of national law. Already in this field, we have competing and **non-economic interests**. Early in the *Cassis* case, the ECJ has accepted 'mandatory requirements in the general interest', as case-law developed reasons of justification for restrictions to the fundamental freedoms, besides the Treaty based reasons (e.g., Art 36 TFEU).<sup>252</sup> Human rights can be seen as complementing these non-economic reasons. Many of these concepts overlap with what the CJEU has developed in its case-law, public health (Art 35 CFR), environmental protection

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freedom to conduct a business recognised in **Article 16 of the Charter**, on the other hand, the assessment of observance of the principle of **proportionality** must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a **fair balance** between them" (emphases added).

<sup>252</sup>ECJ judgement of 20 February 1979, *Rewe vs. Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42, para 8.

(Art 37 CFR), consumer protection (Art 38 CFR), etc. Additionally, one also must acknowledge the **political** and geo-political perspective, both in the EU's internal, but especially also in its external sphere. The CFSP is only one prominent example to be named in this context. This map is not meant to be a tool for the legal solution to a specific case; rather, it should raise **awareness** of these four elements **and** invite to strive a **balanced solution**. As in the case of the golden mean of Aristotle, this golden mean cannot simply be achieved according to an arithmetic progression.<sup>253</sup>

#### 4.4 Lessons Learned

Already in the summary of the previous chapter (cf. Sect. 3.6), we have seen the various relations between values and other provisions of EU law, which have now been further covered in this chapter. The question of the **relationship** of the **values to each other** (Sect. 4.1) has revealed that ideally values **strengthen** each other. This was the case for the 'values trinity' of democracy, the rule of law and human rights. We have also seen this phenomenon for justice and the rule of law, as justice in itself has been qualified as hardly justiciable. We have also seen the 'combination' of human dignity and equality, i.e., '*égale dignité*'. Likewise, pluralism, tolerance and rights of minorities are inherently linked, as a pluralist and tolerant society cannot deny these human rights of minorities. Obviously, values can also **weaken** each other, for instance democratic decisions leading to a limitation of human rights. Values also have limitations in themselves, for instance the freedom of one person that is inherently limited by freedom of other persons. As Art 2 TEU values are all EU primary law, there can be no formal but only a substantive **ranking of values**. For the same reason, there can be no technical primacy of one value over another one. Within a country (united in *diversity*), there can be one or more ranking orders, the same holds true for the situation between two countries. It might be easier to establish such a ranking in specific fields. In the field of healthcare, precaution (Sect. 4.3.2.3) and proportionality (Sect. 4.3.2.5) have been suggested. Ultimately, a ranking of the EU's common values has to take into account the above-mentioned ideas of balancing (cf. also Sect. 4.3.2.5) and the minimum approach (more unity in the core of a concept, potentially more diversity at the periphery). In addition, a transparent public debate about these fundamental questions (e.g., ranking the protection of the embryo or medical research higher) is indispensable.

The values of the hub of Art 2 TEU have various **relations to other provisions of EU law** (Sect. 4.2), covering both primary and secondary EU law. The Court (Polish disciplinary regime) has even held that compliance with the EU's values is a **precondition** for the enjoyment of all the rights deriving from the EU treaties. Like for the relation of EU values to each other (see above), also in the relation to other provisions of EU law we can identify some provisions potentially

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<sup>253</sup> Aristotle (2000), p. 30, 1106b.

**strengthening** these values. This is the case for the principle of sincere cooperation (Art 4[3] TEU), the EU's objectives (Art 3 TEU), the EU's institutional framework (Art 13 TEU), and the accession requirements (Art 49 TEU). On the other hand, Art 4(2) TEU referring to the respect of national identities could be seen as a potential argument weakening the common values. However, it has been convincingly argued that this provision<sup>254</sup> does not allow a Member State to disrespect Art 2 TEU. One **prominent example** of three provisions of this lattice adding up to a greater whole are Art 19(1) second sentence TEU, Art 267 TFEU and Art 47 CFR in the context of the rule of law. They represent one single principle of judicial independence, despite their different purposes, also requiring different types of examination.

For the **enforcement** of EU values, the 'reverse Solange' doctrine can be an important contribution in case of systematic violations, as any court in the EU (including the CJEU) can scrutinise any national measure if the essence (!) of the EU's values of Art 2 TEU, as further substantiated by EU law (e.g., CFR) is affected. In this context we have also seen the strong link to human rights (both CFR and ECHR), which is not surprising, given the fact that human rights figure amongst the values mentioned in Art 2 TEU. Likewise, there are also multiple relations of the hub of Art 2 TEU and EU Secondary law, working in either direction and leading to mutual benefits (value-conform interpretation, further clarification, easier justiciability, etc.).

Based on the historic development of EU integration we have also seen the **relation to other** concepts (Sect. 4.3). EU integration has started with economic integration, adding human rights, the political dimension, and finally turning the EU into a Union of values. Each subsequent step builds on and does not replace the previous one(s).

As already mentioned various times, the author puts an emphasis on the mutual beneficial relation of EU **values and principles**, which feeds into to overall idea of broader 'concepts'. While such a selection will always remain subjective to a certain degree, there is good reason to have chosen the three current challenges of climate change, the pandemic and digitalisation. Besides these recent concerns, this also corresponds to what has been covered earlier in this book (cf. Chap. 3). One such concept is **vulnerability**, which goes into a similar direction as humanitarian solidarity (literature) and social solidarity (ECtHR). It is essential for a **community**, especially in an era of increasing gaps, to 'leave no one behind' (see Sect. 5.3). Another concept is **responsibility**, where this book as argued to supplement human rights with human obligations. This complementary element can also be seen as an element of the suggested **balancing** approach (cf. the 'circle of balance' to acknowledge the four existing dimensions of EU integration). For the pandemic, climate change and for digitalisation **precaution** is key in order to deal with uncertainties

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<sup>254</sup> AG Kokott opinion of 15 April 2021, *Stolichna obshtina, rayon "Pancharevo"*, C-490/20, EU: C:2021:296, para 70 has recently emphasised that this is concept is "an autonomous concept of EU law the interpretation of which is a matter for the Court".

that can have a huge impact on our societies. In the current climate crisis, **sustainability** does not require much explanation (see Sect. 5.2).

An emphasis on values and ethics is key for maintaining or regaining citizens' **trust** (see Sect. 5.1), amongst others for decision-making and digitalisation. So far, Art 2 TEU puts an emphasis on the EU itself and the Member States. Hence, the question remains to which extent also citizens need to move into the spotlight. This includes the questions of supplementing values with **virtues** (see Sect. 5.4).

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## Chapter 5

# Future Direction of Travel (*De Lege Ferenda*)



It may sound surprising that such fundamental aspects of human coexistence, such as values, are subject to change,<sup>1</sup> since they are supposed to stand for stability, reliability and permanence. However, we must acknowledge that both values and fundamental rights have **changed over time**. Slavery was accepted in ancient Greece; nowadays, it would infringe Art 5 CFR. In some countries,<sup>2</sup> homosexuality was punishable even under criminal law some years ago; nowadays, discrimination on grounds of sexual orientation would infringe Art 21(1) CFR.<sup>3</sup> Human dignity was not really a legal issue in case of the atrocities committed during the Second World War, nowadays, also due to this historic experience, it is the corner-stone of the EU's common values (Art 2 TEU, Art 1 CFR). This list could be extended. Consequently, we have to acknowledge the **evolutionary** element of values and fundamental rights, although change might proceed rather slowly. Already with regard to the 'ethical spirit of EU law', I have stated "a theory of ethics is [often] relative to the current challenges of the time and the community we are living in".<sup>4</sup> The same is true for values and fundamental rights. Likewise, this evolutionary<sup>5</sup> element finds an equivalent in the "step-by-step approach inherent to the Schuman declaration".<sup>6</sup>

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<sup>1</sup>Cf. Calliess (2016), p. 40.

<sup>2</sup>For Austria, see for instance: *Strafrechtsänderungsgesetz* 1971, Austrian Official Journal No 273/1971; VfGH judgement of 21 June 2002, *Age of consent with regard to male homosexuality*, G6/02; ECtHR judgement of 9 January 2003, *S.L. vs. Austria*, 45330/99 (Art 14 ECHR, i.c.w. Art 8 ECHR).

<sup>3</sup>See also Berka (2019), p. 668.

<sup>4</sup>Frischhut (2019), p. 141. Philosophy (and the ethical theory that goes with it) is ideally the judge of times, not their sole expression. The word "always" was replaced by "often" in the quotation, because while no ethical theory is immune from (uncritically) reflecting the zeitgeist and being a child of the moment, this does not apply to all of them.

<sup>5</sup>On evolution and legal certainty, see Gamper (2016), pp. 88–91.

<sup>6</sup>Frischhut (2019), p. 141.

Already the Schuman declaration of 9 May 1950 referred to principles, when assigning the task to “an arbitrator”, nowadays, the CJEU. As Robert Schuman pointed out, this arbitrator “will be entrusted with the task of seeing that the agreements reached conform with the principles [!] laid down, and, in the event of a deadlock, he will decide what solution is to be adopted”.<sup>7</sup> While the **CJEU** has played an important role (concerning principles and values) and will continue to do so, also the **people living in Europe** need to get involved in this major issue of shaping EU values.

So far, citizens’ contribution was not major, sometimes they were simply asked what their personal values are, respectively, which values the EU represents. These two questions addressed in various **Eurobarometer** surveys are **summarised** below in Figs. 5.1 and 5.2 for the period of 2007–2012, as well as in Figs. 5.3 and 5.4 for the period of 2013–2019. For a better overview, the two questions (personal values, values representing the EU) were each divided into two figures. The individual scores have not changed too much over time. Peace, respect for human life and human rights constantly ranked top, as well as respect for other cultures and religion constantly ranked last as **personal** values. However, some personal scores are quite different from those attributed to the EU. As **values of the EU**, respect for human life ranked lower compared to personal values; more institutional values such as democracy, the rule of law, and the item ‘respect for other cultures’ on the other hand ranked higher. It is also remarkable, that in 2019 ‘respect for the planet’ was introduced as a new item.

The next major step in the evolution of values is the ‘**Conference on the Future of Europe**’. In a joint declaration,<sup>8</sup> the EP, the Council and the EC have emphasised the importance “to uphold the EU citizens support [!] for our common goals and values [!], by giving them further opportunities to express themselves”.<sup>9</sup> Values play a role in the “aim to give citizens **a say on what matters to them**”.<sup>10</sup> The tentative **list of topics** that (might) matter for citizens include health, climate change, “social fairness, equality and intergenerational solidarity”, digital transformation, as well as “European rights and values including the Rule of Law”, to name but a few.<sup>11</sup> Like we have seen so far, besides the internal perspective, also this joint declaration addresses the **external** one by confirming that Europe needs to take “a leading global role in promoting [!] its values and standards in a world increasingly in turmoil”.<sup>12</sup> Besides content-related issues, likewise the “Conference, its governance and events

<sup>7</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); FR: “*conformes aux principe*”.

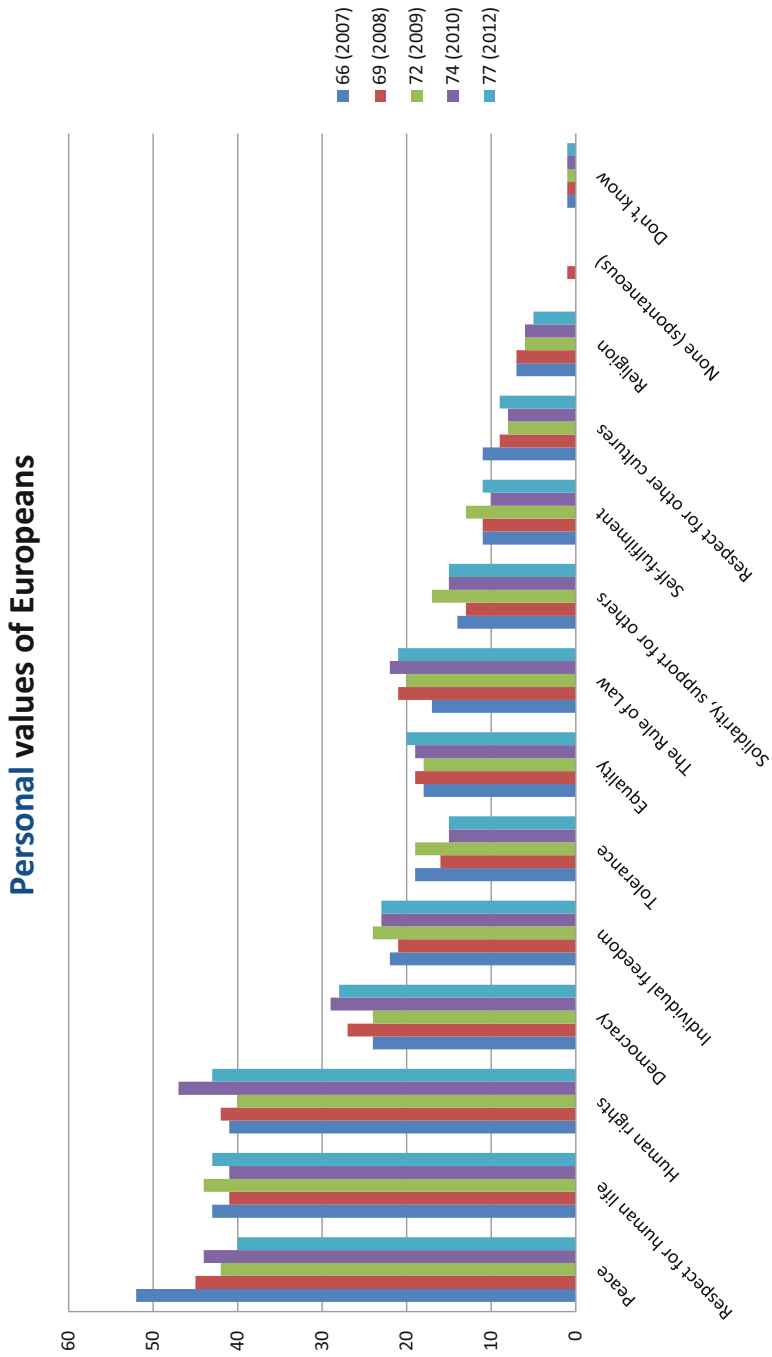
<sup>8</sup>Joint Declaration of the European Parliament, the Council and the European Commission on the Conference on the Future of Europe Engaging with citizens for democracy—Building a more resilient Europe, OJ 2021 CI 91/1, as corrected by OJ 2021 CI 93/1.

<sup>9</sup>Ibid, p. 1.

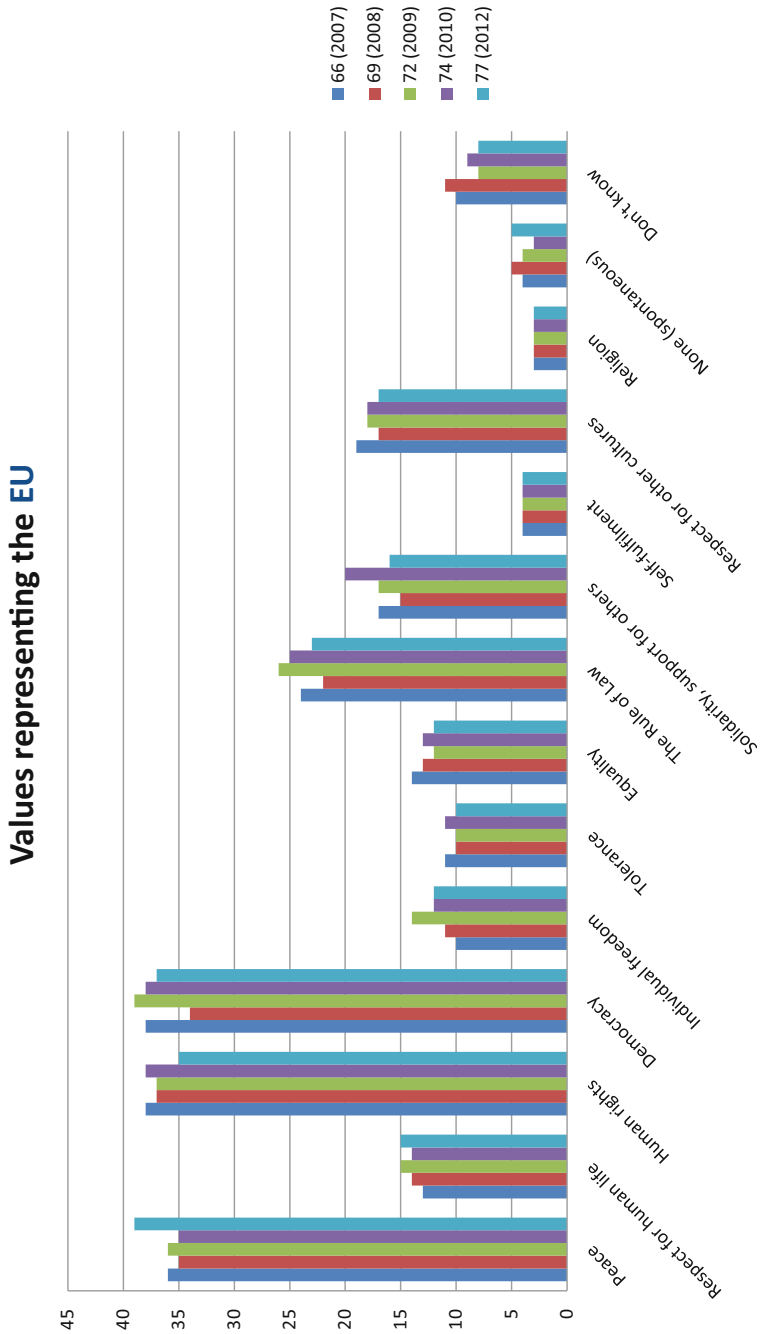
<sup>10</sup>Ibid, p. 3 (no emphasis added).

<sup>11</sup>Ibid, p. 3.

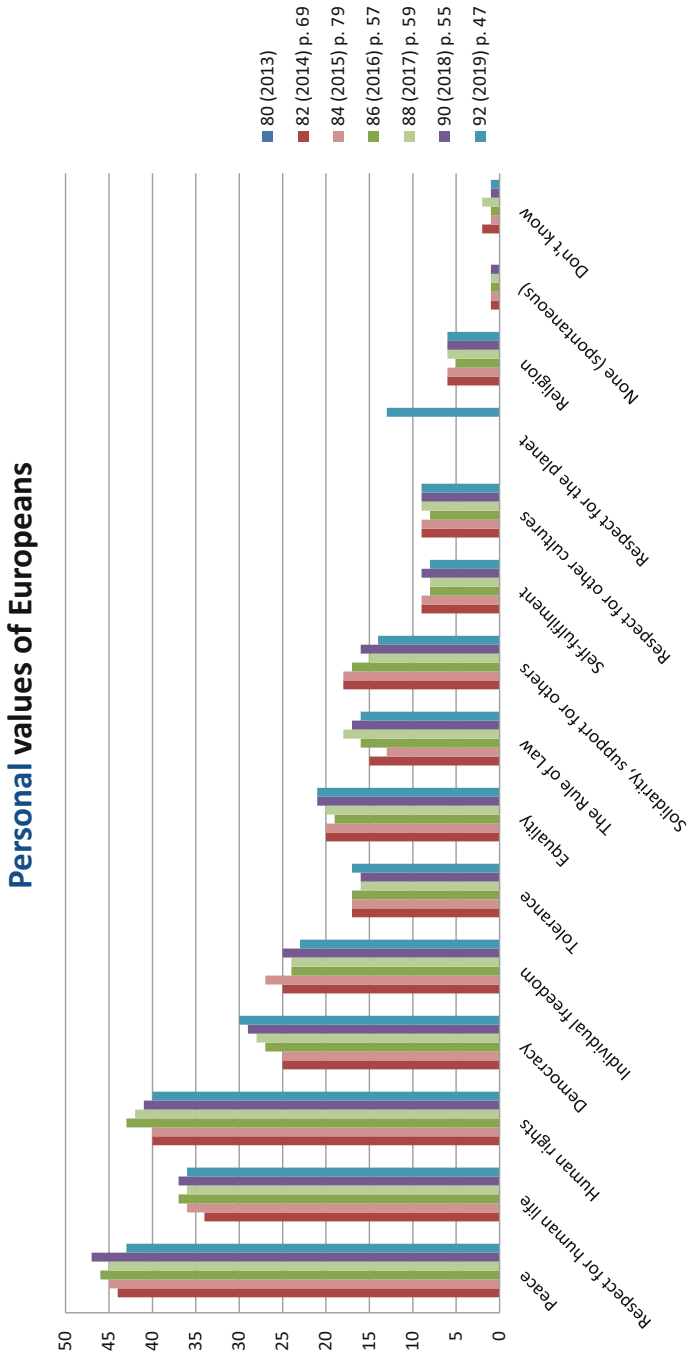
<sup>12</sup>Ibid, p. 1.



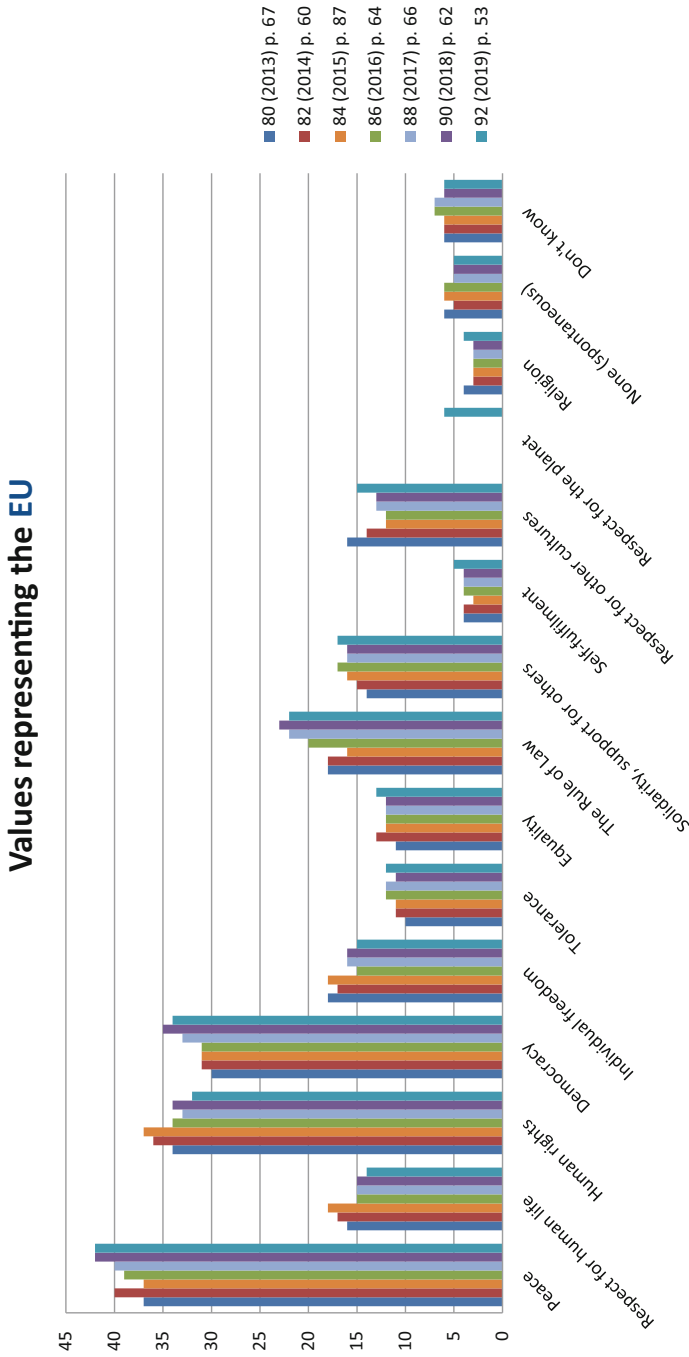
**Fig. 5.1** Personal values of Europeans 2007–2012 [Eurobarometer 77 (2012), pp. 9 and 12; Eurobarometer 74 (2010), pp. 32 and 33; Eurobarometer 72 (2009), Vol. 2, pp. 148 and 152; Eurobarometer 69 (2008), 1. Values of Europeans, pp. 15 and 22; Eurobarometer 66 (2007), p. 28. See also Frischhut and Werner-Felmayer (2020), p. 636]



**Fig. 5.2** Values representing the EU 2007–2012 [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. See also Frischhut (2019), p. 127]



**Fig. 5.3** Personal values of Europeans 2013–2019 [Eurobarometer 82 (2014) p. 69; Eurobarometer 84 (2015) p. 79; Eurobarometer 86 (2016) p. 57; Eurobarometer 88 (2017) p. 59; Eurobarometer 90 (2018) p. 55; Eurobarometer 92 (2019) p. 47. All: “European Citizenship”]



**Fig. 5.4** Values representing the EU 2013–2019 [Eurobarometer 80 (2013) p. 67; Eurobarometer 82 (2014) p. 60; Eurobarometer 84 (2015) p. 87; Eurobarometer 86 (2016) p. 64; Eurobarometer 88 (2017) p. 66; Eurobarometer 90 (2018) p. 62; Eurobarometer 92 (2019) p. 53 I N.B. EU, not EU27. All: “European Citizenship”]



organised in its framework, are also based on the values of the EU as enshrined in the EU Treaties and the European Charter of Fundamental Rights”.<sup>13</sup>

This evolution relates to the two **intertwined** dimensions, the legal and societal one. Kirste has aptly referred to values as a link between constitutional **law** and a **society**.<sup>14</sup> This link also exists between law and **morality** in case-law. Tridimas has convincingly mentioned that “the Court not only reflects but also shapes political morality. Judicial intervention is not only negative but also positive in the sense that it not only seeks to protect the citizens vis-à-vis public authority but also to promote political and social values”.<sup>15</sup> This quotation referring to morality and **values** shows how these concepts are intertwined, and one could add ethics and principles to this statement. In 2015, *The Economist* has argued that the United States Supreme Court seems to be willing to change its case-law,<sup>16</sup> if “at least half of Americans [are] on board”.<sup>17</sup> Values in law and in society mutually influence each other in both directions. The Eurobarometer studies can reveal changing preferences of EU citizens.

The increasing importance of values<sup>18</sup> over time should continue, as values are, amongst others,<sup>19</sup> essential for a European **identity**. Already in 1989, the European Parliament emphasised the importance of values for identity (“whereas the identity of the Community makes it essential to give expression to the shared values of the citizens of Europe”).<sup>20</sup> This requires a close connection between EU values and citizens, as already emphasised by the ‘Declaration on European Identity’ of 1973.<sup>21</sup> As Callies has stated, the entirety of values forms the “value system of a society, which constructs identity over it”.<sup>22</sup> This relationship between values and identity has recently received increased attention in the EU.<sup>23</sup>

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<sup>13</sup> *Ibid.*, p. 4.

<sup>14</sup> Kirste (2020), p. 180.

<sup>15</sup> Tridimas (2006), p. 549.

<sup>16</sup> Important to mention, against the background of an unchanged constitution.

<sup>17</sup> *The Economist* (July 4th–10th 2015), with regard to abortion, same-sex marriage and other issues.

<sup>18</sup> Cf. Callies (2004), p. 1044, “Values can be defined as beliefs of a high degree of abstraction that are part of the social identity of individuals” (translated with DeepL).

<sup>19</sup> As Callies (2004), p. 1039 aptly mentions, also symbols play a role in an emerging EU identity.

<sup>20</sup> EP resolution of 12 April 1989 adopting the Declaration of fundamental rights and freedoms, OJ 1989 C 120/51.

<sup>21</sup> ‘Declaration on European Identity’, Bulletin of the European Communities, December 1973, No 12, pp. 118–122 (119), “a society which measures up to the needs of the individual”.

<sup>22</sup> Callies (2004), p. 1034; translated with DeepL.

<sup>23</sup> See Scharfbillig et al. (2021) on ‘values and identities’, also referring to Special Eurobarometer 508; “The most important personal values in the EU are the value of benevolence (77%) and the value of self-direction (measured with two questions, with scores of 78% for making their own decisions and 73% for forging their own opinions)[.] The least important personal values are the value of stimulation (47%), the value of power (22%), and the value of wealth (13%)”; p. 128.

## 5.1 An Additional Narrative: Trust

**Peace** was the initial narrative<sup>24</sup> of European integration, founded after the atrocities of the Second World War, both in the case of the Council of Europe,<sup>25</sup> as well as in the case of what today is the EU. Economic integration was the ‘methodology’, to achieve this ‘objective’ of peace. Peace is also the item, constantly ranked top in all four figures above (Figs. 5.1, 5.2, 5.3 and 5.4), both in terms of value of the EU and a personal value. The problem with this narrative is that it might not work for people born decades after the end of the war (1945), who in some cases do not even have grandparents left to tell them about the value of peace, where peace is **more than simply the absence of war**.<sup>26</sup> The idea of re-emphasising this narrative and the importance of peace is clearly to be welcomed. The idea of “The WhiteDoveWay”, for instance, proposes a “permanent path of peace, from Northern Ireland to Nicosia”, to make this narrative **more visible** and experienceable.<sup>27</sup>

Based on what we have seen so far, the author suggests an additional narrative, which does not replace the initial one of peace. This **complementary** narrative should be **trust**. Former Commission president Jean Claude Juncker has coined the notion of a ‘polycrisis’, i.e. “various challenges [that] have not only arrived at the same time [and] also feed each other, creating a sense of doubt and uncertainty in the minds of our people”.<sup>28</sup> The situation of various overlapping crises has not improved. Likewise, a key crisis is the loss of trust of citizens in public authorities. As already mentioned,<sup>29</sup> ECJ President Koen Lenaerts has aptly expressed that “[t]rust takes years to build, seconds to destroy and forever to repair”.<sup>30</sup> Trust must therefore be earned, not only between individuals, but even more so in relation to public institutions (such as the EU), which are already fundamentally more distrusted due to geographical distance and the complexity of their structure. Therefore, the European Union should strive to strengthen transparency and integrity to achieve the highest (!) ethical standards, hopefully leading to a high degree of public confidence, as I have outlined in detail elsewhere.<sup>31</sup> Our world becomes increasingly complex, which makes it difficult for individuals to understand certain details, or at least to have a sufficient overview. Even more important that individuals can trust

<sup>24</sup> A narrative is “a spoken or written account of connected events”; Stevenson (2010), p. 1179.

<sup>25</sup> ECtHR judgement of 23 September 1998, *Lehideux and Isorni vs. France*, 24662/94, concurring opinion of judge Jambrek, para 3, “The European Convention was drafted as a response to the experience of world-wide, and especially European, totalitarian regimes prior to and during the Second World War”.

<sup>26</sup> Galtung (1969), Dietrich (2008, 2011, 2012, 2015), and Dietrich et al. (2011).

<sup>27</sup> Opinion of the European Economic and Social Committee on “The WhiteDoveWay — Proposal for an EU-led global peace-building strategy” (own-initiative opinion), OJ 2019 C 228/31, pt. 4.3.1.

<sup>28</sup> Juncker (2016).

<sup>29</sup> *Supra*, Sect. 1.5.4.

<sup>30</sup> Lenaerts (2017), p. 838.

<sup>31</sup> Frischhut (2020).

public authorities. In the Jean Monnet MOOC, organised within this Chair, it was interesting to discuss with students from various countries worldwide, in which country people tend to trust national public authorities. The EU is both geographically and emotionally more distant than the respective national capitals. Hence, taking an ambitious approach is advisable.

## 5.2 An Additional Value: Environmental Protection

If values enshrined in Art 2 TEU should be changed, this requires a unanimous decision of Member States. However, we have also seen animal welfare added as a value by the ECJ. Moving from humans to animals, the next logical step could be including the **environment**, especially against the background of the increasingly visible effects of the climate change. Having compared the ‘values’ of Art 2 TEU and those mentioned in the preamble of the Brexit TCA,<sup>32</sup> it is remarkable that besides democracy, the rule of law and human rights, the “fight against climate change” is addressed (in recital 1). As a preliminary note, it is important to emphasise that EU treaties “shall in no way prejudice the rules in Member States governing the system of property ownership” (Art 345 TFEU). Nonetheless, it can be debated whether there should rather be discussions on the legal personality of robots,<sup>33</sup> or rather for the environment,<sup>34</sup> as challenging as that may be. National court decisions in Germany<sup>35</sup> or the Netherlands<sup>36</sup> point in the direction of strengthening environmental protection.

Such an additional value can be based on the existing concept of sustainability<sup>37</sup> and especially the cross-cutting clause of Art 11 TEU.<sup>38</sup> While such a cross-cutting clause is different from a value, it can have a similar function.<sup>39</sup> In a similar way as

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<sup>32</sup> *Supra*, Sect. 3.4.1.

<sup>33</sup> European Parliament (2017); see, Frischhut (2021a), p. 77. Against the idea of giving AI systems legal personality, UNESCO (2021), pt. 68.

<sup>34</sup> *Supra*, at the end of Sect. 3.3.1.

<sup>35</sup> BVerfG order of 24 March 2021, *Constitutional complaints against the Climate Protection Act partially successful*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

<sup>36</sup> Rechtbank Den Haag judgement of 26 May 2021, *Royal Dutch Shell (RDS) emissions reduction by a net 45% in 2030 compared to 2019 levels*, C/09/571932/HA ZA 19-379.

<sup>37</sup> On sustainability in the EU treaties, see recital 9 TEU (“principle of sustainable development”), Art 3(3) TEU (“sustainable development of Europe”), recital 3 CFR (promotion of “balanced and sustainable development”), Art 11 TFEU (cross-sectional clause of environmental protection), Art 37 CFR (‘environmental protection’), Art 3(5) TEU (“sustainable development of the Earth”), Art 21(2) TEU (Union’s external action).

<sup>38</sup> “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”.

<sup>39</sup> The author wants to thank Andreas Müller for valuable feedback in this regard.

some concepts have developed from principles to values,<sup>40</sup> also this cross-cutting clause of Art 11 TEU can be seen as a milestone towards such a new value.

Unless EU treaties are changed, it is up to the ECJ to decide on additional values, for instance, further developing the principle of sustainability, as well as to rank existing values. As environmental protection can not be achieved via a ranking of the existing values, the author suggests to include **environmental protection**<sup>41</sup> **as an additional value** of the first sentence of Art 2 TEU, for a more resilient<sup>42</sup> EU. Having mentioned various kinds of values,<sup>43</sup> environmental protection should not only be seen as a non-final extrinsic value, i.e. something that is valuable (only) as a means (environment to protect health, quality of life, etc.). Rather, environmental protection should be seen as something that is valued for its own sake, based on intrinsic qualities of the person valuing it (a final **intrinsic** value). At the same time, environmental protection can be seen as a final extrinsic value, i.e. something that is valued for its own sake, because of external **relational** properties.<sup>44</sup> This relational (but still intrinsic) aspect can be seen in the ‘one health’ approach, focussing on the health of humans, animals and the environment, based on the understanding “that the health of humans, animals and the environment are interdependent”<sup>45, 46</sup>

This idea goes in a similar direction as Ferdinand von Schirach, who recently proposed some **additional fundamental rights** on top of the rights in the CFR. These six additional rights can be translated as follows:<sup>47</sup>

- Art 1—Environment: Every human being has the right to live in a healthy environment.
- Art 2—Digital self-determination: Every human being has the right to digital self-determination. The exploration or manipulation of people is prohibited.
- Art 3—Artificial intelligence: Every person has the right to have algorithms that burden them to be transparent, verifiable and fair. Essential decisions must be made by a human being.

<sup>40</sup>This is irrespective of the fact that some concepts can (nowadays) be qualified as both principles and values (e.g., solidarity).

<sup>41</sup>‘Environmental protection’ should be understood as comprising the ideas of ‘sustainability’ and ‘preservation of the natural foundations of life’.

<sup>42</sup>See the definition in Regulation (EU) 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility, OJ 2021 L 57/17 (Art 2[5]): “‘resilience’ means the ability to face economic, social and environmental shocks or persistent structural changes in a fair, sustainable and inclusive way”.

<sup>43</sup>*Supra*, (at the beginning of) Sect. 4.1.1.

<sup>44</sup>For further details on this terminology, see Hermerén (2015), p. 167. The author wants to thank Göran Hermerén for valuable feedback in this regard.

<sup>45</sup>Johnson and Degeling (2019), p. 239.

<sup>46</sup>A similar approach is ‘planetary health’, which “is grounded in the understanding that the achievement of the highest attainable standard of health is dependent on the flourishing of the natural environment, recognizing that many impacts on human health directly arise from human-caused disruptions to the Earth’s natural systems”; Phelan (2020), p. 433.

<sup>47</sup>von Schirach (2021), pp. 18–19; translated with DeepL.

- Art 4—Truth: Everyone has the right to expect that statements made by public officials are true.
- Art 5—Globalisation: Everyone has the right to be offered only goods and services that are produced and provided with respect for universal human rights.
- Art 6—Fundamental rights actions: Anyone can bring a fundamental rights action before the European Courts for systematic violations of this Charter.

The author supports these claims in the fields of digitalisation, the environment, truth, as well as the procedural perspective. Given the close **connection** of values and human rights, environmental protection should be strengthened in the two fields of values and human rights.

### 5.3 A More Communitarian Union

*Respecting the ‘rules of the club’ and playing one’s proper part in **solidarity** with fellow Europeans cannot be based on a penny-pinching **cost-benefit analysis** along the lines (familiar, alas, from Brexiteer rhetoric) of ‘what precisely does the EU cost me per week and what exactly do I personally get out of it?’ Such **self-centredness** is a betrayal of the founding fathers’ vision for a **peaceful and prosperous** continent. It is the antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship. If the European project is to prosper and go forward, we must **all do better** than that.—AG Sharpston, 2019<sup>48</sup>*

*Let me conclude by recalling an **old story** from the Jewish tradition that deserves wider circulation. A group of men are travelling together in a boat. Suddenly, one of them takes out an auger and starts to bore a hole in the hull beneath himself. His companions remonstrate with him. ‘Why are you doing that?’ they cry. ‘What are you complaining about?’ says he. ‘Am I not drilling the hole under my own seat?’ ‘Yes,’ they reply, ‘but the water will come in and flood the boat for all of us’.—AG Sharpston, 2019<sup>49</sup>*

In the ‘ethical spirit of EU law’, I have argued, “being a community could also be seen as a value, as long as it is not used simply to exclude others”.<sup>50</sup> The same is true for identity, which establishes a certain delimitation that should not lead to exclusion.<sup>51</sup> Since the Lisbon treaty, EU law has been ‘lisbonised’, meaning changing

<sup>48</sup> AG Sharpston opinion of 31 October 2019, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, para 254 (emphases added).

<sup>49</sup> *Ibid.*, para 255 (emphases added).

<sup>50</sup> Frischhut (2019), p. 145.

<sup>51</sup> Calliess (2004), p. 1039.

terminology from Community, etc. to Union, etc. From a legal perspective, this is not objectionable. However, it might be that the term of ‘community’ would be an important value.<sup>52</sup> This thought and the opening quote lead us to the common good. The concept of a ‘**community**’ (*Gemeinwesen*) can be understood as an entity with sovereign rights (*Hoheitsrechten*) and the entitlement and, where applicable, the obligation of individuals to a not insignificant extent, directed towards the realisation of a ‘**common good**’ (*Gemeinwohl*).<sup>53</sup>

In literature, the common good has already been linked to the EU values.<sup>54</sup> However, the common good should play an even more important role in the EU. **Lobbying** is seen negatively because a small group is sometimes able to make its minority<sup>55</sup> opinion the rulebook for others. The issues that concern most Europeans should set the agenda for the next years, not those of lobbyists.

The concept of the ‘**common good**’ must be defined and placed in a specific context. For Rawls, the common good can be seen as “certain general conditions that are in an appropriate sense equally to everyone’s advantage”.<sup>56</sup> Fan, for instance, has argued “Rawls’ notion of the common good (namely, social justice for modern Western societies) is not suitable for China, because China has a quite different cultural and historical background from the West”.<sup>57</sup> He finally proposes “that the common good of society is a well-established basic societal order in which everyone can benefit and flourish in pursuing the good life”.<sup>58</sup> As Fan has argued that “one is not the final source of value claims and cannot exclusively determine the good for oneself”,<sup>59</sup> also the common good as to be determined in a collective (not individualistic) way by society at large, as debated in the Conference for the Future of Europe. While national constitutional courts have recently focussed on personal autonomy and self-determination,<sup>60</sup> “the Chinese would not grant a liberal right to the self-determination of the good”.<sup>61</sup>

A stronger emphasis on the value of community and the common good does not end here. In the same opinion quoted at the beginning of this section, AG Sharpston states as follows: “Solidarity is the **lifeblood** of the European project. Through their participation in that project and their citizenship of European Union, Member States

<sup>52</sup> Cf. already Frischhut (2019), p. 142.

<sup>53</sup> Müller-Graff (2021), para 59.

<sup>54</sup> Hilf and Schorkopf (2021), para 13.

<sup>55</sup> This should not be confused with the legitimate human rights of minorities.

<sup>56</sup> Rawls (1999), p. 217.

<sup>57</sup> Fan (2014), p. 205.

<sup>58</sup> Fan (2014), p. 205.

<sup>59</sup> Fan (2014), p. 208.

<sup>60</sup> BVerfG judgement of 26 February 2020, *Criminalisation of assisted suicide services unconstitutional*, 2 BvR 2347/15, 2 BvR 2527/16, 2 BvR 2354/16, 2 BvR 1593/16, 2 BvR 1261/16, 2 BvR 651/16; VfGH judgement of 11 December 2020, *Prohibiting any form of assisted suicide without exception is unconstitutional*, G 139/2019.

<sup>61</sup> Fan (2014), p. 208.

and their nationals have **obligations** and **benefits**, duties and rights. Sharing in the European ‘demos’ is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also requires one to shoulder collective responsibilities and (yes) burdens to further the **common good**.<sup>62</sup> This goes in a similar direction as Shafik proposing a new ‘social contract’, as “more generous and inclusive social contract would recognise our interdependencies, provide minimum protections to all, share some risks collectively and ask everyone to contribute as much as they can for as long as they can”.<sup>63</sup>

Meulen is right in criticising that sometimes “the modern individual is leading the life of a consumer”.<sup>64</sup> Hence, we need “a moral perspective that promotes the interests of vulnerable individuals”, as “justice alone is not enough to safeguard the interests of [these] vulnerable groups”.<sup>65</sup> As “individuals are connected with each other, they have also a *moral responsibility* towards the well-being of other human beings” (i.e., first claim).<sup>66</sup> This should be seen as an intrinsic value, not just because of a self-interest.<sup>67</sup>

**Human dignity**, as we have seen earlier, has been characterised as a ‘super-value’. Frenz has emphasised the communitarian approach concerning human dignity. Through integration into the community, the individual is limited in that he or she may not endanger the existence of this community as a prerequisite for his or her development.<sup>68</sup>

**Solidarity** and **justice** are two distinct values, as Meulen argues in his second claim. Solidarity should not replace liberal justice, as “justice protects the rights and interests of individuals as autonomous beings”, whereas solidarity “concerns the commitments and recognition of the well-being of the other without personal interests”.<sup>69</sup> His concept of humanitarian solidarity (i.e. paying “special attention to solidarity with vulnerable groups in society”<sup>70</sup>) should help “to create an ethical society, in which individuals are not humiliated and are connected with society on the basis of humanitarian solidarity or ‘shared humanity’”.<sup>71</sup> In his fourth<sup>72</sup> claim he

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<sup>62</sup> AG Sharpston opinion of 31 October 2019, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, para 253 (emphases added).

<sup>63</sup> Shafik (2021), p. 188.

<sup>64</sup> ter Meulen (2017), p. 167. Cf. also Precht (2021), p. 131.

<sup>65</sup> ter Meulen (2017), p. 167.

<sup>66</sup> ter Meulen (2017), p. 168.

<sup>67</sup> ter Meulen (2017), p. 169.

<sup>68</sup> Frenz (2009), p. 262.

<sup>69</sup> ter Meulen (2017), p. 171.

<sup>70</sup> ter Meulen (2017), p. 172.

<sup>71</sup> ter Meulen (2017), p. 173.

<sup>72</sup> His third claim argues for subsidiarity, i.e. in the specific field of care giving priority to family caregivers instead of the state; ter Meulen (2017), pp. 173–176.

argues for an approach, also advocated by ‘new communitarians’,<sup>73</sup> “trying to find a balance between community and autonomy”.<sup>74</sup> Various recent developments (pandemic, increasing gaps in society, etc.) have shown that the EU should embrace this idea of a **communitarian**<sup>75</sup> Union, emphasising the **common good** and ranking **solidarity** as a value higher. This goes in a similar direction as the above-mentioned approach of **human obligations** and **responsibility**.

One idea that is closely related to communitarianism and solidarity, and is currently found in several areas, is the concept of “leaving no one behind”.<sup>76</sup> The United Nations<sup>77</sup> in their 2030 Agenda in the context of their universal values have referred to the following three principles: a ‘human rights-based approach’, ‘gender equality and women’s empowerment’, and to ‘**leave no one behind**’.<sup>78</sup> In the EU, this concept can be found in the Green Deal,<sup>79</sup> in the field of digitalisation,<sup>80</sup> health,<sup>81</sup> development policy,<sup>82</sup> and migration,<sup>83</sup> to name but a few.

This **more communitarian** approach can occur at various levels and in various ways. Within the existing legal framework, a stronger emphasis on the common good is advisable for both the EU and its Member States. Still within the existing legal framework, more solidarity at Member State level would also be both advisable and desirable. For the level of individuals, the call for a more communitarian approach takes place outside the legal turf, and shifts the debate from values to virtues.

<sup>73</sup>On communitarianism, see also MacIntyre (1981); Paul (2002); Etzioni (2012); Frischhut (2019), pp. 28–29; Sandel (2010).

<sup>74</sup>ter Meulen (2017), p. 177. His fifth claim argues that sometimes solidarity can be found in the substance of health systems (e.g., UK and Scandinavian countries), although not labelling it as solidarity; ter Meulen (2017), pp. 178–184.

<sup>75</sup>See already, Frischhut (2019), pp. 141–142.

<sup>76</sup>The author wants to thank Éloïse Gennet for valuable discussions (‘Health in Europe’ seminar at Lancaster University, 3 November 2021) in this regard.

<sup>77</sup>See also, in the field of artificial intelligence, UNESCO (2021), recital 6.

<sup>78</sup>United Nations Sustainable Development Group (2021).

<sup>79</sup>EC ‘The European Green Deal’, COM(2019) 640 final 11.12.2019, p. 4 (“guide action in ensuring that no one is left behind”); EC ‘A Farm to Fork Strategy: for a fair, healthy and environmentally-friendly food system’, COM(2020) 381 final 20.5.2020.

<sup>80</sup>EC ‘Artificial Intelligence for Europe’, COM(2018) 237 final 25.4.2018, p. 2 (“No one is left behind in the digital transformation”); EC ‘2030 Digital Compass: the European way for the Digital Decade’, COM(2021) 118 final 9.3.2021, p. 2 (“The European vision for 2030 is a digital society where no-one is left behind”).

<sup>81</sup>EP resolution of 24 November 2021 on a pharmaceutical strategy for Europe (2021/2013(INI)), [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0470\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0470_EN.html), pt. 4 (“ensure that no patient is left behind”).

<sup>82</sup>EP resolution of 14 February 2017 on the revision of the European Consensus on Development (2016/2094(INI)), OJ 2018 C 252/62, pt. 24 (“the principle of leaving no-one behind”).

<sup>83</sup>EP resolution of 25 October 2016 on human rights and migration in third countries (2015/2316 (INI)), OJ 2018 C 215/111, pt. 70 (“the ‘leave no one behind’ principle”).



## 5.4 From Values to Virtues

*Laws can force conformity of overt behavior, but they cannot change the minds from which such views are formulated. At the bottom, we need some moral inspiration that will allow us to change our views by searching more deeply in our minds for principles that will lead to us treating other people, especially disadvantaged groups, with dignity and kindness.—Zhang (2016), p. 8*

Most of these claims (communitarianism, common good, and solidarity as a value) address the EU and its Member States, the two levels also addressed in Art 2 TEU. Human obligations, however, address individuals.<sup>84</sup> Many EU **values** are more institutional (democracy, rule of law, etc.), while in case of individuals values might also be qualified as **virtues**.<sup>85</sup> According to Aristotle, there are two types of virtues: “Some virtues we say are **intellectual**, such as wisdom, judgment and practical wisdom, while others are virtues of **character**, such as generosity and temperance.”<sup>86</sup> As already mentioned above, virtues should be achieved by striving for a **golden** (not an arithmetic<sup>87</sup>) **mean**. According to Aristotle, “the equal is a sort of mean between excess and deficiency. By the mean in respect of the thing itself I mean that which is equidistant from each of the extremes, this being one single thing and the same for everyone, and by the mean relative to us I mean that which is neither excessive nor deficient – and this is not one single thing, nor is it the same for all.”<sup>88</sup> As he has mentioned, in “fear and confidence, courage is the mean”,<sup>89</sup> in “giving and taking money, the mean is generosity, while the excess and deficiency are wastefulness and stinginess”.<sup>90</sup> “In honour and dishonour, the mean is greatness of soul, while the excess is referred to as a kind of vanity, the deficiency smallness of soul.”<sup>91</sup> This Aristotelian approach also inspired the above-mentioned ‘circle of balance’ (Fig. 4.2), which is not an additional value. It should rather be seen in a complementary way. However, the challenge is that a balanced solution cannot be achieved in a mathematical way, as already mentioned.<sup>92</sup>

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<sup>84</sup> Responsibility can be seen to address all three levels, the EU, Member States, as well as individuals.

<sup>85</sup> On an intriguing personal values model, see Scharfbillig et al. (2021), pp. 36–37.

<sup>86</sup> Aristotle (2000), p. 22, 1103a; emphases added.

<sup>87</sup> Aristotle (2000), p. 30, 1106b; “This is the mean according to arithmetic progression. The mean relative to us, however, is not to be obtained in this way”.

<sup>88</sup> Aristotle (2000), p. 29, 1106b.

<sup>89</sup> Aristotle (2000), p. 32, 1107b.

<sup>90</sup> Aristotle (2000), p. 32, 1107b.

<sup>91</sup> Aristotle (2000), p. 32, 1107b.

<sup>92</sup> Aristotle (2000), p. 35, 1109b; “This is why it is hard to be good, because in each case it is hard to find the middle point; for instance, not everyone can find the centre of a circle, but only the person with knowledge”.

In the context of compulsory vaccination, the ECtHR has emphasised “the value of **social solidarity**”.<sup>93</sup> Regarding Art 2 TEU, solidarity can be strengthened via a ranking of values. However, this ECtHR statement in the end mainly addresses individuals, who decide by their behaviour which contribution they make to the improvement of the situation for everyone. This goes in a similar direction as a recent paper emphasising the role of communitarianism in Africa to overcome the current pandemic.<sup>94</sup> Bieber has aptly stated that solidarity is a manifestation of the comprehensive principle of mutual responsibility,<sup>95</sup> where **responsibility** has a double meaning, on the one hand in the sense of liability and on the other hand in the sense of a standard of action.<sup>96</sup>

Virtues can also play an important role in **environmental protection** and **sustainability**. In a recently published book entitled ‘the virtues of sustainability’, Clayton has identified the following virtues of “environmental relevance: for example, simplicity, moderation, and frugality”, patience, cooperativeness and conscientiousness, and humility and harmony with nature.<sup>97</sup> As she emphasises, “the individual is a member of an interdependent community”,<sup>98</sup> hence it is important to acknowledge “the **interrelatedness** of the individual, society, and environment”,<sup>99</sup> which are key for ‘harmony with nature’.<sup>100</sup> Ferkany has focused on Aristotelian virtue education for sustainable development and has identified the following virtues: (a) virtues of “cosmopolitan justice” (including “fairness, cooperativeness, goodwill, responsibility, and limited patriotism”), (b) virtues of “right attachment to people, places, and things” (including “love, temperance [or moderation], frugality, and (again) limited patriotism”), and (c) virtues of “proper testimonial credulity” (including “open-mindedness and distinctly intellectual forms of justice, autonomy, humility, and charity”).<sup>101</sup>

In the same book entitled ‘the virtues of sustainability’, Cuomo answers the question, whether **respect for nature** is a new value.<sup>102</sup> Respect for nature, which much overlaps with ‘environmental ethics’, is not a new value. It should rather be

<sup>93</sup> ECtHR judgement of 8 April 2021, *Vavříčka and Others v. The Czech Republic*, 47621/13 and 5 others, para 279 (emphasis added), “the value of social solidarity, the purpose of the duty being to protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination” (see also para 306).

<sup>94</sup> Cordeiro-Rodrigues and Metz (2021), p. 61, “Afro-Communitarianism is the view that harmonious communal relationships merit pursuit either as ends in themselves or at least as an essential means to some other end such as vitality or well-being”.

<sup>95</sup> Bieber (2021), p. 226.

<sup>96</sup> Bieber (2021), p. 223.

<sup>97</sup> Clayton (2021), p. 14.

<sup>98</sup> Clayton (2021), p. 15; referring to Jordan and Kristjánsson (2017).

<sup>99</sup> Jordan and Kristjánsson (2017), p. 1220, emphasis added.

<sup>100</sup> On the ‘interconnectedness of life on Earth’, see also Ferkany (2021), p. 59.

<sup>101</sup> Ferkany (2021), pp. 62–63.

<sup>102</sup> Cuomo (2021), p. 135.

seen as the return of an old value,<sup>103</sup> as the more urbanised a society becomes, the more it tends to lose its link to nature,<sup>104</sup> as opposed to native cultures. She also refers to a “fundamental sense of responsibility [!] within mutually supportive social and ecological relationships, and within landscapes where other creatures and living systems are valued for their agency and inherent [!] worth”.<sup>105</sup> This intrinsic value is reminiscent of the underlying idea of human dignity. Unsurprisingly, she states that respect for nature is not only a value, but a virtue.<sup>106</sup> Taking a **holistic** perspective, destroying nature in the end leads to endangering oneself and the other members of one’s community, as stated in the second quotation by AG Sharpston at the beginning of Sect. 5.3, referring to someone destroying a boat underneath his seat. Likewise, as aptly stated in another context, “the highly contagious nature of COVID-19 implies that it is not possible to overcome the pandemic unless there is a holistic approach to it”.<sup>107</sup>

Fan has aptly stated, one should keep in mind the “historical, cultural and social differences” between the concept-exporting and the concept-importing country or society to answer the question, whether the **transfer** can be possible and makes success.<sup>108</sup> Nonetheless, keeping this in mind, we can draw **valuable inspiration** from other parts of the world. At the end of this ‘future direction of travel’, let’s take a brief and non-exhaustive look outside Europe.

Let us first travel south, to **Africa**. ‘Afro-communitarianism’, has been described “as a communal driven ethic that puts relationships of identity and good-will as the highest value”,<sup>109</sup> respectively, as “an ethic that puts solidarity [!] as the centre of its prescriptions and provides a moral and a logical requirement for cooperation”.<sup>110</sup> The virtues usually mentioned by Afro-communitarians are “generosity, compassion, benevolence, tolerance, kindness and good-will, roughly ones that bring people closer together.”<sup>111</sup>

We can also learn from travelling east, having a look at **Confucianism**. Fan has referred to the following “basic Confucian traits or virtues”, including “ren (benevolence), yi (appropriateness), li (ritual propriety), zhi (wisdom), xin (fidelity), xiao (filial piety), zhong (loyalty).”<sup>112</sup> Translations sometimes differ, as Ren has also been translated with humanity and Yi with righteousness.<sup>113</sup> Ren has been described

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<sup>103</sup> Ibid, p. 155.

<sup>104</sup> Ibid, p. 151.

<sup>105</sup> Ibid, p. 140.

<sup>106</sup> Ibid, p. 140.

<sup>107</sup> Cordeiro-Rodrigues and Metz (2021), p. 63.

<sup>108</sup> Fan (2014), p. 197, for instance, argues that it is “unlikely that the Chinese moral crisis can be solved by adopting the position of modern Western liberalism”.

<sup>109</sup> Cordeiro-Rodrigues and Metz (2021), p. 62.

<sup>110</sup> Cordeiro-Rodrigues and Metz (2021), p. 63.

<sup>111</sup> Cordeiro-Rodrigues and Metz (2021), p. 62.

<sup>112</sup> Fan (2014), p. 195.

<sup>113</sup> Zhang (2016), p. 8.

as “a moral character possessed by an altruistic personality” and Yi as standing for “reciprocity expressed in the Golden Rule: ‘Do not impose on the others what you do not wish others to impose on you.’”<sup>114</sup> For the question of what could or should be transferred to Europe, one has to be precise regarding the source. Fan, for example, has asserted a “Chinese moral crisis” in terms of a “severe devastation of the Confucian understanding of the good, the virtuous, and a good society”.<sup>115</sup> Hence, the source of import in this case would be Confucianism in its ‘original’ sense, not the ‘devastated’ version of today.

The rule of law is one of the values of the EU. Clearly, the rule of law can be qualified as an institutional value, focussing on the EU and, as discussed most of the time, concerning Member States. One should not disregard the individual level; hence, we can identify a lacuna, which needs to be filled, while existing values do not need to be replaced. Looking again into Asia, Fan has stated that “Confucian policy is usually termed rule of virtue (*dezhi*, 德治) rather than rule of law (*fazhi*, 法治), although laws are unavoidably supplementary to the rule of virtue in the tradition”.<sup>116</sup> We can take this example to supplement the rule of law with a new **rule of virtues**, mainly focussing on the individual level.<sup>117</sup>

Last but not least, travelling west, Marshall presents the values of the **Lakota** tribe, which can clearly also be qualified as virtues, as they address character traits that need to be practised. Having referred to the EU’s old and the suggested new narrative, it is worth mentioning that Marshall presents each value by means of a short story. It is beyond the scope of this book to attempt to take a similar approach for the EU. Likewise, Lakota values also address an individual level and can be seen as virtues, which sometimes might also have a practical background (e.g., bravery, fortitude), but also others (humility, perseverance, respect, honor, love, sacrifice, compassion, generosity, wisdom). Truth, as another value or virtue, was also suggested by Schirach as a proposed additional fundamental right.

North of the Lakota, the **Iñupiaq**, the native people of Arctic Alaska have also distinct individual values. While some values have a clear practical background (knowledge and language, hard work, domestic skills, hunter success), others are more values of individuals (spirituality, humility, humor), others are much relational (avoid conflict, love for children, sharing, respect for elders, respect for others, cooperation, respect for nature, and responsibility of tribe).<sup>118</sup> Hence, these values can also be seen as virtues.

As mentioned at the beginning of this Sect. 5.4, “[l]aws can force conformity of overt behavior, but they cannot change the minds from which such views are

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<sup>114</sup>Zhang (2016), p. 8.

<sup>115</sup>Fan (2014), p. 197.

<sup>116</sup>Fan (2014), p. 203.

<sup>117</sup>Of course, those virtues would also be important for policy-makers; however, not replacing democracy, as somehow implied by Fan (2014), p. 213: “virtuous leadership is much more important than universal suffrage”.

<sup>118</sup>From Frischhut (2021b).

**Table 5.1** Virtues beyond Europe

Origin (and sources)	Virtues
Afro-communitarianism <sup>a</sup>	Generosity, Compassion, Benevolence, Tolerance, Kindness, Good-will
Confucianism <sup>b</sup>	Benevolence [or Humility] (ren), Appropriateness [or Righteousness] (yi), Ritual propriety (li), Wisdom (zhi), Fidelity (xin), Filial piety (xiao), Loyalty (zhong)
Lakota <sup>c</sup>	Humility, Perseverance, Respect, Honor, Love, Sacrifice, Truth, Compassion, Bravery, Fortitude, Generosity, Wisdom
Iñāpīaq <sup>d</sup>	Spirituality, Humility, Avoid Conflict, Knowledge of Language, Hard Work, Humor, Knowledge of Family Tree, Family Roles, Love for Children, Domestic Skills, Hunter Success, Sharing, Respect for Elders, Respect for Others, Cooperation, Respect for Nature, Responsibility to Tribe

<sup>a</sup> Cordeiro-Rodrigues and Metz (2021), p. 62

<sup>b</sup> Fan (2014), p. 195, respectively, Zhang (2016), p. 8

<sup>c</sup> Marshall (2002)

<sup>d</sup> Cuomo (2021), p. 149

formulated”.<sup>119</sup> These individual values or virtues identified south (Africa), east (Confucianism), west (Lakota) and north (Alaska) of Europe (Table 5.1), can also be a valuable source of inspiration, complementing EU values and concepts also identified in Europe, such as the ‘cardinal virtues’: justice (*iustitia*), temperance (*temperantia*), courage (*fortitudo*) and practical wisdom (*prudentia*).<sup>120</sup>

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<sup>119</sup>Zhang (2016), p. 8.

<sup>120</sup>Klein (1971–2007), p. 695.

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# Chapter 6

## Conclusion



Finally, and for the sake of the debate on EU values, the book is summarised in the following theses.<sup>1</sup> This will include both the summary of the status quo identified so far, as well as the author’s suggestions for improvement.<sup>2</sup>

### Status Quo

1. Values can pertain to various disciplines and they function as a **bridge** between **law and philosophy** (ethics).
2. Values have been enshrined in Art 2 TEU. This provision is a **hub**, where other articles of EU primary and secondary law feed into, filling these concepts with life. These values have been applied to two areas (digitalisation and non-financial reporting, partly in sports), and further specified in others (health and partly in sports) (cf. **objective 2.1**).
3. Various values have been referred to as ‘**concepts**’ in the sense of a neutral umbrella term, as some Art 2 TEU values can be qualified as a value, a principle, a general principle of EU law, and/or as an EU objective (Art 3 TEU). As mentioned by AG Bobek concerning ‘judicial independence’,<sup>3</sup> it is preferable to take the approach of single concepts (e.g., of solidarity) instead of various distinct concepts in different fields, although the application of one concept in different fields (e.g., migration, energy, social security) can lead to different outcomes.
4. EU values address the EU and the Member States, even in purely internal situations (i.e. no cross-border situation) and outside the EU’s competences.

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<sup>1</sup>Hence, in a similar way as in the book on the ‘ethical spirit of EU law’, Frischhut (2019), pp. 143–146.

<sup>2</sup>The author wants to thank Göran Hermerén for aptly mentioning that some of these theses can pertain to both categories (status quo and author’s suggestions for improvement).

<sup>3</sup>AG Bobek opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, joined cases C-748/19 to C-754/19, EU:C:2021:403, paras 162–163.

Individuals are addressed more in terms of EU secondary law referring to values (e.g., in migration, in digitalisation) or as (not legally binding) virtues. Strengthening values at all three **levels** (ad **objective 1**) is essential for the ‘soul’ for the EU integration process.

5. **Content**-wise, non-discrimination, human rights, the rule of law and solidarity are much determined; tolerance and pluralism less so. Human dignity, democracy, equality (also between women and men) and the rights of minorities can be positioned in the middle concerning this question of enough substantive determination (ad **objective 2.1**). Freedom and justice are two broad concepts, which can benefit from the above-mentioned positioning at the interface of law and philosophy.
6. **Human dignity** can be seen as a ‘super-value’, respectively, as the corner stone of EU values, strongly influenced by a Kantian understanding. It has also found expression in EU secondary legislation.
7. The rule of law, justice, democracy, human rights and freedom as more institutional values shall secure the individual, especially against arbitrary decisions, equality and non-discrimination shall avoid that some are “more equal than others”.<sup>4</sup>
8. The approach of linking more **abstract values** to more **concrete principles** has been identified both in the case of the general value of the rule of law, as well as in the case of the specific health values. The advantage lies in the fact that principles combined with values provide more clarity (legal addressees and legal consequences) in addition to more abstract<sup>5</sup> values.
9. EU values are **binding** (ad **objective 2.2**) for the EU, and for the Member States, as mentioned above, even outside EU competences or in the absence of a cross-border situation. Human rights can exceptionally be binding on individuals via general principles of EU law. Gender equality is also binding between individuals (case *Defrenne*<sup>6</sup>), non-discrimination, for instance, can become binding between individuals in case of implemented EU directives.
10. This question is linked to the **justiciability** of values (ad **objective 2.2**). Following existing literature,<sup>7</sup> values can be distinguished between a justiciable hard conceptual core<sup>8</sup> (*‘Begriffskern’*) and a non-justiciable soft conceptual periphery (*‘Begriffshof’*); see also Table 6.1. Some values as freedom, justice, pluralism and tolerance are hardly justiciable. However, one concept (e.g., justice) can be twinned with another one (e.g., rule of law, or

<sup>4</sup>As Walzer (1983), p. 321 mentioned, “[m]utual respect and as shared self-respect are the deep strengths of complex equality, and together they are the source of its possible endurance”.

<sup>5</sup>As mentioned by Scharfbillig et al. (2021), due to “their abstract nature, values need to be interpreted in context, also known as ‘instantiation’”.

<sup>6</sup>ECJ judgement of 8 April 1976, *Defrenne vs. Sabena I*, C-43/75, EU:C:1976:56, para 39.

<sup>7</sup>Sommermann (2020), p. 267.

<sup>8</sup>As Müller-Graff (2021), para 95 has emphasised, values have a hard core of meaning, but in individual cases they are open to time, understanding and therefore also interpretation.

**Table 6.1** Conceptual core and periphery

	Values core	Values periphery
Justiciability	More	Less
Vertical conflict of values	Primacy of EU values if core affected <sup>a</sup> (i.e. minimum approach)	Balancing, hence more pluralism possible (can also take place at national level, e.g. if 'necessary reconciliation' not already at level of EU Secondary law)
Possibility of evolution, by trend	Less	More
Possibility of limitations, by trend	Less	More

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

non-discrimination) to become effective. Non-discrimination (and equality as the other side of the same coin) and gender equality are justiciable as general principles of EU law and as fundamental rights, solidarity as a general principle of EU law. From the first sentence of Art 2 TEU, human dignity, democracy, the rule of law, human rights and the already mentioned equality are justiciable.

11. Like EU integration process itself, EU values have emerged step-by-step. They have been identified in literature early on (e.g. Hallstein 1979<sup>9</sup>), have existed for quite some time as principles,<sup>10</sup> and have been enshrined in the EU treaties via Art 2 TEU. This **evolution** (ad **objective 2.4**) is however not finished and can also occur outside the hub of Art 2 TEU via ECJ case-law (stunning of animals case<sup>11</sup>).
12. According to ECJ case-law, common values are the basis for mutual **trust** between Member States. However, trust is also essential between the EU and individuals (see thesis No 26).
13. **Limitations** of values (ad **objective 2.5**) are possible, although more at the periphery, less in the core of the relevant concept. For instance, based on the Kantian idea that one right or freedom ends, where another right or freedom begins, freedom is not unlimited and can conflict, for instance, with solidarity.<sup>12</sup>
14. Values also have an **external** dimension, where the three values of democracy, the rule of law and human rights have been identified both early on in the Copenhagen criteria, as well as recently in the Brexit deal (Art 763 TCA).

<sup>9</sup>Hallstein (1979), p. 66 has identified the following values of European Community integration: peace, uniformity, equality (between both citizens and Member States), freedom, solidarity, prosperity, progress, and security.

<sup>10</sup>This evolutionary analysis is independent of the fact that some concepts can be qualified as both a value and a principle (e.g., solidarity).

<sup>11</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031.

<sup>12</sup>There is no unlimited freedom of human behaviour in a pandemic and a community will only be able to overcome these challenges if individuals display a sense of solidarity with the vulnerable.

### Future Direction of Travel

15. Basically, EU values (Art 2 TEU) are **human-centric**,<sup>13</sup> and the same is true for fundamental rights (including the CFR). ECJ case-law has added **animals** (stunning of animals case<sup>14</sup>) to the beneficiaries of EU values. A possible next step would be to add the **environment** (see also thesis No 27).
16. As Habermas has emphasised, in the field of **democracy** EU citizens need “an arena in which they can even recognise their shared social interests across national boundaries and transform them into political conflicts”.<sup>15</sup> Such an arena would be important to reflect on different conceptions of the ‘common good’, both in the short (Conference on the Future of Europe<sup>16</sup>) and in the long run.
17. **Solidarity** in the EU can be related to the three tiers identified by Prainsack and Buyx,<sup>17</sup> only that the direction seems to be reversed. That is to say, moving from tier No 3 (codification, or ‘solidification’), to tier No 2 (‘group-based or community-based practices’), and finally, as a virtue, to tier No 1, the interpersonal tier. Likewise, in the field of mandatory vaccination, the ECtHR has emphasised the importance of ‘social solidarity’, i.e. between individuals (on human obligations, see also thesis No 28).
18. **Justice** is a concept where many have struggled to find a definition. As emphasised by the ECJ, in “a society in which, inter alia, justice prevails”,<sup>18</sup> we “have to reason together about the meaning of the good life”,<sup>19</sup> as suggested by Sandel.
19. **Tolerance and pluralism** are two values that are less determined, but where the state should create certain framework conditions, to foster them. Additionally, they could be seen as virtues (see also theses No 27 and 28) of individuals, outside the legal turf.
20. In the ‘ethical spirit of EU law’ I have argued for encompassing the idea of minimal ethics, to step-by-step move from a more diverse to a more uniform approach of this ethical spirit in the vertical relationship between the EU and its Member States.<sup>20</sup> The same **minimum approach**<sup>21</sup> should be adopted for the

<sup>13</sup>Cf. Calliess (2016), p. 39.

<sup>14</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031.

<sup>15</sup>Habermas (2015), p. 551.

<sup>16</sup>Conference on the Future of Europe (2022).

<sup>17</sup>Prainsack and Buyx (2017), pp. 54–57.

<sup>18</sup>ECJ judgement of 20 April 2021, *Repubblica*, C-896/19, EU:C:2021:311, para 62.

<sup>19</sup>Sandel (2010), p. 261.

<sup>20</sup>Frischhut (2019), p. 146.

<sup>21</sup>In the field of ethics and sensitive topics, following this minimum approach, we can observe some consensus in the EU concerning research in human embryonic stem cells. See Statements on Regulation (EU) 2021/695 of 28 April 2021 establishing Horizon Europe—the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination,

ethical spirit of EU values, having more unity in the core, and potentially more diversity in the periphery of these concepts, with a tendency towards more unity over time. As also argued by Calliess,<sup>22</sup> a **vertical conflict of values** may be resolved in the sense of the primacy of EU law, only if the proper functioning (*‘Funktionsfähigkeit’*) of the EU is put in question. This is the case if the conceptual core of values (*‘Wertekern’*) is violated, but not only if the conceptual periphery (*‘Wertehof’*) is affected (cf. the above-mentioned ‘essence’ mentioned in Art 52[1] CFR). At the periphery of a value, a balancing approach has to be applied.<sup>23</sup> At the conceptual periphery of a value it will also be easier to accept new technological or societal developments (**evolution**) and possible **limitations**. On these various questions concerning the conceptual core or periphery of values, see Table 6.1.

21. A **ranking** of values (ad **objective 3**) should not be seen in a formal, but substantively.<sup>24</sup> Additionally, on a **horizontal** level, such a preference should be seen as a force that then pulls in one direction rather than the other, not as a primacy as we know it between EU law and national law. The corner stone or ‘super-value’ of human dignity will obviously tend to pull more in its direction. Individuals should decide the ranking EU values, following a communitarian approach. To some extent, the ranking of values will also be an issue of the CJEU.
22. From the CJEU, we also know the approach of striving for a **balanced** approach, which was applied in relation to different fundamental rights, as well as in relation of fundamental rights and economic fundamental freedoms. Early on (in 1973), the ECJ has emphasised the necessity of balance (or equilibrium) in the field of solidarity.<sup>25</sup> In relation of EU values to the earlier steps of EU integration, namely, economic and political integration, as well as human rights,

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and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013, OJ 2021 C 185/1 (“the European Commission proposes to continue with the same ethical framework for deciding on the EU funding of human embryonic stem cell research as in Horizon 2020 Framework Programme”). See also the documents published on the same day: OJ 2021 L 1671/1 (and p. 81), as well as OJ 2021 L 170/1.

<sup>22</sup> Calliess (2004), p. 1042.

<sup>23</sup> In the context of the rule of law, Schroeder (2016), p. 11 arguing in a similar direction, has emphasised that the “claim for the rule of law should [...] not be understood as a claim for homogeneity”, as there are structural differences and one has to accept the “constitutional pluralism”, enshrined in the EU treaties. See also Lenaerts (2017), p. 640 “*Mindestmaß an normativer Homogenität*”.

<sup>24</sup> As Constantinesco (2000), p. 79 has stated, the “ECJ has established a hierarchy between Constitutional norms and values: all the Treaty provisions are not at the same level. Some are rather technical, others have fundamental importance”. Art 2 TEU, the general principles of EU law, as well as the CFR are part of this constitutional (i.e., non-technical) category. This approach of Constantinesco supports the approach of this book of emphasising the joint importance of values and principles.

<sup>25</sup> ECJ judgement of 7 February 1973, *Commission vs. Italy [slaughtering cows]*, C-39/72, EU: C:1973:13, para 24.

a balanced approach should be achieved, without diminishing the importance of EU values (the ‘circle of balance’).

23. The above-mentioned ranking of EU values can overlap with a balancing of values among themselves. In case of relevant EU secondary law, an analysis of the same will reveal if this balancing can take place **at the national level** (potentially leading to more diversity) or should rather take place at EU level (potentially leading to more uniformity), as suggested by the ECJ in the animal stunning case.<sup>26</sup>
24. The ‘**reverse Solange**’ doctrine, developed for the cooperation of various levels, is a valuable contribution for enforcing of EU values,<sup>27</sup> as further substantiated by other provisions of EU law. It allows individuals, apart from the constraints of Art 51(1) CFR, to bring their case in a situation of systemic violations to any court in the EU, including the CJEU, to scrutinise any national measure if the essence (!) of the EU’s values of Art 2 TEU, as further substantiated by EU law (e.g., CFR) is affected. This doctrine perfectly feeds into the manifold **relations** (ad **objective 3**) as identified in this book. These include the close connection of Art 2 TEU and the CFR, as well as other fundamental rights, e.g. as general principles of EU law. In the context of the Council of Europe, the ECHR should also be mentioned. We have also seen an important relation of Art 2 TEU to various examples of EU secondary law and the above-mentioned relation of values that are more abstract and more concrete principles.
25. The (ethical and or legal) **principles** of vulnerability, responsibility<sup>28</sup> (including human obligations), precaution, sustainability, as well as proportionality and balance can play an important role in some current challenges, our societies are currently facing (i.e., climate change, the pandemic,<sup>29</sup> and digitalisation).
26. In terms of the **future direction of travel** (ad **objective 4**) for this ethical spirit of EU values, trust should be established as an additional<sup>30</sup> (complementary) narrative, where based on a strengthening of values, transparency and integrity the EU should strive to achieve the highest ethical standards.<sup>31</sup> This is especially true in sensitive issues, as well as in EU decision-making (i.e., lobbying).

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<sup>26</sup>ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031.

<sup>27</sup>As Calliess (2004), p. 1044 put it, values must not only be proclaimed in political Sunday speeches, but must also be respected and effectively realised. To ‘walk the talk’, so to speak; cf. Frischhut (2019), p. 145.

<sup>28</sup>Responsibility can also be seen as the ability to provide a response. The author wants to thank Matthias Fuchs for this remark.

<sup>29</sup>Applying these values to different challenges is another challenge, as, for instance, in case of fair and equitable distribution of vaccination. E.g., Emanuel et al. (2020), referring to the values of “benefiting people and limiting harm, prioritizing the disadvantaged, and equal moral concern”.

<sup>30</sup>As mentioned by Scharfbillig et al. (2021), for “policymaking, especially in culturally diverse settings such as the EU, future work should seek to test whether other values are still missing”.

<sup>31</sup>In the field of AI, this approach has already been applied.

27. As in the Brexit (cf. **objective 2.3**) agreement (fight against climate change), **environmental** protection should be upgraded to an EU value, i.e. added to Art 2 TEU. At the level of individuals, values can be supplemented by **virtues**, where respect for nature would be an important virtue and where inspiration can be drawn from both inside Europe (e.g., cardinal virtues) and from the outside (e.g., certain native cultures).
28. The EU should strive for a more **communitarian** approach, for which it must be reflected at EU level in whose interest decisions are made, i.e., the common good and less lobbying of particular interests. This communitarian approach should also apply at Member State level (again, lobbying via the Council as only one example). At the level of individuals, this approach can manifest itself in the form of human obligations, which are not intended to replace virtues and/or human rights but to complement them.

The **objective** of this book was to complement the holistic concept of the ‘ethical spirit of EU law’ with EU values. As already mentioned, the notion of ‘spirit’ is more than just mere intention, but the **holistic** coming together of different elements, hence “the intention of the authors of a legal system, which is reflected in a lattice of various different provisions”.<sup>32</sup> As mentioned in the introduction, the goal of this book is the identification of the **underlying philosophy** of EU values, also in relation to the EU’s approach towards ethics.

Likewise, the ‘ethical spirit of EU values’ is deeply rooted in the **relationship** of EU values to the rest of the EU *acquis*. Those values identified in Art 2 TEU can be seen as a **hub**, linking various provisions of EU primary and secondary law. This holistic point of view combines well with the approach chosen here to speak of **concepts**, since different legal qualifications (value, principle, general principle of EU law, and/or EU objective) can be grouped together. Especially the combination of more abstract **values** and more concrete legal **principles** can offer an important contribution, not only but also for the justiciability of these concepts. While more concrete and justiciable elements of these concepts are important for enforcement by individuals, elements that are more abstract are important in order to offer guidance both for current and for future challenges. Within the existing dimensions of EU integration (i.e., economic integration, human rights and non-economic purposes, political integration, and values), a **balanced** approach has to be found within the existing status quo.

Based on this current situation, it is beyond doubt that **trust** will become more and more important, hence the suggestion of an additional narrative of the EU. For the relationship of EU citizens and people living in the EU, besides virtues, a more **communitarian** and solidarity-based approach (also focussing on the vulnerable persons) would strengthen the resilience of our society on the long run. Beyond the relationship of humans, following the ‘one health’ or ‘planetary health’ approach, it would also be advisable to move from a human-centric or anthropocentric view to a

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<sup>32</sup>Frischhut (2019), p. 90.

more **bio-centric** approach.<sup>33</sup> Along these lines, if animal welfare has been qualified as an EU value it can also be argued (*argumentum a minori ad maius*) that ‘human health’ can also be seen as a value.<sup>34</sup> Strengthening both human health as well as the environment is not a contradiction, rather a necessary complementary approach. Overall, such a more holistic approach would acknowledge the relations of humans, animals and the environment, as also painfully experienced during the COVID-19 pandemic.

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<sup>33</sup> See already Frischhut (2019), p. 145.

<sup>34</sup> See also The EAHL Interest Group on Supranational Biolaw (2022), also putting an emphasis on inclusion, equity and vulnerable persons. Further details and implications of ‘health as a value’ remain to be elaborated.



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# Appendix

## Case-Law (Clustered According to Relevant Court Etc., Then in Chronological Order)

ECJ judgement of 5 February 1963, *Van Gend en Loos*, C-26/62, EU:C:1963:1

ECJ judgement of 12 November 1969, *Stauder vs. Stadt Ulm*, C-29/69, EU:C:1969:57

ECJ judgement of 10 December 1969, *Commission vs. France [conjunctural policy]*, C-6/69, EU:C:1969:68

ECJ judgement of 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114

ECJ judgement of 31 March 1971, *Commission vs. Council [AETR]*, C-22/70, EU:C:1971:32

ECJ judgement of 7 February 1973, *Commission vs. Italy [slaughtering cows]*, C-39/72, EU:C:1973:13

ECJ judgement of 14 May 1974, *Nold vs. Commission*, C-4/73, EU:C:1974:51

ECJ judgement of 28 October 1975, *Rutili vs. Ministre de l'intérieur*, C-36/75, EU:C:1975:137

ECJ judgement of 8 April 1976, *Defrenne vs. Sabena I*, C-43/75, EU:C:1976:56

ECJ judgement of 15 June 1978, *Defrenne vs. Sabena II*, C-149/77, EU:C:1978:130

ECJ judgement of 20 February 1979, *Rewe vs. Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42

ECJ judgement of 29 October 1980, *Roquette vs. Council*, C-138/79, EU:C:1980:249

ECJ judgement of 12 November 1981, *Meridionale Industria Salumi and Others*, joined cases C-212 to C-217/80, EU:C:1981:270

ECJ judgement of 9 February 1982, *Polydor and Others vs. Harlequin and Others*, C-270/80, EU:C:1982:43

ECJ judgement of 27 March 1985, *Scrivner vs. Centre public d'aide sociale de Chastre*, C-122/84, EU:C:1985:145

- ECJ judgement of 22 January 1986, *Eridania*, C-250/84, EU:C:1986:22
- ECJ judgement of 11 March 1986, *Conegate*, C-121/85, EU:C:1986:114
- ECJ judgement of 23 April 1986, *Les Verts vs. Parliament*, C-294/83, EU:C:1986:166
- ECJ judgement of 29 September 1987, *Giménez Zaera vs. Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social*, C-126/86, EU:C:1987:395
- ECJ judgement of 7 March 1989, *Schumacher vs. Hauptzollamt Frankfurt am Main-Ost*, C-215/87, EU:C:1989:111
- ECJ judgement of 21 September 1989, *Hoechst vs. Commission*, C-46/87, EU:C:1989:337
- ECJ judgement of 13 December 1989, *Grimaldi vs. Fonds des maladies professionnelles*, C-322/88, EU:C:1989:646
- ECJ judgement of 28 June 1990, *Hoche*, C-174/89, EU:C:1990:270
- ECJ judgement of 24 January 1991, *Alsthom vs. Sulzer*, C-339/89, EU:C:1991:28
- ECJ judgement of 11 June 1991, *Commission vs. Council [titanium dioxide]*, C-300/89, EU:C:1991:244
- ECJ judgement of 18 June 1991, *ERT vs. DEP*, C-260/89, EU:C:1991:254
- ECJ opinion of 14 December 1991, *Accord EEE - I*, Avis 1/91, EU:C:1991:490
- ECJ judgement of 30 April 1996, *P vs. S and Cornwall County Council*, C-13/94, EU:C:1996:170
- ECJ judgement of 9 July 1997, *Konsumentombudsmannen vs. De Agostini and TV-Shop*, joined cases C-34/95, C-35/95 and C-36/95, EU:C:1997:344
- ECJ judgement of 28 April 1998, *Kohll vs. Union des caisses de maladie*, C-158/96, EU:C:1998:171
- ECJ judgement of 11 May 2000, *Gascogne Limousin viands*, C-56/99, EU:C:2000:236
- ECJ judgement of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296
- ECJ judgement of 3 October 2000, *Échirolles Distribution*, C-9/99, EU:C:2000:532
- ECJ judgement of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420
- ECJ judgement of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465
- ECJ judgement of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458
- ECJ judgement of 9 October 2001, *Netherlands vs. Parliament and Council*, C-377/98, EU:C:2001:523
- ECJ judgement of 25 July 2002, *Unión de Pequeños Agricultores vs. Council*, C-50/00 P, EU:C:2002:462
- ECJ judgement of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333
- ECJ judgement of 29 April 2004, *Commission vs. CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236
- ECJ judgement of 5 October 2004, *Pfeiffer and Others*, joined cases C-397/01 to C-403/01, EU:C:2004:584
- ECJ judgement of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614
- ECJ judgement of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709
- ECJ judgement of 11 July 2006, *Chacón Navas*, C-13/05, EU:C:2006:456

- ECJ judgement of 18 January 2007, *PKK and KNK vs. Council*, C-229/05 P, EU:C:2007:32
- ECJ judgement of 11 December 2007, *The International Transport Workers' Federation and The Finnish Seamen's Union*, C-438/05, EU:C:2007:772
- ECJ judgement of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809
- ECJ judgement of 17 July 2008, *Raccanelli*, C-94/07, EU:C:2008:425
- ECJ judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461
- ECJ judgement of 16 July 2009, *Commission vs. Poland [GMOs]*, C-165/08, EU:C:2009:473
- ECJ judgement of 19 January 2010, *Küçükdeveci*, C-555/07, EU:C:2010:21
- ECJ judgement of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309
- ECJ judgement of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09, EU:C:2010:662
- ECJ judgement of 16 December 2010, *Josemans*, C-137/09, EU:C:2010:774
- ECJ judgement of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811
- ECJ judgement of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806
- ECJ judgement of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124
- ECJ judgement of 18 October 2011, *Brüstle*, C-34/10, EU:C:2011:669
- ECJ judgement of 21 December 2011, *N. S. and Others*, joined cases C-411/10 and C-493/10, EU:C:2011:865
- ECJ judgement of 14 June 2012, *Commission vs. Netherlands [three out of six years' rule]*, C-542/09, EU:C:2012:346
- ECJ judgement of 17 January 2013, *Zakaria*, C-23/12, EU:C:2013:24
- ECJ judgement of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105
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- ECJ judgement of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114
- ECJ judgement of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350
- ECJ judgement of 10 July 2014, *Julian Hernández and Others*, C-198/13, EU:C:2014:2055
- ECJ order of 17 July 2014, *Široká*, C-459/13, EU:C:2014:2120
- ECJ judgement of 2 December 2014, *A*, joined cases C-148/13 to C-150/13, EU:C:2014:2406
- ECJ judgement of 18 December 2014, *FOA*, C-354/13, EU:C:2014:2463
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- ECJ judgement of 19 April 2016, *DI*, C-441/14, EU:C:2016:278
- ECJ judgement of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324
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- ECJ judgement of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198
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- ECJ judgement of 25 October 2017, *Romania vs. Commission*, C-599/15 P, EU:C:2017:801
- ECJ judgement of 5 December 2017, *M.A.S. and M.B. [Taricco II]*, C-42/17, EU:C:2017:936
- ECJ judgement of 25 January 2018, *F*, C-473/16, EU:C:2018:36
- ECJ judgement of 20 February 2018, *Belgium vs. Commission [gambling]*, C-16/16 P, EU:C:2018:79
- ECJ judgement of 20 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117
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- ECJ judgement of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257
- ECJ judgement of 2 May 2018, *K (Right of residence and alleged war crimes)*, joined cases C-331/16 and C-366/16, EU:C:2018:296
- ECJ judgement of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335
- ECJ judgement of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492
- ECJ judgement of 11 September 2018, *IR*, C-68/17, EU:C:2018:696
- ECJ judgement of 6 November 2018, *Bauer*, joined cases C-569/16 and C-570/16, EU:C:2018:871
- ECJ judgement of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874
- ECJ judgement of 10 December 2018, *Wightman*, C-621/18, EU:C:2018:999
- ECJ judgement of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43
- ECJ judgement of 26 February 2019, *Oeuvre d'assistance aux bêtes d'abattoirs*, C-497/17, EU:C:2019:137
- ECJ judgement of 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218
- ECJ opinion of 30 April 2019, *Accord ECG UE-Canada [CETA]*, Avis 1/17, EU:C:2019:341
- ECJ judgement of 14 May 2019, *M*, joined cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403
- ECJ judgement of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622
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- ECJ judgement of 19 December 2019, *Puppinck and Others vs. Commission*, C-418/18 P, EU:C:2019:1113
- ECJ judgement of 2 April 2020, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257
- ECJ judgement of 11 June 2020, *Commission vs. Dôvera zdravotná poisťovňa*, joined cases C-262/18 P and C-271/18 P, EU:C:2020:450
- ECJ judgement of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794
- ECJ judgement of 6 October 2020, *Privacy International*, C-623/17, EU:C:2020:790
- ECJ judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031
- ECJ judgement of 9 March 2021, *Radiotelevizija Slovenija (Période d'astreinte dans un lieu reculé)*, C-344/19, EU:C:2021:182
- ECJ judgement of 9 March 2021, *Stadt Offenbach am Main (Période d'astreinte d'un pompier)*, C-580/19, EU:C:2021:183
- ECJ judgement of 10 March 2021, *Ordine Nazionale dei Biologi and Others*, C-96/20, EU:C:2021:191
- ECJ judgement of 20 April 2021, *Repubblica*, C-896/19, EU:C:2021:311
- ECJ judgement of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335
- ECJ judgement of 12 May 2021, *Bundesrepublik Deutschland (Notice rouge d'Interpol)*, C-505/19, EU:C:2021:376
- ECJ judgement of 18 May 2021, *Asociația "Forumul Judecătorilor Din România"*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393
- ECJ judgement of 3 June 2021, *Hungary vs. Parliament [votes cast]*, C-650/18, EU:C:2021:426
- ECJ judgement of 3 June 2021, *Tesco Stores*, C-624/19, EU:C:2021:429
- ECJ judgement of 22 June 2021, *Venezuela vs. Council*, C-872/19 P, EU:C:2021:507
- ECJ judgement of 15 July 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596
- ECJ judgement of 15 July 2021, *FBF*, C-911/19, EU:C:2021:599
- ECJ judgement of 15 July 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:598
- ECJ judgement of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602
- ECJ judgement of 15 July 2021, *WABE*, joined cases C-804/18 and C-341/19, EU:C:2021:594
- ECJ judgement of 21 December 2021, *Euro Box Promotion and Others*, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034

- ECJ judgment of 16 February 2022, *Hungary v Parliament and Council [conditionality]*, C-156/21, EU:C:2022:97
- ECJ judgment of 16 February 2022, *Poland v Parliament and Council [conditionality]*, C-157/21, EU:C:2022:98
- ECJ judgment of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, EU:C:2022:99
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- AG Jacobs opinion of 14 June 2001, *Netherlands vs. Parliament and Council*, C-377/98, EU:C:2001:329
- AG Stix-Hackl opinion of 18 March 2004, *Omega*, C-36/02, EU:C:2004:162
- AG Maduro opinion of 13 July 2006, *Ahokainen und Leppik*, C-434/04, EU:C:2006:462
- AG Kokott opinion of 4 May 2016, *Poland vs. Parliament and Council*, C-358/14, EU:C:2015:848
- AG Szpunar opinion of 18 May 2017, X, joined cases C-360/15 and C-31/16, EU:C:2017:397
- AG Mengozzi opinion of 26 July 2017, *Eni and Others*, C-226/16, EU:C:2017:616
- AG Sharpston opinion of 31 October 2019, *Commission vs. Poland (Temporary mechanism for the relocation of applicants for international protection)*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257
- AG Bobek opinion of 4 March 2021, *DNA- Serviciul Teritorial Oradea*, C-379/19, EU:C:2021:174
- AG Bobek opinion of 4 March 2021, *Euro Box Promotion and Others*, joined cases C-357/19 and C-547/19, EU:C:2021:170
- AG Bobek opinion of 4 March 2021, *FQ and Others*, joined cases C-811/19 and C-840/19, EU:C:2021:175
- AG Campos Sánchez-Bordona opinion of 18 March 2021, *Germany vs. Poland [energy solidarity]*, C-848/19 P, EU:C:2021:218
- AG Bobek opinion of 15 April 2021, *FBF*, C-911/19, EU:C:2021:294
- AG Kokott opinion of 15 April 2021, *Stolichna obshtina, rayon "Pancharevo"*, C-490/20, EU:C:2021:296
- AG Tanchev opinion of 6 May 2021, *Commission vs. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:366
- AG Hogan opinion of 12 May 2021, *Bank Melli Iran*, C-124/20, EU:C:2021:386
- AG Bobek opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, joined cases C-748/19 to C-754/19, EU:C:2021:403
- AG Bobek opinion of 8 July 2021, *Getin Noble Bank*, C-132/20, EU:C:2021:557
- AG Szpunar opinion of 15 July 2021, *Thelen Technopark Berlin*, C-261/20, EU:C:2021:620
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- GC judgement of 11 September 2002, *Alpharma vs. Council*, T-70/99, EU:T:2002:210
- GC order of 28 September 2007, *France vs. Commission*, T-257/07 R, EU:T:2007:300
- GC judgement of 16 September 2013, *ATC and Others vs. Commission*, T-333/10, EU:T:2013:451
- GC judgement of 10 May 2017, *Efler and Others vs. Commission*, T-754/14, EU:T:2017:323
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- ECtHR judgement of 23 July 1968, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" vs. Belgium*, 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64
- ECtHR judgement of 25 May 1993, *Kokkinakis vs. Greece*, 14307/88
- ECtHR judgement of 23 March 1995, *Loizidou vs. Turkey (preliminary objections)*, 15318/89
- ECtHR judgement of 26 September 1995, *Vogt vs. Germany*, 17851/91
- ECtHR judgement of 23 September 1998, *Lehideux and Isorni vs. France*, 24662/94, concurring opinion of judge Jambrek
- ECtHR judgement of 6 April 2000, *Labita vs. Italy*, 26772/95
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- ECtHR judgement of 18 January 2001, *Chapman vs. the United Kingdom*, 27238/95
- ECtHR judgement of 9 January 2003, *S.L. vs. Austria*, 45330/99
- ECtHR judgement of 4 December 2003, *Gündüz vs. Turkey*, 35071/97
- ECtHR judgement of 16 December 2004, *Supreme Holy Council of the Muslim Community vs. Bulgaria*, 39023/97
- ECtHR judgement of 30 June 2005, *Bosphorus vs. Ireland*, 45036/98
- ECtHR judgement of 14 February 2006, *Christian Democratic People's Party vs. Moldova*, 28793/02
- ECtHR judgement of 3 May 2007, *Bączkowski and Others vs. Poland*, 1543/06
- ECtHR judgement of 16 July 2009, *Feret vs. Belgium*, 15615/07
- ECtHR judgement of 17 September 2009, *Manole and Others vs. Moldova*, 13936/02
- ECtHR judgement of 1 June 2010, *Gäfgen vs. Germany*, 22978/05
- ECtHR judgement of 21 January 2011, *M.S.S. v. Belgium and Greece*, 30696/09
- ECtHR judgement of 7 July 2011, *Bayatyan vs. Armenia*, 23459/03
- ECtHR judgement of 9 January 2013, *Oleksandr Volkov vs. Ukraine*, 21722/11
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- Prot No 24 on asylum for nationals of Member States of the European Union, OJ 2016 C 202/304
- Prot No 28 on economic, social and territorial cohesion, OJ 2016 C 202/309
- Prot No 29 on the system of public broadcasting in the Member States, OJ 2016 C 202/311
- Dec No 7 on Article 16(4) TEU and Article 238(2) TFEU, OJ 2016 C 202/338
- Dec No 9 on Article 16(9) TEU concerning the European Council decision on the exercise of the Presidency of the Council, OJ 2016 C 202/341
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- Dec No 52 by the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Lithuania, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Slovenia and the Slovak Republic on the symbols of the European Union, OJ 2007 C 306/355
- Dec No 61 by the Republic of Poland on the CFR, OJ 2016 C 202/358
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Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44, as amended by OJ 2011 L 132/1

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12

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- Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ 2006 L 376/36
- Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23
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