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Hesselink, M.W.

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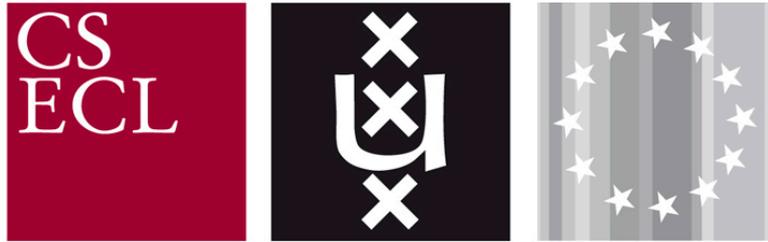
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PRIVATE LAW AND THE EUROPEAN CONSTITUTIONALISATION  
OF VALUES

Martijn W. Hesselink

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## **Private law and the European constitutionalisation of values**

Martijn W. Hesselink

[m.w.hesselink@uva.nl](mailto:m.w.hesselink@uva.nl)

Centre for the Study of European Contract Law  
Universiteit van Amsterdam  
P.O. Box 1030  
1000 BA Amsterdam  
The Netherlands

# Private law and the European constitutionalisation of values\*

Martijn W. Hesselink\*\*

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## Introduction

This paper critically examines the constitutionalisation of values by the EU and its possible impact on private law.

According to the Charter of Fundamental Rights (CFREU), the European Union is founded on the general values such as values of human dignity, freedom, equality and solidarity. In addition, the Treaty of European Union (TEU) refers to a more political set of foundational values, ie respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These references could be understood as purely ornamental, or as irrelevant in any case for private law. Indeed, it is true that the Court of Justice so far has never made any references to these values in private law cases. Still, the Court already has shown boldness before in the context of the interpretation and review of secondary EU law in private law cases, when it discovered general principles of EU law and general principles of civil law. Therefore, it should not be excluded

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\*\* University of Amsterdam.

that the Court may be tempted one day to follow the example of the German constitutional court that famously understands its national constitution as expressing an objective system of constitutional values.

Such a common European value system, as a background for the interpretation of EU law, also in civil disputes, could gradually transform the nature of European private law. So far, EU private law has been entirely at the service, at least officially, of market integration. Therefore, a reading and interpretation of the private law *acquis* as being at the service also of other values, such as human dignity, freedom, equality and solidarity would constitute a major transformation of European private law from market functionalism into a much broader (perhaps comprehensive) instrumentalism.

This paper explores what such an understanding of private law as an instrument for furthering common European values would entail and examines whether such an ethical reading of European private law would be desirable. It argues that the promotion by the EU of a set of official values through its laws is not compatible with the respect we owe each other in a society characterised by reasonable pluralism. In addition, it points to further difficulties, both of a moral and a practical nature, of the idea of advancing ethical values through private law. It concludes that although it is very well thinkable that the values to which the TEU and the Charter refer will one day be interpreted as an objective value system with (indirect) horizontal effects, the Court of Justice nevertheless should refrain from going down that road.

The paper is organised as follows. First, it introduces the notion of values, in particular some of their main characteristics, their relationship to norms, and the fact of value pluralism. Then, it analyses the nature and consequences of the constitutionalisation of values. Finally, it explores the possible future implications of the constitutionalisation of values specifically for private law and civil disputes. The final section summarizes the main conclusions.

## Values

### Values and identity

When we refer to something as one of our values we mean that it is good and valuable for us. It contributes to our good, it makes our lives more valuable. Values may be individual (my values) or collective (our family, club, university, our religious values). What our values are is not a matter of decision, but of interpretation of who we really are, individually or as a group. We determine our values hermeneutically by interpreting our tradition, culture and customs. Thus, we try to figure out what really matters for us, what we are strongly attached to. It is unthinkable that we could be indifferent to - or even reject - some of our own values. Values give us orientation in our lives. They tell us - or at least provide guidance in determining - how to live a good, meaningful and authentic life. Our values, therefore, constitute an important part of our (individual or collective) identities. We identify with our values just like we value our identity. Our values tell us and others who we really are. During an identity crisis we are uncertain about what really matters to us, what we are committed to, what we truly value. The way out of the crisis goes by (re-) discovering what is an

authentic part of us (individually or as a group), what values are constitutive of our identity.

### Individual and common values

As said, values may be individual or shared with others. Shared values may be common to groups of different kinds. Think, for example of family values, club values, university values, sports values, party values, or religious values. Our shared or common values are an important aspect of our common or collective identities as a family, club, religious community et cetera.

Sometimes reference is also made to national values.<sup>1</sup> The notion of national values and national identity are more controversial than those of other group values and group identities. The reason is that the concept of a nation, understood as anything going beyond - ie being 'thicker' than - merely the population of a given state, is itself highly controversial.<sup>2</sup> Some members of the population of a certain country may have very strong ideas about their national tradition, identity and values, but these are not necessarily shared by other citizens who may not even conceive of themselves as belonging to a nation, and who may resent the projection onto them of national values by their fellow citizens.

### Value pluralism

We do not assume that others, who do not belong to our family, club or religion share the same values. On the contrary, what distinguishes us from them are for an important part our values and theirs; this is an important aspect of the difference between them and us. If we had exactly the same values we would be less inclined to regard them as being different from us.

When we respect other people (individuals and groups) and their values this does not mean that insofar we adhere to their values. We do not need to become one of them in order to respect other groups, cultures, traditions and religions. Indeed, we can be equally respectful of people having values that differ from our own as of people who share our values. Whether we do in fact equally respect people independent of their values, does itself depend on our own values: equal respect may (or may not) be an important value to us individually or as a community (family, association, culture).

Even when people (individually or as groups) adhere roughly to the same set of values then they may still disagree strongly with regard to the relative

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<sup>1</sup> See for example, K Lenaerts, 'EU values and constitutional pluralism: the EU system of fundamental rights protection' in: *XXXIV Polish yearbook of international law* (Scholar, 2015), 135-160, 136, who assumes that each national society has its own set of values: 'The level of protection that a national society gives to a fundamental right tells us something about that society's own set of values.'

<sup>2</sup> Today, the primordialist conception of nations, according to which nations exist prior to nationalism rather than being its product, is broadly rejected. See eg E Gellner, *Nations and Nationalism*, 2<sup>nd</sup> ed (Blackwell, 2006), 54 ('it is nationalism which engenders nations, not the other way round'), J Habermas, *Die postnationale Konstellation; Politische Essays* (Suhrkamp, 1998), 37 ('kollektive Identitäten werden eher gemacht als vorgefunden'); EJ Hobsbawm, *Nations and Nationalism; Programme, Myth, Reality* (CUP, 1990), 10 ('Nations do not make states and nationalisms but the other way round'); B Anderson, *Imagined communities*, revised ed (Verso, 2006), who characterises nations as 'imagined communities'.

importance of each value within a given set. The hierarchies among our values are an important aspect of our individual and collective identities. Some individuals and communities single out one value as their supreme value. And sometimes they develop a more or less articulate and comprehensive value system based on that ultimate value.

It is a familiar characteristic of pluralist societies of the kind we live in today that people (individually and as groups) adhere to different values. Indeed, that *is* what makes a pluralist society, ie a society characterised by value pluralism. And it is especially with regard to the question of ultimate values - whether they exist and what they are - that we expect strong disagreement among different groups and individuals within a society.

### Objective values?

It is sometime argued that certain things are not merely valuable because (and to the extent that) we value them but because these things *are* valuable.<sup>3</sup> On this view, it is reductive to limit the discussion of values to their subjective and intersubjective aspects, of individual and common values respectively, because in addition values may also have an objective aspect.

Such views raise difficult (meta-ethical) questions concerning the existence of objective substantive values, their nature and how we can know them.<sup>4</sup> The mere observation that we cannot observe objective values does not settle these questions. Requiring 'value-facts' (Putnam) or 'moral particles (morons)' (Dworkin) as evidence would amount to an impermissible naturalist reduction.<sup>5</sup> Rather, there is room for reasonable disagreement concerning the ontological, metaphysical and epistemological status of objective values. As we will see, this fact of reasonable disagreement concerning the existence of objective values, in general and with regard to certain specific values, is of relevance, from the perspective of justice, for law in a pluralist society.

The greatest advantage attributed to an objective value system is that it facilitates – or is even indispensable for – societal integration.<sup>6</sup> It is clear that a community's firm commitment to a set of substantive values that it understands as objective, can constitute a powerful antidote against fragmentation and atomism. However, in any pluralist society inevitably some members will not recognise the proclaimed set of objective values (or a part of it) or will more generally reject the understanding of their society as a community of values. This will not only reduce the chance of success for the integration project. It also raises the question how legitimate it is for a society and its institutions to enforce the observance of these values against those who reject them or to promote these values through laws in spite of the fact that some citizens identify with

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<sup>3</sup> See H Putnam, 'Are values made or discovered?', in: H Putnam, *The collapse of the fact/value dichotomy and other essays* (Harvard University Press, 2002), 96-110, 103: 'the distinction between the *valued* and the *valuable*'.

<sup>4</sup> G Sayre-McCord, 'Metaethics', in: EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition), <http://plato.stanford.edu/archives/sum2014/entries/metaethics/>.

<sup>5</sup> See Putnam, n 3 above, 102; R Dworkin, *Justice for hedgehogs* (Belknap Press, 2011), 42.

<sup>6</sup> R Smend, *Verfassung und Verfassungsrecht* (Duncker & Humblot, 1928), 45: 'Die Werte führen ein reales Leben nur vermöge der sie erbenden und verwirklichenden Gemeinschaft. Umgekehrt lebt aber auch die Gemeinschaft von den Werten.'

different values. In other words, in a pluralist society the idea of objective values raises serious practical and legitimacy concerns.

### Value judgements

Judgments in relation to values are evaluative or value judgments. We expect those judgments to make sense (to be intelligible and meaningful) at least to those who share our values. In other words, value judgments presume the existence and validity of our values. They take the existing values as the basis for evaluation and judgment. They do not judge or evaluate the values themselves. Rather, they take them as given, at least in a general sense. Of course, evaluative judgments, being interpretative judgments, constantly give rise to the re-interpretation of our values, but we do not expect the practice of interpreting our values with a view to solving practical problems, to lead to the conclusion that we have to replace some or all of our values with others. Similarly, we do not expect people who are indifferent to our values - or even reject them - to accept our evaluations and value judgments based on our values. Rather, we anticipate that their acceptance of our judgment or evaluation will depend to a large extent on whether they share our values (or recognise their objective existence).

### Values and norms

Values can be distinguished conceptually from norms. Norms tell us what we should or ought to do. In the words of Joas, norms are restrictive while values are attractive.<sup>7</sup> Obviously, we can value the norms that apply to us as attractive. Indeed, an important reason for most people to abide by the norms that apply to them is that they value them, because either the content of the norms or the way the norm became applicable to them corresponds to their values. However, unlike in the case of values,<sup>8</sup> norms in order to count as norms do not require actual endorsement. Both moral and legal norms may also apply to someone who rejects them or rejects the way they came about. This may be the case, for example, when the norm could have been reasonably accepted by the person who in fact rejects it, eg because it came about through a legitimate procedure. Still, the conceptual distinction between norms and values (and between deontology and axiology, the right and the good, and ethics and morality) should not be reified. Most people find important continuities between their values and applicable norms. The point of the conceptual distinction is not one of strong dualism based on a sharp separation, but, in the words of Forst, of making an 'incision' between the two.<sup>9</sup>

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<sup>7</sup> H Joas, 'Values versus norms: a pragmatist account of moral objectivity', 3 *The hedgehog review* (2001), 42-56.

<sup>8</sup> On the endorsement constraint, see R Dworkin, *Sovereign virtue* (Harvard University Press, 2000) ('no component contributes to the value of a life without endorsement ... And it is implausible to think that someone can lead a better life against the grain of his most profound ethical convictions than at peace with them.');

W Kymlicka, *Contemporary political philosophy*, 2<sup>nd</sup> ed Oxford University Press, 2002), 216 ('no life goes better by being led from the outside according to values the person does not endorse').

<sup>9</sup> R Forst, *The right to justification: elements of a constructivist theory of justice* (Columbia University Press, 2012), 64.

## Values and justification

We may refer to discourses concerning values as ethical discourses. Ethical discourses address practical questions - ie question about what to do - from the (internal) perspective of the relevant values, ie my values (in the case of individual values) or our values (in the case of the common values of our group).<sup>10</sup> They purport to be convincing to the members of one's own ethical community (or to oneself in the case of self-reflection). There exist other perspectives from which the question of what to do (individually or collectively) can also be addressed. Each of these perspectives has its own appropriate type of discourses.<sup>11</sup>

Pragmatic discourses are discourses about the most appropriate means to achieve given ends. In pragmatic discourses, the ends are taken as given; the question is what should be done by me or us in order to best achieve these individual or collective ends. For example, if we want to achieve an internal market what harmonisation measures should we take? Or, how can contract law best contribute to economic growth? Answers to such questions are a matter of means/ends rationality (Habermas) or conditional imperatives (Kant). In advanced societies, characterised by divisions of labour, experts are entrusted with the task of answering many such pragmatic questions. The risk is of course that experts (in good or bad faith) confuse means with ends and, in the cloak of pragmatic discourses, make recommendations with regard to the ends to be pursued, eg by claiming that the EU is essentially or intrinsically about creating an internal market or by recommending that contract law reform should be guided by considerations of economic efficiency. The question of what ends I or we should pursue is an ethical question on which by definition there exists no special expertise, except perhaps if objective values do indeed exist.<sup>12</sup> In the latter case, individuals, groups and the (perfectionist) state should probably take advice from such value experts, eg doctrinal theologians and other moralists.<sup>13</sup>

Moral discourses are concerned with the question of what we owe each other.<sup>14</sup> Which moral obligations do we have towards others, what moral rights do others have vis-à-vis us? The perspective here is not that of my or our values, or my individual or our common good: according to my or our own values how should I or we treat people who do not belong to our community (family, association, religion, nation), who do not share our culture tradition and customs, and who therefore will adhere to values that are different at least in part? The perspective is one that includes the other as she sees herself. Indeed, moral discourses aim to be convincing to *any* other person. They therefore address practical questions from a universal perspective. In the context of moral questions we cannot

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<sup>10</sup> As said, an important reason for me or us to value a certain good may be that, in my or our view, it is objectively valuable.

<sup>11</sup> See J Habermas, *Erläuterungen zur Diskursethik* (Suhrkamp, 1991); J Habermas, 'Werte und Normen: Ein Kommentar zu Hilary Putnams kantischem Pragmatismus', 48 *DZPhil* (2000), 547-564; R Forst, *Contexts of justice; Political philosophy beyond liberalism and communitarianism* (University of California Press, 2002).

<sup>12</sup> On this question, see above.

<sup>13</sup> See J Ratzinger, *Werte in Zeiten des Umbruchs* (Herder, 2005): 29: 'Hier wird nun auch deutlich, was der Glaube zur rechten Politik beitragen kann: er ersetzt nicht die Vernunft, aber er kann zur Evidenz der wesentlichen Werte beitragen.'

<sup>14</sup> TM Scanlon, *What we owe each other* (Belknap Press, 1998).

presume that others share our values, and we should beware of projecting our own values onto others.<sup>15</sup>

Finally, legal discourses address practical questions from the perspective of a certain political community and its laws. These discourses are concerned with the legal rights and obligations that derive from the generally applicable legal rules of the legal system. They address the other as a citizen (of her own state or another). Within the confines of their territorial and personal scope, legal rules are generally applicable. They do not distinguish between individuals and groups, eg in accordance with their individual or collective values.

Again, we should not reify the distinction between these different types of practical discourse. First, because we cannot exclude the possibility that objective values do exist and can be determined.<sup>16</sup> Secondly, and most importantly, because these ideal types of discourses are only of limited practical use. In real life discussions it will be difficult to determine, and moreover a controversial matter - especially when the stakes are high -, whether a certain argument or reason given by someone 'really' constitutes an ethical, moral, pragmatic or legal argument and, for that reason, is permissible as an argument in the context at hand.<sup>17</sup>

## Constitutional values

What happens when certain values are proclaimed as the official state values? In particular, what happens if the constitution of a state indicates certain values as its fundamental values? There are several dimensions to the constitutionalisation of values. Values turn from private (including collective) into public values, ie they become a matter of the state and its citizens. Moreover, these values obtain legal force which raises the question of what it means to 'enforce' them and how this can be done. Finally, the constitutional status gives these values precedence over other, non-constitutional considerations, including considerations deriving from other values that have not been elevated to constitutional values.

The constitutionalisation of values is not merely a hypothetical possibility. Values are an important element in the constitutional practice in certain Member States, most notably Germany since the *Lüth* judgement of its constitutional court in 1956.<sup>18</sup> Fundamental values also have a prominent place in the constitutional framework of the European Union since the entrance into force of the Treaty of Lisbon in 2009.<sup>19</sup>

## European constitutional values

If we refer to the Treaty on European Union (TEU) and the Charter of Fundamental Rights of the European Union (CFREU), together with the Treaty on

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<sup>15</sup> Forst, n 9 above, 66.

<sup>16</sup> See above.

<sup>17</sup> On this, see Forst, n 9 above, 67.

<sup>18</sup> BVerfG, 15 January 1956, *BVerfGE* 7, 198 (Lüth).

<sup>19</sup> Pre-Lisbon, Art 16 EC on services of general economic interest, already referred to 'the shared values of the Union', and Art 11 EU on the Union's common foreign and security policy indicated as one of its objectives 'to safeguard the common values ... of the Union'.

the Functioning of the European Union (TFEU) and the unwritten general principles of EU law, as the constitutional framework of the European Union, then we can say that the European Union has constitutionalised certain values. In the TEU and the CFREU, we find several references to a variety of values. The exact nature and role attributed to these values is not always clear from the wording.

See, in the first place, the Treaty of European Union, in its preamble and its Article 2 respectively:

'Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law ...'

'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.'

Note that according to the Treaty these values are not only values of the EU, in that the Union is founded on them, but also common to the Member States, and indeed (at least some of them) universal (in spite of the fact that they are also said to have developed from the cultural, religious and humanist inheritance of Europe).

The references in the opening sentences of the Charter of Fundamental Rights of the European Union are even more prominent. So much so that one could think it was a Charter of fundamental values. I quote the first three paragraphs of the Preamble in full:

'The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

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; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.'

Note that here again the values are said to be common not only to the peoples of Europe but also (at least some of them, ie the ones on which the Union is founded) universal. Moreover, these latter founding and universal values of

'human dignity, freedom, equality and solidarity' are also 'indivisible'. Presumably this does not mean that none of these values can be divided into smaller parts (for it is not clear what that would mean) but rather that they are inseparable, perhaps somewhat like a trinity (think also of the three musketeers who in fact were four too), which evokes the idea of a value system. Note further that the EU sets itself the task of preserving (making sure that these goods remain valuable?) and developing (causing to grow?) these values.

The constitutionalisation of European values, through the reference to the values of the EU in these documents with constitutional status, raises several questions which we will now address.

### Founding values and constitutional interpretation

The fact that the TEU and the CFREU refer to these universal or common values as the foundation of the Union does not imply per se that these documents also give them any legal force. However, it is clear from the text that the reference to the EU's values is meant to be more than merely ornamental. Pursuant to Art 3 TEU, it is the (single) *aim* of the EU is to promote its values (and peace and the well-being of its peoples).<sup>20</sup> Thus, this explicitly teleological understanding of the EU places the Union's values at its centre.

The Union values become truly operational in Art 7, which allows the Council to suspend certain rights of a Member State, including the voting rights in the Council, when it has determined the existence of 'a serious and persistent breach by a Member State of the values referred to in Article 2'. Note that apparently the EU values are of such a nature that they can be breached, just like duties and obligations. This is what Poland is currently suspected of; the European Commission has announced a 'preliminary assessment'.<sup>21</sup>

However, the impact of the fundamental values of the Union stated in one of its founding Treaties and in its Charter of fundamental rights is likely to go well beyond the possibility for the European Commission to threaten Member State governments engaging in authoritarian practices, that their voting rights may be limited. Their practically most relevant and influential potential role, at least in normal times, lies elsewhere, ie in the interpretation of the TEU and the CFREU and the norms subject to them, ie the entire body of secondary EU laws and the national laws implementing EU law.

In its path-breaking *Lüth* ruling in 1958, the German constitutional court held that the German constitution 'has erected an objective order of values' (*eine objektive Wertordnung aufgerichtet hat*). This 'system of values' (*Wertsystem*) constitutes at the same time a 'hierarchy of values' (*Wertrangordnung*).<sup>22</sup> Clearly, if the CJEU was to follow this example, or a version of it, and were to understand the European founding treaties and charter as having erected an objective system of values, then the fundamental values of the EU could come to play a key role in the interpretation of EU law and of the national laws implementing it, and

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<sup>20</sup> Article 3(1) TEU: 'The Union's aim is to promote peace, its values and the well-being of its peoples.' See also Para 5: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. (...)'

<sup>21</sup> Cf [http://europa.eu/rapid/press-release\\_SPEECH-16-71\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-16-71_en.htm).

<sup>22</sup> N 18 above, nos 27, 49.

thus in the shaping of the Union, its relationship to its citizens and to its Member States. There seems to be good reason, therefore, to critically examine the nature and roles of the European Union's fundamental values.

### Universal, common and national values

Both the TEU and the CFREU are somewhat ambivalent concerning the reason why they proclaim exactly these values, and not others, as the foundation of the EU, referring to them both as 'universal' and as 'common' values.

The reference to universality does not seem to be meant as a claim that human dignity, freedom, equality and solidarity have been universally valued, independent of time and place. In other words, the universality of these values, it seems, should not be understood as deriving from – or depending on – the actual subjective endorsement by anyone, let alone everyone. Even though there is likely to be a strong convergence between this particular set of values and the values actually held by many people that still does not justify the strong claim as to their universality. In other words, universal values are probably meant here as objective values.

The notion of 'common values', in contrast, does suggest endorsement by the members of the relevant community. For the EU, this could mean everyone belonging to the EU today, for example all EU citizens. However, both the TEU and the CFREU seem to understand common values differently, ie as values common to the Member States, or to the peoples of Europe. Presumably, 'peoples of Europe' (in the plural) is not understood here in the ethical (let alone ethnical) sense of nations but in the civic sense of the citizens of the respective Member States. And perhaps the reference to the common values of Member States and their peoples is not meant as a claim that all the citizens of each Member State hold these values, but rather that in each of the Member States these goods are considered to be objectively valuable.<sup>23</sup> In other words, common values is probably not meant as shared values.<sup>24</sup> On a communitarian reading, the idea of constitutional values as common values is not a matter of collective endorsement, but rather of interpretation, ie of our community, our tradition, our culture.<sup>25</sup> The phrase '[c]onscious of its spiritual and moral heritage, the

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<sup>23</sup> Compare the *Declaration on European identity* (Copenhagen, 14 December 1973), no 1: 'The Nine [ie the Member Countries of the European Communities in 1973] wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. *Sharing as they do the same attitudes to life ... they are determined to defend 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. All of these are fundamental elements of the European Identity. The Nine believe that this enterprise corresponds to the deepest aspirations of their peoples who should participate in its realization, particularly through their elected representatives.*' The reference to shared attitudes to life and to the deepest aspirations of the peoples of the then nine Member Countries expresses a rather strongly ethical (in the narrow sense) understanding. This should, of course, not surprise for a declaration on European *identity*. For a reconstruction of the historical context of the Declaration, see R. Janse, 'The origins of the EU as a community of values', forthcoming.

<sup>24</sup> But see Advocate General Trstenjak, Case C-520/06, *Stringer and Others*, ECLI:EU:C:2008:38, 52: the Charter 'constitutes a concrete expression of shared fundamental European values'.

<sup>25</sup> Cf the Opinion of Advocate General Jacobs in C-168/91 (*Konstantinidis*) arguing that a Community national who goes to another Member State as a worker or self-employed person 'is entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values'.

Union is founded on the indivisible, universal values ...' seems to point in the direction of such a reading.<sup>26</sup> Similarly, the idea of principles resulting from 'the constitutional traditions common to the Member State', that the CJEU often refers to,<sup>27</sup> takes a communitarian turn when it is transformed into 'constitutional values common to the Member States',<sup>28</sup> or when it is held that 'it is inherent in the very nature of the constitutional values of the Union as constitutional values common to the Member States that they must be refined and developed by the Court in a process of ongoing dialogue with the national courts'.<sup>29</sup>

Universal and common values and - broader - universal and common good, even if both are understood objectively, differ in that one notion refers to what is good for everyone and the other to what is good for us. In other words, the notion of common values is both more communitarian and more relativistic than the notion of universal values.<sup>30</sup> Clearly, the nature of these values matters for how convincing we will find the claim that a particular value belongs on the list, and for the role it should play, notably in constitutional interpretation. As we saw above, the notion of objective substantive values, although strongly supported by some,<sup>31</sup> nevertheless is likely to remain a highly controversial one.

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<sup>26</sup> The *Declaration on European Identity* (Copenhagen, 14 December 1973), no. 3, claimed that the common values contribute to the *originality* of the European identity (which is in direct opposition with universality): 'The diversity of cultures within the framework of a common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a United Europe, all give the European Identity its originality and its own dynamism.' (However, further on, no. 14, it is also claimed that 'we share values and aspirations based on a common heritage' with the United States.)

<sup>27</sup> Eg Case C-415/93 *Bosman* [1995] ECR I-4921, 79; Case C-144/04 *Mangold* [2005] ECR I-9981, 74.

<sup>28</sup> See Opinion of Advocate General Jääskinen, Case C-425/11, *Ettwein*: 'the constitutional values common to the Member States with regard in particular to the equal treatment of individuals in a comparable situation'.

<sup>29</sup> Opinion of Advocate General Poiares Maduro, Case C-127/07 (*Arcelor Atlantique and Lorraine and Others*). Interestingly, in this case the Advocate General turned a question by the French Conseil d'État concerning constitutional principle (ie whether a Directive was valid in the light of the principle of equal treatment) into one concerning constitutional values: 'In reality, what the Conseil d'État is asking the Court to do is not to verify the conformity of a Community act with certain national constitutional values – which it could not do anyway – but to review its lawfulness in the light of analogous European constitutional values.' The AG argues that '[t]he European Union and the national legal orders are founded on the same fundamental legal values'. Indeed, EU laws has 'incorporated the constitutional values of the Member States'.

<sup>30</sup> On the notion of universal values, see also *Communiqué on the current state of the ideological sphere; a notice from the Central Committee of the Communist Party of China's General Office* (better known as 'Document 9'; for an English translation, see [www.chinafile.com/document-9-chinafile-translation](http://www.chinafile.com/document-9-chinafile-translation)), which denounces '[p]romoting "universal values" in an attempt to weaken the theoretical foundations of the Party's leadership'; 'the goal of espousing "universal values" is to claim that the West's value system defies time and space, transcends nation and class, and applies to all humanity.'

<sup>31</sup> The classic is M Scheler, *Der Formalismus in der Ethik und die materiale Wertethik* [1913] (Meiner, 2014). Karol Wojtyła dedicated his *Habilitationsschrift* to Scheler's ethics. Cf R Buttiglione, *Karol Wojtyła: the thought of the man who became Pope John Paul II* (Eerdmans, 1997), 54-62. For a contemporary catholic account, see Ratzinger, n 13 above, 147: 'Auch heute sind Verantwortung vor Gott und Verwurzelung in den großen, überkonfessionellen Werten und Wahrheiten des christlichen Glaubens die unverzichtbaren Kräfte für die Bildung eines Europa, das mehr ist als ein Wirtschaftsblock'.

Moreover, the explicit link made by the TEU and the CFREU between values and Member States (and their peoples) is based on an understanding that countries have values and that values may differ from one country to another.<sup>32</sup> In other words, the connection between common values and Member States is nationalist in that it attributes special importance to, and thus privileges, the values that we share (or regard as objective) within one community (ie the nation) over the ones we share in other (imagined) communities to which we also belong and that we may identify with more strongly (eg a region, the EU, the world, a church, a political party or a fan club) and whose borders may cross those of EU Member States.<sup>33</sup> In other words, the European constitutional documents seem to regard us as being 'united in diversity' *along national lines*.<sup>34</sup>

### Official values and value pluralism

The notion of objective values, be it as universal values or as an objective understanding of common values, when used in a constitutional context, is intrinsically perfectionist. It is based on an objective account of what is good and valuable and on the idea that it is the task of the state to promote what is objectively valuable.<sup>35</sup> Citizens (and other affected parties) who do not adhere to one or more of the proclaimed universal values - or do not regard these as more important than one or more values not mentioned in the official set - will regard the claim of universality as a lie, or at least as mistaken. And those who reject - or are indifferent towards - one or more values that are officially presented as 'common values', or identify more with a different hierarchy among these than the one officially established (eg by a constitutional court elaborating a system of values), will feel excluded: after all - at least on the official view - they are not a part of the community (eg the nation) they thought they belonged to; they are not 'one of us' because they do not share 'our common values'. In other words, the notion of constitutional values is in direct tension, at least potentially, with the value pluralism within one society that we are familiar with today in Europe

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<sup>32</sup> This matches with claims made, for example, by Germany, Austria and Ireland in recent CJEU cases that their national values were at stake. In *Sayn-Wittgenstein*, C-208/09 the Austrian government invoked 'fundamental values of the Republic of Austria' (and 'fundamental values of the Austrian legal order') as a justification for a restriction on the free movement of persons. Note, however, that the Court transformed the claim into one invoking a fundamental and legitimate interest of the Member State. Similarly, in *Omega*, C-36/02 the German Bundesverwaltungsgericht wanted to know whether the freedom to provide services could be restricted by national law for a certain commercial activity that 'offends against the values enshrined in the constitution'. Here too the Court replied in terms of the different conceptions Member States may have 'as regards the precise way in which the fundamental right or legitimate interest in question is to be protected' without any reference to constitutional values, national or European. In *Schremm*, C-362/14 the referring Irish High Court invoked 'the fundamental values protected by the Irish Constitution' (which could be understood as a reference to objective values), but there too the Court answered without referring to (fundamental) values.

<sup>33</sup> See Anderson, n 2 above; Gellner, n 2 above.

<sup>34</sup> Lenaerts, n 1 above, consistently treats value pluralism as a matter of European versus national values, that therefore can be solved through constitutional pluralism.

<sup>35</sup> Cf S Wall, 'Perfectionism in moral and political philosophy', *Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), EN Zalta (ed).

(as opposed to a theoretically conceivable value pluralism among different homogeneous societies – see above).<sup>36</sup>

This is perhaps not problematic for extremist, fundamentalist and intolerant worldviews which cannot reasonably be expected to provide a justification for laws that claim general application or for their interpretation. However, this is different for the many worldviews and values that are perfectly reasonable (or at least not unreasonable) but just happen to differ from one another. This brings us to what Rawls referred to as ‘the fact of reasonable pluralism’,<sup>37</sup> ie the fact that in modern constitutional democracies a debate among reasonable persons on ultimate values is unlikely ever to lead to an agreement. Rather, every new round of discussion probably will further entrench each position and exacerbate the disagreement among competing worldviews, each referring to different supreme values. Under these circumstances (ie our circumstances), the state would not show equal respect and concern for its citizens if it took sides and established one such controversial worldview, value or set of ultimate values, as the official state doctrine, or justified the adoption (or rejection) of its policies and laws in the name or in terms of such a controversial value. For this reason, the state must try to remain neutral with regard to ultimate values. A partisan state would be an unjust state because it would treat all those citizens holding a different worldview and adhering to different ultimate values than the officially established ones as second-rate citizens. Therefore, state institutions should refrain from acts, such as the promulgation of laws, that can be justified only in terms of such a controversial worldview or values, and not also by reasons that no one could reasonably reject.<sup>38</sup> The same applies, of course, for the interpretation of the constitution by a constitutional court - and of the TEU and CFREU by the Court of Justice - in terms of controversial ultimate values.

We are morally entitled to justification of the laws that apply to us with reasons that no one could reasonably reject, ie reasons that are both reciprocal and general.<sup>39</sup> And these cannot include controversial values or controversial hierarchies of objective values. The best we can hope for in a non-oppressive, pluralist society - and what we should strive for instead - is perhaps to agree among people with different values on a limited set of self-standing, autonomous principles of justice that should govern our main institutions.<sup>40</sup>

Justice does not necessarily require state neutrality in the strong sense that the state would not be allowed to enact laws or pursue policies that foreseeably will favour one conception of the good over another. That would lead to a minimalist conception of the state that would itself be difficult to reconcile with an autonomous conception of justice. However, in a society characterised by a plurality of reasonable but different worldviews, what the state should refrain

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<sup>36</sup> According to Lenaerts, n 1 above, 142, ‘the Charter is the result of a pan-European political consensus’. That is a very strong claim and a highly implausible one if it suggest unanimity among citizens (and not merely among Member States).

<sup>37</sup> J Rawls, *Political liberalism*, expanded edition (Columbia University Press 2005), 36. Similar, C Larmore, *The morals of modernity* (Cambridge University Press, 1996), 168: ‘reasonable disagreement’.

<sup>38</sup> TM Scanlon, ‘Contractualism and utilitarianism’, in: A Sen & B Williams (eds), *Utilitarianism and beyond* (Cambridge University Press, 1982), 103-128.

<sup>39</sup> Forst, n 9 above.

<sup>40</sup> Rawls, n 37 above, 58.

from if it wants to show equal respect to its citizens, is justifying its laws, and especially its charter of fundamental rights and their interpretation, with explicit reference to one or more such controversial value or an official balance or hierarchy among them<sup>41</sup> But that is exactly what the TFEU and the CFREU do: these documents tell us that we have fundamental rights deriving from universal or common values that are indivisible and have developed from the cultural, religious and humanist inheritance of Europe.<sup>42</sup> That phrase is perhaps meant as ecumenical but that alone does not necessarily make these values, or their invocation, eg by the Court of Justice when interpreting primary and secondary EU law, become sufficiently neutral.

### Baskets of values and log rolling

It is, therefore, illegitimate for the majority to impose its values (or particular balance or hierarchy among these) on minorities who hold different (reasonable) values, especially in the strong sense of making these values become official values, constitutionalising them, and determining legal rights and obligations and their scope (and their relative scope in the case of a clash, eg in horizontal cases) in the name of these values. We must refrain from projecting our own values onto others in the name of their 'common', 'universal' or objective nature.<sup>43</sup>

However, both the TEU and the CFREU refer to a plurality of values. According to the Charter, the Union is founded on the general values of human dignity, freedom, equality and solidarity. To these the TEU adds the political values of democracy and the rule of law (but does not mention solidarity) as founding values and further mentions pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men as 'prevailing' in society. Among the Union's founding universal values we find thus the core values of much of the main-stream political spectrum, ie from liberal-egalitarianism and social-democracy (equality) via communitarianism and Christian-democracy (solidarity) to libertarianism and neoliberalism (freedom).<sup>44</sup> Can such a diverse set of constitutional values, one that is sufficiently broad to include at least one value for each citizen to identify with (as long as she belongs to the political mainstream), solve the problem of determining common or universal constitutional values for a pluralist society? I do not think it can, for two reasons.

First and most fundamentally, such a basket of values from which each citizen can cherry-pick, cannot be said to be a statement of truly common or universal values. Log rolling ('if you accept to include my value I will support yours') is

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<sup>41</sup> Contrast Ratzinger n 13 above, 139: 'Auch ein laikaler Staat darf, ja, muss sich auf die prägenden moralischen Wurzeln stützen, die ihn gebaut haben; er darf und muss die grundlegenden Werte anerkennen, ohne die er nicht geworden wäre und ohne die er nicht überleben kann'.

<sup>42</sup> For an endorsement, see Lenaerts n 1, 136: 'Fundamental rights are to be understood as a pan-European good.'

<sup>43</sup> Forst n 9 above, 65.

<sup>44</sup> The characterisation of left, centre and right as the political mainstream may be outdated. Today, populism seems to be becoming rapidly the political mainstream. Populist parties and movements are themselves fundamentally anti-pluralist and for that reason themselves incompatible with (indeed a threat to) an (even minimally) just society. See J-W Müller, *Was ist Populismus?* (Suhrkamp, 2016), 26 and passim.

perhaps the only viable way to draw up a list of values on which agreement (perhaps even consensus) can be reached. However, crucially, in this way it is not even ensured for any of the values that they are regarded as fundamental by a majority of citizens, let alone universally.

A truly overlapping consensus in a society on values is not per se unthinkable. Indeed, Rawls explicitly considers the possibility of such 'political values', ie values that do not emanate from specific 'comprehensive doctrines' and other controversial worldviews, and that can be relied on in the public justification of legal rights and obligations.<sup>45</sup> However, such a list of political values which all citizens could agree on in an overlapping consensus, would inevitably be significantly shorter. For, it would not include any controversial fundamental values, nor values that are relatively uncontroversial in general but would become controversial if they had to serve as the founding values of the Union, and which could be used eg for the interpretation by the CJEU of fundamental rights.

If we *all*, ie including (reasonable) minorities, can agree about a set of political values for our society then we might as well call them our constitutional values. But clearly this will apply only to a very limited set of values - ie the political values that ensure justice among people adhering to different and irreconcilable (perhaps even incommensurable) ultimate values -, much more limited - and quite different from - the kind of values on which the EU and the Charter are said to be based, which are values on which clearly there exists no consensus in the EU. Perhaps the list would be limited to the value of human dignity.<sup>46</sup> At the end of the day, the Charter and Treaty values are presented to us as a dogma, as a metaphysical reality rather than as a political consensus.<sup>47</sup>

The second reason why a bouquet of values is problematic is a more practical, institutional one. A basket or set of values, that perhaps we can agree on, through log rolling, as common values (if you support my value I will back yours) brings value pluralism into the constitution, as indeed the Charter has done. The unresolved conflict among ultimate values requires the Court constantly to balance values (rather than to protect rights and reconcile principles) and therefore to give value judgments rather than interpretations of rules, obligations, rights and principles.<sup>48</sup> A list of constitutional values requires balancing (as opposed to reasoning) right from the outset.<sup>49</sup> These values do not

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<sup>45</sup> Rawls n 37 above, 125, 224.

<sup>46</sup> The founding values listed in the TEU seem to be more of a political nature than the ones to which the CFREU refers as foundational. On the question of whether these values (or some of them) are best understood as principles, see below.

<sup>47</sup> Cf Habermas n 2 above, 548: 'Dogmatismus'.

<sup>48</sup> Very critical for this reason of the *Bundesverfassungsgericht's* reading of the constitution as an objective order of values (labelling it as '*Wertejudikatur*', ie 'value jurisprudence'), J Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy* (Polity, 1996), 253-266.

<sup>49</sup> For an example of such a judicial value balancing exercise (human health against economic interests), see Opinion of Advocate General Kokott, Case C- 358/14 (*Poland v Parliament and Council*) on an action brought by the Republic of Poland for annulment of a directive prohibiting the sale of menthol cigarettes: 'the protection of human health has considerably greater importance in the value system under EU law than such essentially economic interests (see Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU and the second sentence of Article 35 of the Charter of Fundamental Rights), with the result that health protection may justify even

only conflict. They also have clearly identifiable groups of supporters in society. This turns value conflict into constitutional disputes and entrusts the constitutional interpreter with the explicit task of making value judgments. Instead of determining what rights citizens have as matter of constitutional law and principle the interpreter of the constitution (in this case the Treaty and the Charter) will have to consider what rights it would be most valuable for them to have.

### The added value of constitutional values

This brings us to the question of the added value of constitutional values in addition to constitutional rights and constitutional principles. In addition to the rights (contained in the CFREU and in principles) and principles (such as the general principles of EU law) what value is added by the notion of constitutional values? Would anything be lost, for example, if Art 7 TEU referred to a breach by a Member State of the EU's principles rather than of its values? (How does one breach a value anyway?) The notion of official, constitutional values is intrinsically perfectionist. It is based on the controversial idea that objective values exist and that it is the task of the state to promote them. Do we really need the state - in this case the EU - to tell (or remind) us what is valuable, even if only in the context of determining our fundamental rights? It is not clear that we do.

Of course, the constitutionalisation of values is not necessarily worse than constitutional instrumentalism that also places the law, including for private law, at the services of the common good, eg the good of market integration, with priority – as a result of constitutionalisation - not only over other goods but also over rights. Still, there is some difference between formulating and constitutionalising public ends (such as the construction of an internal market) and formulating public values (because of the endorsement constraint).

### Principles in disguise?

Perhaps the entire problem is merely a semantic one. Maybe these so-called (axiological) 'values' are in reality (deontological) 'principles'. Many authors use

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substantial negative economic consequences for certain economic operators'. For another example (social solidarity against economic efficiency), see Opinion of Advocate General Wahl, Case C- 113/13 (*Azienda sanitaria locale n. 5 «Spezzino» and Others*) in response to the invocation by the region of Liguria of 'the principle of solidarity, which is a fundamental value enshrined in Articles 2 and 18 of the Italian Constitution': 'I am mindful of the fact that the pursuit of economic efficiency in a Europe-wide market based on free and open competition is not an end in itself, but only an instrument to achieve the aims for which the European Union has been created. Accordingly, I am prepared to accept that the need to promote and protect one of the fundamental values on which the European Union is founded may, at times, prevail over the imperatives of the internal market.' Finally, in his Opinion in Case C- 34/10 (*Brüstle*) on the patentability of human embryos, Advocate General Bot points to the need 'to prevent the economic functioning of the market giving rise to competition at the cost of sacrificing the fundamental values of the Union' and to the fact that 'the Union is not only a market to be regulated, but also has values to be expressed' (competition versus human dignity). In all three cases the proposed outcome was left-leaning, which is good news for some of us (a victory over neoliberalism). However, it is troubling that this was not justified in terms of justice (notably subjective rights), but as a value judgment. This means, as a matter of principle, that the prevailing party never was entitled to the outcome (ie rights are not taken seriously) and, as a practical matter, that a another Advocate-General or Court may well reach an entirely different value judgment (which then cannot be challenged in law).

the concepts of constitutional rights and values interchangeably which may indicate that in practice nothing important turns on the distinction.<sup>50</sup>

According to Bernhard Schlink, the German Federal Constitution Court's value orientation is a 'myth': the court just needed a new concept in order to be able to make the bold move of applying fundamental rights between citizens.<sup>51</sup> However, if it were true that the court's choice of concept was entirely strategic then it is not clear why the court chose for a concept that would make its life even more difficult, given that constitutional values were not even mentioned by the (brand new) constitution.

As to the EU, for the political 'values' that the TEU refers this is arguably the case: 'respect for human dignity', 'the rule of law' and 'respect for human rights' seem to be more appropriately referred as principles than as values (human dignity is a value but respect for it seems to be an obligation) while freedom, democracy, and equality, although doubtlessly values common to many and perhaps even objective, are also often referred to, and appropriately it seems, as the principles of democracy (Arts 9-12 are referred to by Title II of the Treaty as 'provisions on democratic principles'), equal treatment and (perhaps less frequently and more controversially) respect for freedom. In contrast, a deontological reading of the Charter's reference to the 'indivisible values of human dignity, freedom, equality and solidarity' seems to be much more difficult to reconcile with its language.

## Horizontal effects

Given their prominence in the make-up of the Charter it is not inconceivable that one day the EU's fundamental values will be given some effect also in civil disputes. This could occur, for example, in the context of the interpretation by the Court of Justice of Charter provisions with (indirect) horizontal effects on disputes between private parties, governed by private law. Should this happen then a new set of question would arise: Is it justifiable for private law to require parties to promote certain values, which may not be their own, in their relationships with others, beyond what is required from them by justice

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<sup>50</sup> For example, S Grundmann, 'Constitutional values and European contract law: an overview', in: S Grundmann (ed) *Constitutional values and European contract law* (Kluwer Law International 2008), 3-17, refers to 'the question how European constitutional values influence European contract law' as a 'millennium question', but then goes on discussing essentially the question of the horizontal effects of constitutional rights (the same goes for most other contributions to that volume).

<sup>51</sup> B Schlink, 'The dynamics of constitutional adjudication' in: M Rosenfeld and A Arato, *Habermas on law and democracy: critical exchanges* (University of California Press, 1998) 371-378, 374: 'since the 1970s, it has no longer used the value concept'. But see *Bundesverfassungsgericht*, 19 October 1993, *BVerfGE* 89, 214 (*Bürgerschaft*), 50, where the German constitutional court held that the interpretation of general clauses like good faith and good morals should be guided by the standard of value conceptions expressed in constitutional principles: 'Das Grundgesetz enthält in seinem Grundrechtsabschnitt verfassungsrechtliche Grundentscheidungen für alle Bereiche des Rechts. Diese Grundentscheidungen entfalten sich durch das Medium derjenigen Vorschriften, die das jeweilige Rechtsgebiet unmittelbar beherrschen, und haben vor allem auch Bedeutung bei der Interpretation zivilrechtlicher Generalklauseln. Indem § 138 und § 242 BGB ganz allgemein auf die guten Sitten, die Verkehrssitte sowie Treu und Glauben verweisen, verlangen sie von den Gerichten eine Konkretisierung am Maßstab von Wertvorstellungen, die in erster Linie von den Grundsatzentscheidungen der Verfassung bestimmt werden.'

(interpersonal and distributive)? And if so, does this mean that the other party becomes entitled to whatever is in accordance with common European values? In other words, can and should the respect for the EU's foundational values be privately enforced?

### The horizontal effect of constitutional values

Could the fundamental values in the TEU or the CFREU obtain horizontal effects? In principle, both direct and indirect effects seem possible, especially in the context of the interpretation of fundamental rights. The TFEU does not itself refer to fundamental values. However, given the fact that according to the TEU and the CFREU the Union itself (and not merely the two texts) is founded on these values it seems that also eg the interpretation of market freedoms and of Art 114 TFEU could be affected by the fundamental values. And consequentially they could come to have a further impact on private law relationships.

Moreover, in analogy to the general principles of EU law, it even seems possible that the CJEU will discover new, unwritten constitutional values with horizontal effects. In light of the fact that the list of values, as said, is already quite long and diverse, and of the fact that the CJEU has been quite activist in discovering general principles of EU law with horizontal applicability (think of *Mangold* and *Kücüdeveci*), the discovery of new unwritten fundamental values by the CJEU seems a realistic prospect.

As usual, horizontal effects could, in principle be direct and indirect. Indeed, the effect could even be doubly direct or indirect or a combination of the two. For, civil disputes could be affected, directly or indirectly, by Treaty or Charter provisions interpreted in light of the fundamental values, or private law rules (EU rules or national rules implementing EU law or otherwise within its scope) could be affected directly by these European fundamental values. Admittedly, the latter would constitute an exceptionally bold move by the CJEU.

In practice, the most likely effect of the Union's fundamental values upon civil disputes seems to be in the interpretation of EU fundamental rights in the context of the judicial review of secondary EU private law (such as consumer protection directives) and, especially, the interpretation thereof with a view to determining the compatibility therewith of national law transposing EU law.<sup>52</sup>

The question is of course: is any of this already happening?<sup>53</sup> In particular, do European constitutional values already have any visible impact on European private law? The short answer to this question is: no. In particular, the CJEU, in its interpretation of the primary and secondary EU law that is relevant for private law has not so far explicitly referred to any of the constitutional values mentioned in the Treaty and the Charter (to my knowledge). However, this does not mean that it could not happen. Just like the CJEU started referring to general principles of EU law<sup>54</sup> and, later on, to general principles of civil law,<sup>55</sup> and has

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<sup>52</sup> See as an example of this type of reasoning, Opinion of Advocate General Jääskinen, Case C- 492/08 (Commission v France): 'the objective of promoting access to justice and the law in general for persons with insufficient resources is in accordance with the fundamental values of the system of judicial protection prevailing within the European Union'.

<sup>53</sup> This question was rightly asked by Paul Craig at the seminar.

<sup>54</sup> See T Tridimas, *The general principles of EU law*, 2<sup>nd</sup> ed (Oxford University Press, 2006).

already sought interpretative inspiration in the general objectives of the EU in civil law cases,<sup>56</sup> it may well one day discover also the constitutional values as a helpful source of inspiration,<sup>57</sup> for example, when ‘a fair balance’ needs be struck between different fundamental rights.<sup>58</sup>

So, more than anything else the most concrete, practical argument made in this paper is that the Court should not go down that route, neither for private law nor, of course, for other fields. For the reason is the same: we should not understand the EU as an ethical community; that would be incompatible with respect we each owe others, who do not share our values, in a society characterised by reasonable pluralism.

### **Constitutional values and interpersonal conduct**

How do constitutional values affect the rights and obligations that citizens have vis-à-vis each other? Rules and principles have a normative force, values only provide an evaluative standard. Can it be expected from citizens to behave vis-à-vis each other in a way that is valuable, ie corresponds to or promotes constitutional values properly balanced? How are we to understand constitutional-value-oriented interpersonal conduct: do we wrong eg our contracting party if in our private dealings act we in a way that seems incongruent with one or more constitutional values?

More pointedly: can one private party have a subjective right (absolute or relative) against another party to a type of conduct that is respectful of the common European understanding of human dignity, freedom, equality and solidarity et cetera? Or, more indirectly, should the rights and obligations of private parties that derive from primary or secondary EU law be understood as always being coloured by values on which the EU is founded (according to the Treaty and the Charter)? In other words, should perhaps European private law be understood and interpreted as a matter of private enforcement of the EU’s values and be evaluated in terms of the contribution it makes to the achievement of the Union’s aim to promote its values (Art 3(1) TEU)?

In addition to these matters of principle, there are also practical difficulties. In private law disputes, the evidence is brought by the private parties with a view to furthering their own (conflicting) private interests. Can the proper balance of

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<sup>55</sup> See MW Hesselink, ‘The general principles of civil law: their nature, roles and legitimacy’, in: D Leczykiewicz & S Weatherill (eds), *The involvement of EU law in private law relationships* (Hart Publishing, 2013), 131-180.

<sup>56</sup> In Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, the Court, in order to justify its consumer-friendly interpretation of the unfair terms directive, argued (with little textual support) that strengthening consumer protection, ‘according to Article 3(1)(t) EC [is] a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory’.

<sup>57</sup> For an example of the discovery of a new fundamental value, see the Opinion of Advocate General Kokott in Case C- 566/10 P, where she argued that ‘account must be taken of the relevant fundamental values of the European Union, such as the principle of multilingualism’.

<sup>58</sup> See eg Case C-275/06 *Promusicae* [2008] ECR I-271, 70 ‘Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order’. For a perceptive critical analysis, see CA Angelopoulos, *European intermediary liability in copyright: a tort-based analysis* (doctoral thesis, University of Amsterdam, 2016), esp sections 2.3 and 4.6.

public values, and its implications for the rights of private parties in a particular case, be properly determined on such a narrow evidentiary basis? Or should it become the parties' task to bring sufficient evidence (whatever that may be) of the fundamental values that might be at stake in the dispute and might affect the interpretation of relevant fundamental rights or Treaty provisions? Before - and generally outside - any dispute, how are private parties to know what the constitutional values require them to do (or refrain from doing) in their interaction with other individuals and firms? How can private parties become aware of the way constitutional values might inform the rules of interpersonal conduct by which they must abide given the fact that 'because there are no rational standards for this, weighing [of values] takes place either arbitrarily or unreflectively, according to customary standards and hierarchies'<sup>59</sup>?

There is a parallel here with the horizontal effect of market freedoms and its justification regime that also does not seem to be well adapted for the application to private parties in their private dealings, because private parties in their private dealings pursue private objectives motivated perhaps by private values, not public objectives based on fundamental constitutional values.<sup>60</sup> Should not the question whether Poland should be suspended under Art 7 TEU depend on quite different values - and a balance of these - than eg the question whether a certain private contract should remain unenforceable?

### European private law as an objective system of values?

Obviously, there exists also an important connection here with fundamental rights, not only in the general sense that in many jurisdictions fundamental rights have been given horizontal effects,<sup>61</sup> but also in the specific sense that in one system - ie the German one - constitutional rights have been turned into an objective value system, an objective order of values which must be balanced against one other, and which, especially via general clauses such as the ones on good faith (§ 242 BGB) and good morals (§ 138, 826 BGB), have an impact on private law.

Could European private law take the same path? This seems very well possible. The official comment to the Charter excludes horizontal effect of the rights included in it. However, the Court has already started to give certain horizontal effect to fundamental rights. The effects are usually indirect, ie via the interpretation of sometimes primary but usually secondary EU law, especially directives in conformity with one or more fundamental rights. In *Mangold* and *Kücüdeveci* the principle of non-discrimination on the ground of age was held directly horizontally applicable which arguably paved the way for direct horizontal effects in the more narrow sense that rights and obligations of private parties are modified by the principle itself (as opposed to the cases where the

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<sup>59</sup> Habermas, n 48 above, 259.

<sup>60</sup> See eg H Schepel, 'Who's afraid of the total market? On the horizontal application of the free movement provisions in EU Law', in: I Lianos and O Odudu (eds), *Regulating trade in services in the EU and the WTO: trust, distrust and economic integration* (Cambridge University Press, 2012), 611-639; AS Hartkamp, 'The effect of the EC Treaty in private law: on direct and indirect horizontal effect of primary community law', 18 *ERPL* (2010), 527-548.

<sup>61</sup> See OO Cherednychenko, *Fundamental rights, contract law and the protection of the weaker party* (Sellier, 2007), C Mak, *Fundamental rights in European contract law* (Kluwer Law International, 2008).

principle sets aside a provision of national law but leaves the consequences to national law).<sup>62</sup>

Moreover, and more importantly, in horizontal cases the Court has started balancing fundamental rights against each other not only but also - crucially - against 'interests'. For example, in *Schrems* the Court held that 'the national supervisory authorities must ... ensure a fair balance between, on the one hand, observance of the fundamental right to privacy and, on the other hand, the interests requiring free movement of personal data'.<sup>63</sup> That reminds very much of the Bundesverfassungsgericht's discourse of balancing.<sup>64</sup> Indeed, from balancing rights against (public) interests it seems only a small step towards the inclusion also of constitutional values in the balancing exercise.

An obvious possible entrance gate for a flow of fundamental values into European private law, would be Art 3, Unfair terms directive 1993, that refers to 'good faith and fair dealing' and could therefore be interpreted as a European general clause. In its interpretation of Art 3 the Court has already referred to fundamental rights. In *Kušionová*, the Court held that '[u]nder EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13'.<sup>65</sup> Here the Court quite appropriately gives indirect horizontal effect to the right to accommodation. Still, from this the step towards a much more doubtful interpretation of good faith and fair dealing in the light of the Courts favourite balance of fundamental values may seem relatively small. If that happens, the European constitutional order might be turned into an objective system of values. And the 'total constitution' might thus colour, with its palette of values, every aspect of EU private law.<sup>66</sup> Indeed, European private law itself would be turned into an objective value system.

However, if the Court were to take this bold step then a formidable practical objection would still remain, ie that such an objective value system would only apply within the scope of EU law. In other words, any horizontal effects of the EU's fundamental values, be it directly upon private law relationships, or indirectly via the interpretation of (primary or secondary) EU law or of the national rules implementing EU law (or otherwise giving effect to it), would always be limited to cases within the scope of EU law. That would remain a crucial difference with the German context where the understanding of the objective value system is that of a comprehensive and seamless system.<sup>67</sup>

Such a development is not desirable. After what was said above, the main reasons should clear. In order to avoid a misunderstanding: there is nothing wrong with the horizontal effect of human rights. On the contrary, for the paradigmatic fundamental right to property (and its limits) the horizontal effect

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<sup>62</sup> In this sense, A Hartkamp, *European law and national private law* (Kluwer, 2012), 147.

<sup>63</sup> Case C-362/14, 42.

<sup>64</sup> See J Bomhoff, *Balancing constitutional rights: the origins and meaning of postwar legal discourse* (Oxford University Press, 2013).

<sup>65</sup> C-34/13 (*Kušionová*), ECLI:EU:C:2014:2189, para 65.

<sup>66</sup> M Kumm, 'Who is afraid of the total constitution? Constitutional rights and principles and the constitutionalization of private law', 7 *German Law Journal* (2006), 341-369.

<sup>67</sup> See Bomhoff, n 64 above, 103-109, contrasting this aspect with US law where no such claim to comprehensiveness has been made.

even are historically (natural law) and, arguably, also logically prior to its vertical effects. Moreover, certain conduct of private parties (individuals, firms) may represent a threat to other people's fundamental rights just as much as (and sometimes more than) state action. However, the resulting system should be understood as one of subjective rights, not of objective values. Private rights should be understood as the rights (with limits) that autonomous citizens mutually accord to one another through democratically adopted general rules, ie private autonomy (rights) and public autonomy (democracy) which, in the terminology of Habermas, are co-original and equiprimordial.<sup>68</sup> The EU should not be understood an ethical community,<sup>69</sup> but as a legal order (or an interconnected set of these) aspiring to be sufficiently just. And courts should not evaluate the conduct of private parties but interpret and protect their respective rights and obligations.

### Contracts against good European morals?

So far, the EU legislator has steered clear of dealing with contractual invalidity on the ground of immorality. The question whether certain transactions should be banned from the internal market because they are contrary to good morals or public policy has been left entirely and deliberately to national law.<sup>70</sup> For example, the Common European Sales Law proposal explicitly mentioned 'illegality or immorality' among the subjects that were beyond its substantive scope, and therefore left to national law to determine.<sup>71</sup> And the latest proposals on contracts for the online sales of goods contracts and for the supply of digital content do not even mention the issue.<sup>72</sup>

This is somewhat surprising since today the online market seems to be the place where most contracts are concluded that might be declared invalid in one or more Member States under a doctrine of contracts contrary to good morals or public policy. So, one would expect the European Commission in its zeal to create a level playing field for operators on the internal market and to increase consumer confidence in cross-border shopping, to remove the obstacle to the proper functioning of the internal market constituted by different national understandings of the moral limits to the market laid down in mandatory rules.

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<sup>68</sup> Habermas, n 48 above, 409.

<sup>69</sup> Contrast (for Weimar Germany), Smend, n 6 above, 163: 'die beide Momente ... in denen der inhaltliche Sinn eines Grundrechtskatalogs besteht: er will eine sachliche Reihe von einer Geschlossenheit, d.h. ein Wert- oder Güter-, ein Kultursystem normieren, und er normiert es als nationales, als das System gerade der Deutschen, das allgemeinere Werte national positiviert, eben dadurch aber dem Angehörigen dieser Staatsnation etwas gibt, einen materialen Status, durch den sie sachlich ein Volk, untereinander und im Gegensatz gegen andere, sein sollen'.

<sup>70</sup> Also *Omega Spielhallen*, if it had come to the Court as a case about the validity of the franchise contract at hand, would have been only concerned with the question whether Germany could declare the contract void, not whether it had to do so on account of eg European fundamental values.

<sup>71</sup> See Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final), preliminary recital 27.

<sup>72</sup> See Proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods Brussels, 9.12.2015, COM(2015) 635 final, and Proposal for a directive on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015, COM(2015) 634 final.

The reason why the European Commission has avoided harmonising the rules on contractual immorality despite the obvious potential for 'justice for growth', is that conceptions of contractual immorality are considered to differ from one Member State to another. Here again we see at work a nationalist bias in the understanding of value pluralism.<sup>73</sup> However, the more important point is that such a European doctrine of contracts against good morals, based on an EU wide understanding, seems very well possible as long as good morals is understood here in the normative sense of what we owe each other, ie chiefly of principles of justice (as opposed to our common values), of which the protection of human rights (which constitute a much narrower category than the fundamental rights and freedoms contained in the Charter, that also include eg the freedom to conduct a business)<sup>74</sup> are a core element. In other words, it would be possible - and from the perspective of the justice concern of putting moral limits to the internal market highly desirable<sup>75</sup> - for the European legislator to introduce a doctrine of contractual immorality, defined as the violation of human rights and principles of justice. However, as follows from the analysis in this paper the question whether the sale of certain goods such as weapons, soft and hard drugs, alcohol, Mein Kampf, pornography, organs, or the provision of services like laser gaming, dwarf tossing, prostitution, surrogacy and similar should be banned for from the internal market, should be discussed and answered in terms of rights and principles of justice, not with reference to 'common' or other fundamental values (with the possible exception of a very limited set of 'political values').

## Conclusion

In conclusion, then, although it is very well thinkable that the values to which the TEU and the Charter refer could be interpreted as an objective value system with (indirect) horizontal effects, the Court of Justice nevertheless should refrain from going down that road. At first sight, it may be tempting, especially in times of ongoing and consecutive crises, to understand the EU as a community of values and to interpret the values referred to in the CFREU and the TEU as an objective value system through which further integration among Europeans can be achieved. However, inevitably the integration of the majority would lead to exclusion of minorities, why happen to identify with different values (or a different hierarchy among the same values). In other words, whatever would be gained in this way in terms of integration would represent a loss in terms of justice, especially of the equal respect we owe each other – and therefore state institutions owe us - in pluralist society, where people inevitably and legitimately adhere to different ultimate values. In addition, the project of promoting European values specifically through private law would lead to additional difficulties, both of a moral and of a practical nature, especially when it comes to enforcement.

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<sup>73</sup> Similar, Lenaerts n 1 above, who does not even consider the possibility of value pluralism within and across national borders and treats Member States monolithically as each having national values.

<sup>74</sup> See MW Hesselink, 'The justice dimensions of the relationship between fundamental rights and private law' (forthcoming, ERPL 2016).

<sup>75</sup> See Hesselink, 'Unjust conduct in the internal market', forthcoming.