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## **If you don't like our principles we have others**

On core values and underlying principles in European private law: a critical discussion of the new 'Principles' section in the draft CFR\*

Martijn W. Hesselink\*\*

### **Introduction**

In March 2009 the Outline Edition of the 'academic' *Draft Common Frame of Reference* (DCFR) was published.<sup>1</sup> The Outline Edition is very similar to the Interim Outline Edition that was published a year earlier.<sup>2</sup> One important difference, however, is that in addition to the part on Model Rules, which form the bulk of the DCFR, and the part dedicated to Definitions, the latest edition contains a new part called 'Principles'.

The content of this new part is quite different from what the Introduction in the Interim Outline Edition had to say about 'principles, aims and values'.<sup>3</sup> Whereas the Interim Outline Edition contained an open-ended list of fifteen core aims and values of equal standing, the new Principles section in the Outline Edition contains only four 'underlying principles' of freedom, security, justice and efficiency which, however, are assigned an important task in the interpretation and development of the model rules. The remaining principles that still were mentioned in the 2008 edition, as core aims and values of European private law, such as 'solidarity and social responsibility', are now said to be 'generally of a rather high political nature' and, therefore, primarily relevant to an assessment from the outside of the DCFR as a whole. In other words, a reduction from fifteen to four and a transformation from values into underlying principles in a year's time.

The new 'Principles' section in the DCFR raises several questions. This contribution addresses three of them. First, are these 'principles' really principles in the usual sense or are they better understood by their original denomination, i.e. as values? Secondly, does Europe need a limited set of private law principles or values? And, thirdly, how can the 2009 version of the DCFR be so different from the 2008 version on such a fundamental subject?

### **A matter of principle?**

The main reason for this new separate section dedicated to "Principles" in the Outline Version of the DCFR seems to have been the explicit request by the European

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<sup>1</sup> C. von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR); Outline Edition* (Munich: Sellier, 2009).

<sup>2</sup> C. von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR); Interim Outline Edition* (Munich: Sellier, 2008).

<sup>3</sup> Nrs. 15-42.

Commission for such principles. However, it is doubtful that the 'principles' as presented in the 2009 Outline Edition are what the Commission had in mind. These four 'underlying principles' are not really principles in the usual sense. They look more like (underlying) values. Indeed, some of the 'underlying principles' contained in the 2009 Outline Version of the DCFR already figured in the Interim Outline version, but as underlying 'values'.

Principles are usually understood (quite literally) as starting points, in this case for legal reasoning. According to Dworkin legal principles have 'a dimension of weight' which makes them differ from legal rules, such as the model rules in the DCFR, which have an 'either or' character.<sup>4</sup> One of Dworkin's well known private law examples is the principle that no one should benefit from his own wrong.<sup>5</sup> This principle can assist us, for example, in answering the question whether a murderer can be denied an inheritance from the deceased even if the relevant statutory rules seem to point in the opposite direction. In contrast, our values express our conceptions of the good. These may be individual or political. Some commonly held political values include freedom, equality and solidarity. Although values and principles obviously are closely connected these concepts can also be distinguished. Principles belong to the law, values to the law makers. Principles play a role in the (interpretative) internal perspective (the legal system seen from within), values in the (evaluative) external perspective (the legal system seen from the outside). Different people hold different (interpretative) views concerning the fundamental principles that make their legal system coherent, whereas at the same time different people may evaluative their legal system in the light of different sets of values (i.e. of different conceptions of the good).

For international contracts, Klaus-Peter Berger has listed 120 principles of transnational law.<sup>6</sup> These include, for example, the principle of simultaneous performance (*Zug um Zug*), the principle that no one may claim restitution if he knew that his performance was illegal (*nemo auditur turpitudinem suam allegans*), the property law principle that no one may transfer more rights than he actually has (*nemo plus iuris transferre potest quam ipse habet*) et cetera.

Something very similar was expected, it seems, when the European Commission announced that the CFR would contain a set of 'common fundamental principles of European contract law'. In its 2004 communication *The Way Forward*,<sup>7</sup> the follow-up to its 2003 *Action Plan*,<sup>8</sup> the Commission, describing the possible structure of the CFR, wrote: 'The first part of the CFR could provide some common fundamental principles of European contract law and exceptions for some of these principles, applicable in limited circumstances, in particular where a contract is concluded with a weaker party. Example: Principle of contractual freedom; exception: application of mandatory rules; Principle of the binding force of contract; exception: e.g. right of withdrawal; principle of

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<sup>4</sup> See Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986). See, earlier, his *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press 1977) and *A Matter of Principle* (Cambridge, Massachusetts: Harvard University Press 1985).

<sup>5</sup> Another one that figures prominently *Law's Empire* is the private law principle that people should not be held responsible for causing injury they could not reasonably foresee.

<sup>6</sup> See [www.trans-lex.org](http://www.trans-lex.org). See earlier Klaus-Peter Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International 1997).

<sup>7</sup> *European Contract Law and the Revision of the Acquis: the Way Forward*, 11.10.2004, COM(2004) 651.

<sup>8</sup> *A More Coherent European Contract Law, an Action Plan*, Brussels, 12.2.2003, COM(2003) 68.

good faith.<sup>9</sup> Contract law principles and exceptions, seems to be the format that the Commission had in mind; not competing abstract values.

The 'general principles of civil law' that the European Court of Justice has referred to in a number of recent cases also are of a similar nature. In *Société thermale d'Eugénie-Les-Bains* (2007) the Court cites 'the general principle of civil law' that 'each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder',<sup>10</sup> in *Hamilton* (2008) it mentions as 'one of the general principles of civil law' the (frankly somewhat opaque) principle 'that full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract'.<sup>11</sup> In his Opinion in the same case Advocate-General Poiares Maduro, pointed out that the placing of a time-limit on the exercise of a right is 'a principle common to the laws of the Member States'. 'That principle', he said, 'might well ultimately appear at Community level in the context of the creation of a common frame of reference for European contract law.' In *Messner* (2009), the Court invoked 'the principles of civil law, such as those of good faith or unjust enrichment',<sup>12</sup> and in *Asturcom* (2009) it referred to the 'basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure' and to 'the importance, both for the Community legal order and for the national legal systems, of the principle of *res judicata*',<sup>13</sup> while in *Audiolux* (2009), the Court rejected the existence of a 'general principle of Community law' on the protection of minority shareholders.<sup>14</sup> At the same time human dignity is referred to by the Court in the *Omega* case (2004) as a 'fundamental value'.<sup>15</sup>

As to the Council of the European Union, in 2008 the Justice and Home Affairs Council expressed itself twice on the CFR.<sup>16</sup> Concerning the structure of the CFR the Council said the following:<sup>17</sup> 'the CFR should consist of three parts: (i) one part containing definitions of key concepts in contract law; (ii) a second part setting out common fundamental principles of contract law, possibly including guidance when exceptions to such

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<sup>9</sup> *The Way Forward*, Annex I (p. 15).

<sup>10</sup> ECJ, 18 July 2007, Case C-277/05, *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie*, par. 24.

<sup>11</sup> ECJ, 10 April 2008, Case C-412/06, *Annelore Hamilton v Volksbank Filder eG*, par. 42.

<sup>12</sup> ECJ, 3 September 2009, C-489/07, *Pia Messner v Firma Stefan Krüger*, par. 26.

<sup>13</sup> ECJ, 6 October 2009, Case C-40/08, *Asturcom Telecomunicaciones SL v Maria Cristina Rodríguez Nogueira*, paras. 35 and 38.

<sup>14</sup> ECJ, 15 October 2009, Case C-101/08, *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others, Bertelsmann AG and Others*. In this case the Court pointed out that general principles of Community law have 'the general, comprehensive character which is naturally inherent in general principles of law' (Para 42, 50), 'have constitutional status' (Para 63), and are not 'characterised by a degree of detail requiring legislation to be drafted and enacted at Community level by a measure of secondary Community law' (Para 63).

<sup>15</sup> ECJ, 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. See also the recent case C-42/07 (*Liga Portuguesa de Futebol Profissional and Baw International*) where the Court held that 'the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own *scale of values*, what is required in order to ensure that the interests in question are protected' (emphasis added).

<sup>16</sup> Conclusions of the Justice and Home Affairs Council, 18 April 2008; Conclusions of the Justice and Home Affairs Council, 28 November 2008.

<sup>17</sup> Conclusions of the Justice and Home Affairs Council, 28 November 2008, nos. 5-8.

fundamental principles could be required; (iii) finally, a third part containing "model rules" inspired by those principles and using those definitions. ... The identification of fundamental principles would reveal the fundamental values underlying European contract law and help to make the CFR a consistent whole. The aim of the "model rules", which follow the philosophy of the fundamental principles, is to provide model provisions governing the main contractual situations which arise.' Clearly, if the identification of fundamental principles is supposed to reveal the fundamental values underlying European contract law then these principles cannot themselves already be of the nature of values. Moreover, if they are meant to assist in making the CFR a consistent whole then that indeed seems to be very similar to the role that Dworkin attributes to principles. Finally, it is difficult to see how the model rules can follow the philosophy of the fundamental principles if these principles are actually nothing more than a very limited set of four values.

In relation to Art. 288 EC, according to which any non-contractual liability of the Community for damage caused by its institutions or by its servants must be established 'in accordance with the general principles common to the laws of the Member States', the ECJ has consistently held that this non-contractual liability of the Community depends on the satisfaction of a number of conditions, relating to unlawfulness, damage and causal link.<sup>18</sup>

Also in the Treaty of Lisbon principles are of a similar nature. For example, the consolidated version of the Treaty of European Union refers to a number on principles such as the principle of sincere cooperation (Art. 4) and the principles of conferral, subsidiarity and proportionality (Art. 5) which are indeed starting points with a dimension of weight and which are very different from the values expressed in art. 2 of the Treaty (on which see below).

In sum, the European Commission asked for principles such as the binding force of contract, *nemo auditur, nemo plus* et cetera. Instead they got values. Does this matter? I think that it will for the Commission and for the other political institution of the European Union that are planning to rely on the CFR for legislation. For example, I expect an MEP to say: 'We know what our values are and they are not a matter of expertise, but what we need is a set of underlying principles that are fundamental to contract law and you, as experts, should instruct us about those'.

However, if their reaction will indeed be of this kind the next question is whether it was at all realistic to expect from the DCFR drafters that they provide a set of fundamental principles which (in the words of the Council) 'would ... help to make the CFR a consistent whole'. Clearly, the compilation of a set of principles that could resolve all the gaps and ambiguities in the DCFR would be a formidable task. Indeed, in his theory Dworkin reserves this task for 'an imaginary judge of superhuman intellectual power and patience who accepts law as integrity' whom he calls Hercules.<sup>19</sup> In other words, not only does the call for a set of underlying principles seem to imply the endorsement of a widely held a but nevertheless controversial position in legal theory (law as integrity), but even within that theory principles seem to be of the nature that they can hardly be listed in advance, before the interpretation and further development of the DCFR starts

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<sup>18</sup> See Joined Cases C-120/06 P and C-121/06 P (*FIAMM*), 106, with further references.

<sup>19</sup> Dworkin, *Law's Empire*, 239.

(except by a herculean judge). It is not until we are actually confronted, in a specific case, with the ambiguities and gaps in the CFR that it will become apparent what kind of principles will be needed. As we saw, for commercial contract law alone Klaus-Peter Berger has listed 120 principles. For all the subjects that the DCFR deals with probably many more can be found.<sup>20</sup>

## A closed value system?

Quite apart from what the European institutions may expect we can ask the separate question of what is desirable. Although they are unconvincing as 'underlying principles', freedom, security, justice and efficiency may still be appropriate as a set of underlying values. Are they?

Our values are what we find important. Contract law may be related to what we value in different ways. Of course, we may value contract law per se. But beyond (and even within) the circle of contract lawyers there will not be many who attach any intrinsic value to contract law. Rather, we would like contract law somehow to express or encourage or respect whatever we happen to value. Since different people value different things it is not clear that legislators or drafters who produce rules of contract law should compile any limited list of values on which these rules are said to be based. And if such a list is made (e.g. because it is thought to be requested by the European Commission), it seems, at least, that such a list should be very inclusive. Indeed, it should include, as much as possible, the values (or at least the most important ones) that inspired whoever drafted or enacted the rules. Moreover, for reasons both of justice and expedience there seems to be a case for taking into account also the values of those who will be affected by these rules. In a democracy, at least in relation to private law, these two groups of authors and addressees happen to coincide.<sup>21</sup> Therefore, one would expect a European set of private law rules to be based on the values held by the European citizens. As said, only four values made it to the Outline Version of the DCFR, i.e. justice, freedom, security and efficiency. That seems rather poor as an expression of common European values.

In particular, there is a sharp contrast with Article 2 of the new Treaty of European Union (i.e. the consolidated version following the Treaty of Lisbon) on the founding values of the European Union, which refers to: respect for human dignity, freedom, democracy, equality, the rule of law, respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men. Is there anything in this fourteen item list, that incidentally looks quite similar to the DCFR's original list of 15 core aims and values, that we do not value so much that we regard it as an indispensable basis for European private law? Or, moving from the normative to the positive, should it not be acknowledged that these values, on which the European Union is said to be founded, *are* indeed fundamental values on which also the DCFR *is* based? The answer is positive. Of course, the DCFR is also based on equality. It is difficult to conceive of any acceptable set of private law rules that is not. Indeed, not only are the rules of general contract law

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<sup>20</sup> For an overview of the principles and values discussed in this Section, see the table of principles and values in European (private) law in the annex to this paper.

<sup>21</sup> See Jürgen Habermas, *Faktizität und Geltung; Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 5<sup>th</sup> ed. (Frankfurt: Suhrkamp, 1997), 52.

based on the idea of formal equality. There are also many provisions, including the ones on 'unfair exploitation' (art. II.-7:207), 'variation or termination by court on a change of circumstance' (art. III.-1:110), and those on consumer protection (e.g. the one in section II.9.4 on 'unfair terms'), that aim at restoring substantive equality.<sup>22</sup> Similarly, many rules in the DCFR clearly express the value of human dignity. Indeed, art. VI.-2:203 on 'infringement of dignity, liberty and privacy' explicitly refers to it. And what else than solidarity can explain strict liability in tort (see Section VI.3.2 on 'accountability without intention or negligence') or certain rules on the plurality of debtors, such as art. III.-4:102 on 'solidary, divided and joint obligations'? Or, for yet another example, does the DCFR accept discrimination of ethnic minorities or between men and women? Of course not; book II (on contracts and other juridical acts') even contains a separate Chapter on 'non-discrimination' (Chapter 2). In sum, there is no reason why all the values that the new Art. 2 of the Treaty on European Union refers to should not also be included in any meaningful list of fundamental values underlying the DCFR.

The DCFR is meant to be a living document. It contains a provisions which explicitly aims to regulate how the DCFR should be interpreted and further developed. The article reads as follows:

I.-1:102: Interpretation and development

(1) These rules are to be interpreted and developed autonomously and in accordance with their objectives and the principles underlying them.

...

(4) Issues within the scope of the rules but not expressly settled by them are so far as possible to be settled in accordance with the principles underlying them.

Note that the article only refers to the four 'underlying principles', not to the longer list of 'overriding principles' and remember that the drafters thought the latter to be 'generally of a rather high political nature'. In other words, this is a clear attempt to de-politicise the interpretation and further development of the DCFR. Courts, when dealing with gaps and ambiguities in the DCFR should find their solutions inspired only by freedom, security, justice and efficiency, and should pay no attention e.g. to 'solidarity and social responsibility', one of the 'overriding principles'.<sup>23</sup> The idea is familiar. It is the old paradigm of private law as an autonomous, self-contained value system. However, that idea has long been superseded, both in theory and practice.<sup>24</sup> There is really no reason why European private law should be inspired by values that are categorically different from those underlying other branches of our law.

Therefore, if a limited set of underlying values for European private law is necessary then at least these values should be the ones on which the European Union is based. However, it is doubtful that European private law (or indeed any other part of European law) should be based on a closed system of values at all. Why should not lawmakers,

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<sup>22</sup> In recent cases the ECJ has underlined that the unfair terms directive, 'taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them' (*Mostaza Claro*, par. 36; *Pannon*, par. 25).

<sup>23</sup> 'Introduction', DCFR 2009, no. 18.

<sup>24</sup> See Hugh Collins, *Regulating Contracts* (Oxford: OUP, 1999); Jürgen Habermas, *Faktizität und Geltung*, 479 and the ECJ which underlines, in *Mostaza Claro*, par. 38 and *Pannon*, par. 31, 'the nature and importance of the public interest underlying the protection which the Directive [on unfair terms] confers on consumers.'

when trying to make the best possible rules, be inspired by whatever it is that they value most? We may even want to be inspired by values that are not (yet) ours. As Sen has pointed out societies often have much to gain from openness towards the experiences of other societies and may wish to be inspired by what these other societies have learned to value.<sup>25</sup> In other words, our private law need not be based exclusively on a social contract made by those who are, directly or indirectly, affected by it.

In her contribution Bénédicte Fauvarque-Cosson underlines the important role that a European civil code containing a section on fundamental 'guiding principles' could play in building a European civil society and creating a common European identity.<sup>26</sup> This is undoubtedly true. However, such a Euro-nationalist attempt at inventing common traditions,<sup>27</sup> for which I have great sympathy as long as this European identity is conceived of as being merely one of the many identities that a person may subscribe to,<sup>28</sup> surely should be based on an open-minded conception of a Europe built on many values and experiences both from within and from outside current borders?. Is there really nothing more to European identity than our common longing for liberty, security and loyalty?<sup>29</sup>

In sum, it is not clear that European private law needs a limited set of officially recognised private law principles or values or even a more flexible and open-ended canon. However, to the extent that there will be such a set or canon – and the European institutions have reiterated that there will be one – it is, of course, crucial that this set be well balanced. A more inclusive European canon of fundamental private law values would include, at least, values almost universally cherished such as dignity, equality and solidarity which are currently excluded from the list.

## The politics of principle

The Interim Outline Edition (2008) listed fifteen core aims and values: justice, freedom, protection of human rights, economic welfare, solidarity and social responsibility, establishing an area of freedom, security and justice, promotion of the internal market, protection of consumers and others in need of protection, preservation of cultural and linguistic plurality, rationality, legal certainty, predictability, efficiency, protection of reasonable reliance, and the proper allocation of responsibility for the creation of risks. Of these values the Interim Outline Edition said:<sup>30</sup> Any attempt to work on principles of private law will at least have to deal with the following core aims and the values expressed in them: Justice, Freedom, Protection of Human Rights, Economic Welfare, Solidarity and Social Responsibility.' One year later 'solidarity and social responsibility' prove to be dispensable for the work on principles of European private law and only

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<sup>25</sup> Amartya Sen, *The idea of justice* (London, Penguin, 2009).

<sup>26</sup> Bénédicte Fauvarque-Cosson, 'Theoretical foundations of European private law: the need for codified guiding principles and model rules in contract law'. See also Hugh Collins, *The European Civil Code: the way forward* (Cambridge: CUP, 2008) and Hugh Collins, 'Does "Fragmented Europeanisation" require a European Civil Code?', *JFT* (special issue for Thomas Wilhelmsson) 213-224, on 219-222.

<sup>27</sup> Cf. Benedict Anderson, *Imagined communities*, revised ed. (London, New York: Verso, 2006).

<sup>28</sup> One multiple identities see Amartya Sen, *Identity and Violence; The Illusion of Destiny* (London: Penguin Books, 2006); E.J. Hobsbawm, *Nations and Nationalism; Programme, Myth, Reality* (Cambridge: CUP, 1990).

<sup>29</sup> On the 'principes directeurs' see further below.

<sup>30</sup> Introduction, no. 22.

four values survive as the underlying principles of freedom, security, justice and efficiency that should determine the interpretation and further development of the DCFR.

The editors explain the dramatic reduction from 15 to 4 as follows:<sup>31</sup> 'the many fundamental principles listed in the introduction to the Interim Outline Edition can be organised and presented in a more effective way. A small group of them (corresponding to some extent to those identified in the *Principes directeurs*) can be extracted and discussed at greater length. These are the principles which are all-pervasive within the DCFR. They can be detected by looking into the model rules. They are underlying principles. They furnished grounds for arguments about the merits of particular rules. The remaining principles mentioned in the introduction to the Interim Outline Edition are generally of a rather high political nature. They could be said to be overriding rather than underlying. Although some of them are strongly reflected in parts of the DCFR, they are primarily relevant to an assessment from the outside of the DCFR as a whole.'<sup>32</sup> This is a rather puzzling explanation.<sup>33</sup> If these four principles furnished the grounds for arguments about the merits of particular rules does not that make these principles political by definition, much more so than the remaining principles which instead are said to be 'generally of a rather high political nature'? Indeed, if it were really true that the drafters of the DCFR had only been inspired by freedom, security, justice and efficiency as grounds for arguments about the merits of particular rules then the DCFR would certainly be of a very peculiar (and highly controversial) political nature.

The explanation is also implausible. What really seems to have made the difference was a very critical article by a group of scholars led by Reinhard Zimmermann that was published in the *Juristenzeitung* in the summer of 2008 and was reported extensively in the *Frankfurter Allgemeine Zeitung* (in the 'Science' section!).<sup>34</sup> In that article they denounced the DCFR's value pluralism and in particular the reduction of private autonomy to merely one value among many others, including the 'political' notion of solidarity and social responsibility. It is striking that one article by a group of conservative German scholars (almost a pleonasm) can make the editors of the DCFR decide overnight to throw all the principles that these particular scholars took offense of (and which are now labelled as 'highly political') out of the list that should be taken into account when interpreting and further developing the DCFR.<sup>35</sup> This eminently political move overnight from representative to conservative values shows more than any theory

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<sup>31</sup> Although the DCFR is a collective work the Introduction was signed separately, by Christian von Bar, Hugh Beale, Eric Clive and Hans Schulte-Nölke.

<sup>32</sup> Introduction, no. 14.

<sup>33</sup> The underlying principles furnished grounds for arguments about the merits of particular rules: is that not what one would expect from values rather than from principles? See above. There is more conceptual confusion. For example, according to the Introduction, 'the principle contractual loyalty' (one of the *principes directeurs*) is covered to a large extent by 'the wider principle of justice' (nr. 14). Both loyalty and justice are important values, and many would regard them both as virtues, but is loyalty really an aspect of justice rather than e.g. of friendship, to mention another Aristotelian virtue (see *Nicomachean ethics*).

<sup>34</sup> See Hans Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner & Reinhard Zimmermann, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht - Wertungsfragen und Kodifikationsprobleme -', 63 JZ (2008), 529-584, and 'Ungesteuerte Richtermacht; ist die Zeit schon reif für ein europäisches Zivilgesetzbuch?' (*Frankfurter Allgemeine Zeitung*, 5 June 2008).

<sup>35</sup> In the same sense Duncan Kennedy, 'A Transnational Genealogy of Proportionality in Private Law'; Hugh Collins, *op. cit.*, p. 217

of the politics of private law could do how important it is that such value choices are made by elected politicians rather than by scholars.

A different role was played by the *principes directeurs* that were published in 2008 by a group of French scholars who had a political mission of their own. The drafters of the *principes directeurs* openly had the double aim of increasing the (until then rather modest) French contribution to the DCFR and of raising enthusiasm for European private law among French legal scholars which thus far had been predominantly Euro-sceptic (if not Euro-hostile).<sup>36</sup> As to the former aim, one of the two sponsors of the project was the *Association Henri Capitant des Amis de la Culture Juridique Française*, a well known vehicle of benign French legal imperialism (the other sponsor was the *Société de législation comparée*),<sup>37</sup> and the project is supported by the *Fondation pour le Droit Continental*, the more recent French response to the much more aggressive projects for the propaganda of American law that go under less straightforward names such as 'rule of law', 'legal origins', 'doing business'.<sup>38</sup>

In spite of its all-French authorship, and probably due to the comparative method that was adopted, the result has a surprisingly European outlook. The four 'principes directeurs' are further elaborated in a small set of 11 articles (with sub-sections) which are proposed as a preliminary title to the DCFR.<sup>39</sup> These rules look very familiar. Indeed, so much so that the drafters of the DCFR saw no use for them since the substance of these 11 articles was already dealt with in various places in the DCFR, only organised in a different way. This may explain, in part, why the 'principes directeurs' were not so very influential after all, in spite of the generous lip service paid to them in the Introduction to the Outline Version.<sup>40</sup> Overall, the (German/British) editors of the Principles section in the DCFR proved much more resistant to the French proposals than to the German criticism. Having said that, the low number (i.e. three) of the 'principes directeurs' has certainly been helpful for the drafters of the DCFR in limiting the number of their fundamental principles as well (as said, to four). Also the counter-revolutionary move by the French team of substituting equality with security has doubtlessly contributed to the distinctly reactionary outlook of the four fundamental values that the editors of the DCFR are now proposing.

## Conclusion

The inclusive and open-ended statement of fifteen 'aims and underlying values' in the DCFR of 2008 was transformed overnight into a closed set of four rather conservative 'underlying principles'. The irony is that by removing the non-conservative values and labelling them as 'political' the editors of the DCFR made their favourite set of values become much more 'political', in the sense of politically controversial, because it is so openly conservative.

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<sup>36</sup> See e.g. Gérard Cornu, 'Un code civil n'est pas un instrument communautaire', *D.* 2002, pp. 351-352 ; Yves Lequette, 'Quelques remarques à propos du projet de code civil européen de M. von Bar', *D.* 2002, pp. 2202-2014 ; Philippe Malaurie, 'Le code civil européen des obligations et des contrats; Une question toujours ouverte; Colloque de Leuven (Belgique) (30 nov.-1er déc. 2001), *J.C.P.* 2002, pp. 281-285.

<sup>37</sup> The *Association Henri Capitant des amis de la culture juridique française* recently has undergone a transformation from friends of 'la culture juridique romaniste'.

<sup>38</sup> See [www.doingbusiness.org](http://www.doingbusiness.org).

<sup>39</sup> See pp. 197-198.

<sup>40</sup> E.g. 'Introduction, no. 14: 'Lessons learned from the *Principes directeurs*'.

Zimmermann c.s. denounced the DCFR in its 2008 Interim Outline Edition for giving too little guidance and too much freedom to judges. However, it should not be forgotten that the DCFR is meant, in the first place, to become a toolbox for the European legislator rather than for judges. The 2009 Outline Edition raises the more troubling question whether legal scholars should really try to convince the European Commission, Council of the European Union and the European Parliament that European private law is exclusively a matter of freedom, security, justice and efficiency.

The fact that so-called 'fundamental principles' could be exchanged so easily for others does not only make one think of the famous Groucho Marx quote.<sup>41</sup> It also reveals something fundamental. If, within only one year, they can be reduced from 15 to 4, modified from representative into conservative, and transformed from values into principles, then it seems unlikely that this year's list really consists of fundamental principles. Rather, the principles of freedom, security, justice and efficiency seem to be a contingent set of values, the choice of which is highly dependant on their authors and on the varying responsiveness by these to criticism from different angles.

This further suggest that any rigid distinctions between, on the one hand, a limited set of fundamental principles which may play an exclusive role in interpreting and further developing the DCFR, and on the other, overriding principles, underlying values, and indeed anything else that may inspire those who will have to interpret and further develop the DCFR, may be not so desirable after all.

Compiling a complete list of underlying principles in the Dworkinian sense before the interpretation of the DCFR starts seems impossible. And any limitative list of values that should guide the interpretation seems undesirable. Maybe the best we can hope for now is a much less ambitious and more general, inclusive, and open-ended list of values that could inspire the interpretation and further development of the DCFR - something along the lines of art. 2 of the new Treaty of European Union. The irony is that the original list of core aims and values in the 2008 edition of the DCFR was just that. In my view it should be restored.

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<sup>41</sup> The quote 'those are my principles, and if you don't like them... well, I have others', can be found on many Internet sites but, to my knowledge, never with a source reference.

## Annex: Table of principles and values in European (private) law

DCFR 2009	Association Capitant & Soc. de législation comparée 2008	DCFR 2008	Art. 2, Treaty of Lisbon 2007 (consolidated version)	The Way Forward 2004	ECJ, Eugénie-Les-Bains 2007, Hamilton 2008, Messner 2009	ECJ, Asturcom 2009	ECJ, Omega 2004
<i>underlying principles</i>	<i>guiding principles</i>	<i>core aims and underlying values</i>	<i>values on which the union is founded</i>	<i>common fundamental principles of european contract law</i>	<i>general principles of civil law</i>	<i>basic principles of the domestic judicial system</i>	<i>fundamental values</i>
justice		justice					
freedom	liberté contractuelle	freedom	freedom	contractual freedom			
		protection of human rights	respect for human rights				
		economic welfare					
		solidarity and social responsibility					
		promotion of the internal market					
		preservation of cultural and linguistic plurality					
		rationality					
security	sécurité contractuelle	legal certainty				legal certainty	
		predictability					
efficiency		efficiency					
		protection of reasonable reliance					
		proper allocation of responsibility for creation of risks					
	loyauté contractuelle						
			human dignity				human dignity
			democracy				
			equality				
			rule of law				
				binding force of contract	binding force of contract		
				good faith	good faith		
					unjust enrichment		
					discharge by performance or termination		
						protection of rights of defence	
						proper conduct of procedure	

